IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO. 13/2004

BEFORE:	**THE HON. MR. JUSTICE PANTON, J.A.** **THE HON. MR. JUSTICE COOKE, J.A.** **THE HON. MR. JUSTICE HARRISON, J.A. (Ag.)**
BETWEEN:	**LEONARD CARTY** **APPELLANT**
AND:	**MERLINE CARTY** **RESPONDENT**

Owen Crosbie and Debayo Adedipe for the appellant

Arthur Williams for the respondent

November 15, 16, 2004 and March 11, 2005

PANTON, J.A.

1. I have read in draft the reasons for judgment written by my learned brother Cooke, J.A., and I agree fully that this appeal should be dismissed. The reasoning of the learned Resident Magistrate is sound. However, I wish to add a few words in respect of the jurisdiction of a Resident Magistrate to grant a declaration.

2. Ground 1a of the grounds of appeal reads thus:

> "Judgment irregular being contrary to law, for example,
>
> a. Over the objections supported by authority, the judge wrongfully allowed the defence and counter claim to stand and also over objection the court proceeded to make declarations without jurisdiction, and so in all respects, misdirected herself".

3. In his written skeleton argument, Mr. Crosbie, on behalf of the appellant, stated that neither the Married Women's Property Act nor the Judicature (Resident Magistrates) Act provides for the making of a declaration in relation to actions under the Married Women's Property Act. Special provision, he said, would have to be made to give a Resident Magistrate such jurisdiction. He referred to the fact that section 106 of the Judicature (Resident Magistrates) Act gives jurisdiction to a Resident Magistrate to make a declaration in matters falling under section 105 of the Act, which latter section does not provide for suits such as the one before the Court. In his oral submissions before us, however, Mr. Crosbie went further by saying that the Resident Magistrate's Court had no jurisdiction whatsoever to grant a declaration as there is no statutory provision that has given this power, and the Resident Magistrate's Court is a creature of statute.

4. Mr. Williams responded by referring to section 199 (e) and (f) of the Judicature (Resident Magistrates) Act which reads as follows:

> "199. In order to further the concurrent administration of law and equity in civil causes and matters in the Courts, the following provisions shall apply –
>
> (a)...
> (b)...
> (c)...
> (d)...
> (e) Every Magistrate, in the exercise and within the limits of the jurisdiction vested in his Court by this Act, in

> every cause or matter pending before him, shall grant, either absolutely, or on such reasonable terms and conditions as to him seem just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter, so that, as far as possible, all matters so in controversy between the said parties respectively, may be completely and finally determined and multiplicity of proceedings avoided.
>
> (f) Every Magistrate shall, as regards all causes of action within his jurisdiction for the time being, have power to grant, and shall grant in any proceeding in a Court, such relief, redress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the Supreme Court".

5. In making the submission referred to earlier, Mr. Crosbie, although he did not say it, may have been influenced by the case **Phillips v Bisnott** (1965) 9 J.L.R. 116. In that case, the Resident Magistrate for the parish of Portland had before him a claim and counterclaim for damages for trespass. The defendant had also counterclaimed for a declaration that she was the sole, absolute and lawful owner of the land which was the subject of the alleged trespass. The Resident Magistrate refused to grant the declaration on the ground that he had

no jurisdiction to do so. The appeal filed by the defendant challenged, among other things, this ruling as to lack of jurisdiction. However, during the hearing of the arguments, counsel for the appellant conceded that the Resident Magistrate had no jurisdiction to grant such a declaration (see page 117 A-B). This case should be contrasted with **White v Chance** (1967) 10 J.L.R. 111, an appeal from the judgment of His Honour Mr. Astwood, Resident Magistrate for Clarendon (as he then was). The respondent's claim was for a declaration that she was entitled to an estate in fee simple in possession of a small parcel of land in Manchester, and for an injunction to restrain the appellant from directing the Registrar of Titles to issue a registered title to the said land in the name of any person other than the respondent. The Resident Magistrate granted the declaration, as prayed. The appeal was against the Resident Magistrate's refusal to allow the appellant's evidence to be taken on commission on the basis of ill health. The majority decision of the Court of Appeal (Duffus, P. and Eccleston, J.A. ;Waddington, J.A. dissenting) was that the Resident Magistrate had erred in refusing the application as it was in the interest of justice for the appellant to have been heard. A new trial was ordered.

6. The first point to be made in respect of these cases is that whereas in **Phillips v Bisnott** learned Queen's Counsel had conceded that there was no jurisdiction for a Resident Magistrate to grant a declaration, the hearing of the appeal in **White v Chance** proceeded on the basis that the Resident Magistrate did indeed have such jurisdiction. Had it not been so, a new trial would not have

been ordered. The second point to be made is that neither case can be said to have definitively determined the question of the jurisdiction as there were no arguments on the matter. That being the position, it is now necessary to examine the provisions of section 199 of the Judicature (Resident Magistrates) Act on which Mr. Williams relies.

7. Section 199(e) gives the Magistrate the power:

> "in the exercise and within the limits of the jurisdiction vested in his Court by this Act, in every cause or matter pending before him" to "grant... all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim...".

The "jurisdiction" that is vested in the Court and which is here being referred to is the jurisdiction to hear and determine disputes in civil matters. It is set out under various headings between sections 71 and 134 of the Act. It should be noted that paragraph (e) states clearly Parliament's intention that:

> "as far as possible, all matters ... in controversy between the ...parties ... be completely and finally determined and multiplicity of proceedings avoided".

As far as section 199 (f) goes, the Magistrate has the authority and power in respect of:

> "all causes of action within his jurisdiction" to "grant... relief, redress, or remedy, or combination of remedies, either absolute or conditional".

He is also required to give:

> "such and the like effect to every ground of defence or counter-claim, equitable or legal...in as full and

> ample a manner as might and ought to be done in the like case by the Supreme Court".

Finally, it should also be noted that the governing clause of section 199 states that the provisions in the various paragraphs (a to g) apply "in order to further the concurrent administration of law and equity in civil causes and matters in the Courts".

8. A declaration is generally regarded as the decision of a court as to the state of the law or the rights of a party in a matter. Given that definition, and considering the provisions of section 199 referred to above, there is no justification in strict law or common sense for the holding of the view that a Resident Magistrate has no jurisdiction to grant a declaration. The Resident Magistrate's Court is expected, indeed required, to do substantial justice between the parties in matters that properly come before it. Were it otherwise, there would be an untenable situation considering the very wide jurisdiction of the Court and the vast numbers of persons affected by its decisions. In the instant case, although the learned Resident Magistrate steered clear of the word 'declaration', the fact is that she has declared the rights of the parties on the facts that she found. A trek to the Supreme Court for such a declaration would have been unnecessary.

COOKE, J.A.

1. This is an appeal against the decision of Her Honour, Mrs. Marva McDonald-Bishop a resident magistrate for the parish of Manchester delivered on the 15th April, 2003. Her adjudication was within the context of the Married Woman's Property Act and in particular section 16 thereof. As a ground of appeal challenges her conclusion for want of jurisdiction section 16 is now set out in extenso:

> "16. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society, as aforesaid in whose books any stocks, funds or shares of either party are standing, may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or (at the option of the applicant irrespectively of the value of the property in dispute) to the Resident Magistrate of the parish in which either party resides; and the Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute, and as to the costs of and consequent on the application, as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit:
>
> Provided always that any order of a Judge of the Supreme Court to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same Judge in a suit pending, or on an equitable proceeding in the said Court, would be; and any order of a Resident Magistrate under the provisions of this section shall be subject to appeal in the same way as any other order made by the same Resident Magistrate would be:

Provided also that the Judge of the Supreme Court or the Resident Magistrate, if either party so require, may hear any such application in Chambers:

Provided also that any such bank, corporation, company, public body or society as aforesaid, shall, in the matter of any such application, for the purposes of costs or otherwise be treated as a stakeholder only."

2. In pursuant of his cause the applicant/appellant (the husband) filed particulars of claim with a concluding prayer. It is necessary to reproduce this:

"PARTICULARS OF CLAIM

The Applicant is the husband of the Respondent and brings this action under the Married Woman's Property Act.

The Applicant claims on the estate and interest in the following:-

Quarter acre of land with dwelling house and known as the matrimonial home situated at 6 West Close, Mandeville in the parish of Manchester.

Quarter acre of land situated at 6 West Close, Mandeville in the parish of Manchester.

Two shops situated at 44 Main Street May Pen in the parish of Clarendon operating as hairdressing parlour and a store, one of which is registered at Volume 1200 Folio 243 of the Register Book of Titles.

1995 Toyota Coaster Bus lettered and numbered PP 325H

1988 Isuzu Encava Coaster lettered and numbered PP 2370

1992 Toyota Corolla motor car lettered and numbered 9920 BN

1991 Pick Up lettered and numbered 7136 AT

Joint account number 1201390 Jamaica Money Market

Household effects and any account held in the name of the Respondent in any bank or financial institution licenced or otherwise.

And the Applicant prays that the honourable court:-

Determines the interests of the Applicant and the Respondent and makes consequential orders including order as to costs and such orders as the courts sees just."

3. The learned resident magistrate decided as follows:

"Having examined the evidence of both parties against the background of the relevant legal principles and having closely scrutinized the demeanor of the witness paying due regard to the submissions of both Counsel I make the following determination:

1. As agreed between the parties each is beneficially entitled to a ½ share in the ¼ acre of land with matrimonial home thereon at 6 West Close, Mandeville, Manchester.

2. As agreed the parties are each beneficially entitled to a ½ share in the ¼ acre of land at 6 West Close, Mandeville, Manchester.

3. The Applicant has no beneficial interest in the current account standing in the sole name of the Respondent at CIBC, May Pen Branch. The Respondent is sole legal and beneficial owner.

4. The Applicant has no beneficial interest in the account in the name of the Respondent at the

Clarendon Co-operative Credit Union. The Respondent is sole legal and beneficial owner.

5. The Applicant has no beneficial interest in the account in the CIBC savings account at May Pen branch opened by the Respondent and to which Applicant's name later added. The Respondent has sole equitable interest therein.

6. The Applicant has no legal or beneficial interest in the JMMB account in the name of the Respondent and her niece.

7. The Applicant is the sole beneficial owner of savings account at CIBC, May Pen in their joint names opened after the account in the name of the Applicant was closed at Worker's Bank. The Respondent has no beneficial interest therein.

8. The Applicant has no beneficial interest in the two shops at 44 Main Street, May Pen. One operating as a beauty salon and other as a store. The Respondent is entitled to the entire beneficial interest therein.

Based on the claim. Defence and Counter Claim the Court makes no determination as to the Claim regarding the motor vehicles and the JMMB account # 1201390.

From the pleadings it appears both parties consented to equal beneficial interest. No issues joined.

Accordingly I make no consequential orders in relation to these.

IN KEEPING WITH THE FOREGOING IT IS HEREEBY ORDERED:

1. The ¼ acre of land at 6 West Close. The ¼ acre of land with matrimonial home thereon at 6 West Close, Mandeville, Manchester be valued by agreement of the parties or by

reputable valuator to be agreed on by the parties. If the parties cannot agree, the Clerk of Courts Manchester is empowered to appoint one.

2. Each party may purchase the interest of the other.

3. In the alternative, the properties are to be sold by private treaty and failing that by public auction. The net proceeds from such sale to be divided, shared equally between the parties.

4. Costs incidental to such sale and transfer to be bourne equally by the parties.

5. The Clerk of Courts for Manchester is empowered to sign any and all documents to effect a registrable transfer if either party is unwilling or unable to do so.

6. Parties to bear their own costs.

7. Liberty to apply."

4. It is patently clear from paragraph (3) (supra) that the learned resident magistrate dealt specifically with the prayer in the husband's particulars of claim. She made determination and consequential orders. Yet there is a complaint (ground one of the appeal). It is that the judgment was irregular and contrary to law essentially because:

> "a. Over the objections supported by authority, the judge wrongfully allowed the defence and counter claim to stand and also over objection the court proceeded to make declarations without jurisdiction, and so in all respects misdirected herself."

5. The defence and counterclaim of which the husband refers is headed:

"NOTICE OF SPECIAL DEFENCE AND COUNTER CLAIM:-

TAKE NOTICE that the Defendant intends at the hearing of this Plaint to give in evidence and rely upon the following grounds of Special Defence and Counterclaim as follows:

1. Save and except for the shops referred to at paragraph (c) of the Particulars of Claim, and for any bank account or any property acquired solely by the Defendant at any time, the Defendant admits the claim of the Plaintiff that he is beneficially interested in the properties referred to in the said Particulars of Claim, but so interested to the extent of no more than 50%, subject to a lesser percentage of or value in those properties according to what the Defendant will prove at trial is due to her on the principles of a Resulting Trust or the Presumption of Advancement.

2. The Defendant COUNTER-CLAIMS against the Plaintiff for a Declaration that she is under the aforesaid principles, beneficially entitled to the entire interest, estate and equity in the properties saved and excepted in paragraph 1 aforesaid."

6. The burden of the complaint was that the learned resident magistrate as a creature of statute, was only possessed of jurisdiction accorded by the Judicature (Resident Magistrates) Act and, since in that enabling Act there was no provision for a resident magistrate to make declarations, the defence and counterclaim in seeking a declaration should have been struck out. A passage from **Snell's** Principles of Equity 29th edition at p 571 was brought to the attention of the Court. This passage contained a brief historical survey of the development of the remedy of a declaration in English law. It is a remedy which is declaratory of litigant's rights in the matter in question without granting any consequential relief. The exercise of this jurisdiction would seem

to be primarily statutory. In this regard, the term declaration is a remedy used in a specified sense. It is my view that it is incorrect to transport the specialised features of a declaratory remedy to the proceedings which took place before the learned resident magistrate. In the particulars of claim the husband claimed an interest in the listed properties and asked the court to determine the respective interests of the parties and to make consequential orders. The defence and counterclaim was filed by virtue of section 150 of the Judicature (Resident Magistrates) Act. The purpose of this was to alert the applicant and the court of the stance of the respondent in respect of the claim of the applicant. In section 16 of the Married Women's Property Act (supra) the resident magistrate "...may make such order with respect to the property in dispute..." It would seem to me that before any such order is made there would have to be a determination of the respective interests of the contending parties and a disclosure of that determination. In this case the declaration sought in the defence and counterclaim was no more than the disclosure of the determination of the learned resident magistrate. Reliance was placed on **Clarence Allen v Lloyd Reid et al** (1974) 12 J.L.R. 1344 but that case is not helpful. I would say that the learned resident magistrate was not in error in adjudicating upon the issues within the procedural framework in which they were presented. In respect of this complaint that the judgment was irregular and thus contrary to law the husband listed other "examples". While these were included in the skeleton arguments there was no reference to them in

oral submissions. It is quite understandable why this was so as the "examples" put forward could not be sustained as being any ground for criticizing the learned resident magistrate in the task she performed.

7. In grounds 2 and 3 there is some overlap and these grounds can be conveniently dealt with together. They were:

> "2. The judgment of the Learned Resident Magistrate cannot be supported by the evidence and relevant laws, both of which eloquently demonstrate beyond reasonable doubt that each party was by law entitled to 50% interest in each real estate with special reference to the two shops. In this context, the learned Resident Magistrate sitting without a jury, has not taken proper advantage of her having seen and heard the witnesses and in exercising her function as judge failed to place the correct interpretation to laws material to the judgment.
>
> 3. The Learned Resident Magistrate failed to properly analyze and evaluate the evidence and the arguments both in written skeleton and oral form in support of the Appellant's case in general because her judgment is cast in mis-statements of material facts by her and flies in the face of compelling material evidence demonstrating that at least all real estates are owned jointly by the parties and each party would in law and in equity be entitled to 50%, and omission of material facts, and flawed interpretation of material laws."

8. It is the determination and orders of the learned resident magistrate in respect of the two shops listed in the particulars of claim (supra) which has been the focus of this appeal. Great emphasis was placed on section 68 of the Registration of Titles Act which reads:

> "No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or

> on account of any informality or irregularity in the applications for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seized or possessed of such estate or interest or has such power."

The husband sought to say that the word "conclusive" in this section is determinative of the success of the submission in that since the titles to the shops were in the joint names of the parties then there should be an equal share of the beneficial interest. This is not so. In **Slydie Basil Joseph Whitter v Monica Whitter** (1989) 26 J.L.R. 185 a similar submission was made to this court. Wright J.A. in delivering the judgment of the Court had this to say in respect of section 68 at p. 190:

> "It is common knowledge that the beneficial interest does not inevitably follow the legal interest. Otherwise, the operation of a resulting trust would be precluded where the legal estate or interest is in one person but the beneficial interest is really in another. Accordingly, despite the eloquent submissions of Mr. Frankson to the contrary, I find my reasoning persuaded to agree with Mr. Grant that section 68 is not determinative of the issue and to that extent it is irrelevant. Of course, the husband cannot proceed to deal with the title without the participation of his wife. Section 68 guarantees her position. But in my judgment, section 68 has nothing to do with the beneficial interest. A case in point is **Ivan Josephs v. Evelyn Josephs** R.M.C.A. 13/84 dated October

> 30, 1985 (unreported) in which the legal title was in the name of the husband alone but the Court of Appeal upheld the award by the Resident Magistrate of a one-half share in the beneficial interest to the wife. And this is not a novel case."

Mr. Crosbie, faced with this authority asked that that decision be overruled. There is no basis for the contemplation of such a course. In **Gardner** and **Another v. Lewis** (1998) 53 W.I.R. 236, their Lordships' Board made it clear that the provisions in section 68 are not a bar to the pursuit of equitable claims in respect of registered land.

9. I will now deal with the complaint that the judgment of the learned resident magistrate cannot be supported by the evidence and her failure "to properly analyse and evaluate the evidence and the arguments both in written skeleton and oral form in support of the Appellant's case". The issue before the learned resident magistrate was to determine the beneficial interest of the respective parties in the shops in circumstances where the legal estate resided jointly in those two parties. The challenge must therefore be viewed against the background of the evidence pertinent to that issue. Guidance of the approach of the appellate court as to reviewing the decision of the judge at first instance, is provided in **Roy Green v Vivia Green** (Privy Council Appeal No. 4 of 2002) delivered on the 20th May, 2003. It is at paragraph 13 and 14 of that judgment and is as follows:

> "13. There is another principle which must be taken into account in this case. It applies where the decision of the judge at first instance is taken to appeal and the appellate court is asked to consider

whether the judge's decision was justified by the evidence. In **Watt v Thomas** [1947] AC 484, 487-488 Lord Thankerton said that where a question of fact has been tried by a judge without a jury, and there is no question of his having misdirected himself, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that the decision of the judge cannot be explained by any advantage which he enjoyed by reason of having seen and heard the witnesses. Lord Macmillian developed the same point at pp 490-491. He said that the printed record was only part of the evidence. What was lacking was evidence of the demeanour of the witnesses and all the incidental elements which make up the atmosphere of an actual trial. He added these words at p 491:

> 'So far as the case stands on paper, it not infrequently happens that a decision either way may seem equally open. When this is so, and it may be said of the present case, then the decision of the trial judge, who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not to be disturbed. This is not an abrogation of the powers of a court of appeal on question of fact. The judgment of the trial judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved, or otherwise to have gone plainly wrong.'

14. The appellate court must bear in mind too the observations of Lord Fraser of Tullybelton in **Chow Yee Wah v Choo Ah Pat** [1978] 2 MJL 41, 42. He said that when Lord Thankerton referred in **Watt v Thomas** to "the printed evidence" (and this applies also to the passage which their Lordships have quoted from Lord Macmillian's speech in that case) he was referring to a transcript of the verbatim shorthand record of the evidence, and that it was

> obvious that the disadvantage under which an appellate court labours in weighing evidence is even greater where all it has before it is the judge's notes of the evidence and has to rely on such an incomplete record. In this case there is no verbatim transcript. The only record of the evidence is contained in the notes of the proceedings which were taken during the trial by the trial judge."

This guidance is equally applicable to the review of the decision of a resident magistrate. Before proceeding it should be noted that it is not being said the learned resident magistrate did not apply the correct legal principles in her determination i.e. as regards the common intention at the time of the acquisition of the two shops and the direct or indirect contribution which the husband said he made. Accordingly, it is unnecessary for me to enter into a discussion of this aspect of the case.

10. The parties got married in 1976. At that time the wife was employed to Signet Beauty Salon in Kingston. The husband was engaged in the transport industry and at one time or another operated either taxis or buses or both. He lived in Clarendon. The wife went to live with him then in that parish. She embarked on a hair dressing business of her own. It was her evidence that through her own initiative she acquired hair-dressing equipment and ultimately the two shops on Main Street, in May Pen, Clarendon. She provided all the financing. The husband contended that the purchase of the shops was a joint enterprise. Emphasis was placed on the evidence of the wife at the trial to the effect that when the titles to the shops were being secured, "the expectation was that we would live together until old age or until one dies and

the other inherit." Further two receipts were tendered by the husband dated the 3rd and 29th May 2002 respectively as contribution to the mortgage payments in respect of one of the shops. The wife agreed that the husband participated in the organization of the labour force used in the refurbishment of the shops.

11. The learned resident magistrate in her reasons for judgment embarked on a comprehensive analysis of the relevant evidence. This analysis was captioned (a) circumstances prior to acquisition (b) circumstances at time of acquisition and (c) post acquisition. In respect of (a) it was her view that the applicant (appellant) was not able to help much with the circumstances leading to the acquisition of the shops whereas the respondent gave a detailed account thereof. In respect of (b), whereas the wife provided details leading to the acquisition of the shops including her negotiations for loans the husband admitted that he did not enter into any negotiations for the purchase of the properties. He could not recall the purchase price, the deposit or the installments but gave approximate figures. He said his wife did everything and he would just sign papers taken to him by her. As to (c), this concerns the assistance of the husband in doing repairs to the shops. He said he and his wife would pay the workmen. He would use his money to buy materials. He claimed that the money from their account was used to pay mortgage installments.

12. After analyzing the evidence the learned resident magistrate set out her "findings on shops". These are as follows:

> "FINDINGS ON SHOPS
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> I find that the arrangement between the parties like in most union was casual and as such presents a particular challenge in ascertaining their intention particularly in the absence of documentary proof.
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> It is indeed sad the paucity of documentary evidence in this case. The findings in the case hinge mostly on the viva voce evidence of the parties. As such, I have recognized that the determination of the matter rests largely on the credibility of the parties and so their demeanour has been of critical importance to me.
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> In this regard, having closely reviewed the evidence of both parties in relation to the circumstances prior to and at the time of the acquisition of both shops and having examined their conduct in relation to the shops after the purchase while bearing in mind the applicable law, I find on a preponderance of the probabilities the facts set out below.
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> 1. I find that during the course of the union the parties were working together in their separate fields acquiring various properties – real and personal. No thought, it appears, was given to the probability of marital breakdown and what should happen in such circumstances. There was thus a general practice between the parties to purchase properties in their joint names. As the respondent said, that was how they were operating.
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> 2. General understanding and practice, however, are not in my view directly referable to the acquisition of specific property and so any general understanding between husband and wife to the effect that "you will get everything when I die" or "what is mine is thine" or "we buy it for our pension upon retirement",

without more are insufficient, in my view to form an express agreement as to the beneficial interest at the time of acquisition of any particular property.

3. Having combed the evidence of both parties, I accept the respondent that when the shops were identified she had no discussion with the applicant about purchasing it for their retirement because the bus alone cannot do but that she acted unilaterally and instantaneously out of desperation to get the first shop.

4. Accordingly, I find there is nothing pointing to an expressed common intention between the parties at the time of the acquisition of the two shops as to how the beneficial interest in them should vest.

5. In the absence of such an expressed common intention, I have examined the circumstances of the case to see if it can be inferred from the parties words and conduct at the time of acquisition and subsequently that a common intention was formed at the time of acquisition that both would share in the beneficial interests of the two shops and the applicant acted to his detriment in reliance on this common intention.

6. I find that the respondent, being a hair dresser and conducting that as her business was interested in acquiring a location for herself in light of the difficulties she was having as a tenant. She was even more interested than the applicant who agreed in evidence that he actually told her on one occasion to come home since she could not get anywhere and she was being abused.

7. I am satisfied that the respondent was solely instrumental in identifying the two shops and had embarked on the process for their

acquisition before any discussions with the applicant. Accordingly, I reject that the shops were purchased because the applicant told her to stop renting and to buy.

8. The respondent strikes me as the "brain" of the union and prior to the acquisition of the two shops was obviously interested in her personal financial affairs and status being a business woman in her own right and operating independent of the applicant. Within this context, she was the one with the more established connections to the financial institutions. She had the overdraft facility at CIBC. She had the current account at CIBC and she was the sole holder of the credit union account. The mortgages were obtained from these two institutions to which she is closely associated. The applicant stated that he would give her money and she deals with the banking. He does not even know the existing accounts and how they are operated.

9. It was the applicant who entered into negotiations for the loans, dealt with the lawyer concerning the purchase of the shops and sorted out the documentation for the purchases of the shops. The applicant on his own admission took no active part in negotiation of the loan apart from signing papers taken to him. Indeed, the limited nature of his involvement is evident from the vagueness of his evidence concerning the negotiations and the circumstances of the purchase. This is contrasted with his testimony relating to the purchase of the matrimonial home in which he provided more details and that was an earlier purchase.

10. I accept that given that the respondent was not without means prior to the acquisition of the shops and given the role she played in the negotiation process and that she was the one dealing with the accounts at the financial

institutions, that she is the one better able to say from what source the money for the deposit came.

11. The respondent maintained that all the money that dealt with the shops came from her business and from her account at the bank. The applicant cannot say for certainty from which account the money for the deposits and the mortgage installments were taken. As already found by me, there is no evidence of a common purse for the joint use and benefit of the parties in relation to the accounts examined. The applicant is in no position to effectively challenge the applicant as to where the money came from that was paid to the bank since he was not a party to the negotiations and he was not dealing with the banking.

12. I find as insufficient and lacking in cogency his bald assertion that money used to pay for the shops came from money he earn from his bus and given to the respondent to lodge in the bank. This finding is fortified by the fact that the respondent was employed at the time, earning her own income and therefore not without the means. The applicant himself admitted that the respondent assisted in the operation of the bus business, but he did not assist in the running of the shops. There is nothing on the applicant's case to suggest even vaguely that the respondent on her own could not afford the deposit or the mortgage repayments.

13. Furthermore, in a situation like this where money is moving from the husband to the wife, the applicant must present evidence to establish a resulting trust in his favour thereby rebutting the operation of the presumption of advancement. He has pointed to no specific purpose for which he gave money to the respondent to be placed in the bank.

14. The respondent, on the other hand, is more detailed and specific as to the accounts that were held and how she dealt with the money given to her by the applicant. Her evidence that she used her overdraft facility at CIBC to write cheques to take care of the bus insurance, for instance, stands unchallenged. Her explanation that the money he gave her sometimes was to lodge to her current account to cover the cheques she has written for this purpose stands undisputed. So too is her evidence that she would operate his savings account for him at his request by lodging money he gave her to cover the loan he had at the bank.

15. By and large, the evidence of the applicant as to the mortgage repayments is also vague and indirect. His testimony basically is that he gave the respondent money to bank and it is from his earnings she paid the mortgage.

16. The unreliability of the applicant's evidence is fortified by the fact that the mortgage on the second shop was transferred to the Clarendon Credit Union where the applicant is not an account holder. The respondent is undisputedly, the only member of that institution and as already found, this account is not a joint purse.

17. Given, the lack of specificity by the applicant as to which account was set up for the purposes of dealing with payments for the shops and his direct contribution to such accounts and the fact that the respondent was using money he gave her to cover certain obligations he had at the bank, he has failed to satisfy me that he has made any direct substantial contribution to the deposit or mortgage repayments. He has not even sought to suggest on the evidence that there was an arrangement between the parties communicated between them that he

would take care of the buses thereby, directly or indirectly, providing the respondent with the resources to pay for the shops. In such situation, it would be left open for the Court's scrutiny to see whether he has acted to his detriment by so doing.

18. I find that when the applicant, after this hearing started, went to CIBC and made two payments in 2002, it was an insincere effort to influence the Court to find that he has been making contributions to the mortgage repayment.

19. I have duly noted that the receipts he has tendered reveal that there was regular payment of the account. The receipts shows "Merlene Carty" to be recorded as account holder on the computer while the name of the applicant is missing from the first receipt but written in pen on the second receipt dated May 22.

20. The handwritten name of the applicant on the second receipt is no doubt an attempt on his part to indicate to the Court that the account is in their joint names. The fact that the first receipt does not bear his name and the fact that his name is not printed from the computer tells me that the receipts were always issued in the name of the respondent as account holder. These receipts confirm the respondent's assertion that she was paying the mortgage installments for this shop notwithstanding her failure to furnish receipts.

21. I attach no weight whatsoever to these two payments made by this applicant after trial has started to find that he has contributed to the mortgage repayments. I find evidence of such payments insufficient and unreliable to point to an inference that there was a common intention that he would share in the beneficial interest of the two shops and that he acted to

his detriment in reliance on this common intention. Accordingly, they are totally disregarded as evidence of contribution by him for the purposes of my deliberation.

22. In relation to both shops, I accept the respondent when she said that she paid the mortgage installments for both shops with funds derived from her business which is not operated as a partnership with the applicant. I believe that the applicant undertook responsibilities for the payment of the shops because from the beginning she saw herself as owner notwithstanding the applicant's name as joint owner.

(It appears that in error "applicant" is used when it should have been "respondent")

23. I accept that only one of the shops was repaired as stated by the respondent and that the role of the applicant in carrying out the repairs was not so substantial as to manifest an intention present at the time of acquisition that he would share in the beneficial ownership of the shop. Indeed, repairs after purchase – substantial or otherwise – cannot by itself give a proprietary interest where none existed before. I so find.

24. From the parties conduct and means prior to and contemporaneous with the purchase and after the purchase of the two shops, I infer that there was no common intention that although the shops were transferred in their joint names, that the applicant should share in the beneficial interest and that he acted to his detriment in reliance on this common intention.

25. The respondent has demonstrated on the evidence that it would be inequitable for the applicant to deny her the entire beneficial interest. I am satisfied that the name of the applicant was placed on title because of the

> manner in which the parties were conducting their affairs then and the reason advanced by the wife that if she formed the decision unilaterally to put his name on the titles so that if she dies he could get it because by that time there was a child in the union. (Emphasis supplied.)
>
> (It appears that the presence of "if" is an oversight.)
>
> 26. Accordingly, I would hold that the respondent is entitled to the entire beneficial interest in both shops."

The criticism of the judgment of the learned resident magistrate in grounds 4 and 5 is untenable. The findings of the learned resident magistrate have been set out in full to demonstrate that she thoughtfully analysed and evaluated the relevant evidence. Mr. Crosbie subjected the evidence to microscopic attention and despite his pertinacity, it cannot be said that the learned resident magistrate was "plainly wrong" in arriving at her conclusion.

14. The final ground of appeal was couched thus:

> "4. The Learned Resident Magistrate wrongfully excluded material evidence the admissions of which would by law without more result in severance of the joint tenancy and for all times and purposes create 50% legal and/or equitable interest in each party in the two shops as one of the ways."

The "material evidence" said to be "wrongfully excluded" was "evidence relating to the divorce [of the parties] which would in equity [have] severed the joint tenancy and create(d) a tenant-in-common in equal share(s)". I am not

aware of any legal principles which suggests that there is any validity in this submission.

15. Finally, despite the arduous effort of Mr. Crosbie who urged every possible argument on behalf of the husband, I would dismiss the appeal and affirm the judgment of the learned resident magistrate. I would make no order as to costs.

HARRISON, J.A.

I agree.

PANTON: J.A.

Appeal dismissed. No order as to costs.