IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV01173

BETWEEN	MYRNA DOUGLAS	CLAIMANT
AND	EASTON DOUGLAS	DEFENDANT
AND	JACQUELINE BROWN	DEFENDANT TO COUNTERCLAIM

Ms. Georgia Gibson-Henlin and Ms. Carissa Messado instructed by Gibson-Henlin for the Claimant

Ms. Carol Davis for the Defendant

Defendant to Counterclaim present

Heard: 31st January 2011, 1st and 3rd February 2011 and September 20, 2013

Division of Matrimonial Property - Claim filed before Property Rights of Spouses Act (PROSA) - Brown v Brown - Express Agreement between Parties - Agreement of the Acquisition of Property - Onus of Proof - Limitation of Actions - Abandonment

Campbell J

Background

[1] The Claimant, Myrna Douglas and the Defendant, Easton Douglas whom I shall call wife and husband respectively, were married on the 7th June 1958 and were separated in July 1994. The marriage was dissolved on the 5th May 2006. The Defendant to the Counterclaim, Jacqueline Brown is their daughter. The parties were all involved in the business of Easton Douglas & Company Ltd.

[2] The parties are professionally trained; the husband is a Chartered Surveyor, who entered representational politics in 1988. He formalized his private practice in 1982, under an unincorporated entity, Easton Douglas & Co. He became a Cabinet Minister. The daughter is, an Urban Planner and Lecturer at University of Technology, who joined the family business after graduating university. The wife was a deputy Office Manager at the University of the West Indies, before her resignation to join the business. It is safe to say that they are familiar through training and practice with the real estate enterprise, its valuation, transfer and sale in Jamaica.

[3] The operation of the practice of Chartered Surveyor, which was pursued by the business, required by law, the certification of the husband in his capacity as a licensed real estate dealer for the provision of certain reports. The husband was physically absent from the business, after his entry into representational politics. It is unchallenged that the business continued in his absence. The evidence conflicts as to the mechanism employed, by the parties to satisfy the statutory requirements necessary for the operation of the business. The daughter's evidence is that she was given permission by the husband to execute valuation report on his behalf. The husband says that such permission was subject to review and she was not legally qualified to do real estate business. The husband alleges that the system proposed of files being forwarded to him and returned to the business through third parties, was too onerous for his agreement. The husband has denied the wife assertion that she was a real estate's agent, by exhibiting a list published of such agents. The husband said despite his complaints about the operation of the business, the quality of the work declined, until the company was struck off the list of Chartered Surveyors approved by use by government agencies.

Order for Financial Statement of Easton Douglas

[4] On September 23, 2005, Marsh J ordered that an Auditor be agreed by the parties to prepare an audited financial statement of the Easton Douglas and Company Ltd. from its incorporation to the date of preparation of the account. The Report of Mr. Oliver Campbell, the accountant agreed by the parties and appointed by the Court,

shows that he was unable to prepare the accounts as there were no documents to support the entries made in the accounts in his Report, Mr. Oliver Campbell states in his Report "the general ledger and financial statements do not of themselves, provide evidence that the information received was correct or appropriate to the company."

[5] The accounts were deemed dubious, by Counsel for the husband, who identified rental sum, in the amount of $540,000, although all the parties agreed no rental was ever paid. Similarly, it was contended that the husband, a director of the company received no director's emoluments, despite the reports that there were substantial sums for such emoluments recorded. The wife says of the business, "it was used among other things to pay the husband's personal insurance and overseas subscriptions, mortgages for properties and to run the household." The operation of the business and the absence of accounts were the source of conflict of the evidence between the parties. The involvement of the husband in the business operation, its viability and the company's compliance with relevant laws were the source of divergence between the parties. They were inconsistent statements in many areas as it concerns the business of the company.

[6] The matters came to a head in February of 2005, when the husband requested office space at 14 Carvalho Drive, the premises from which the business operates. He was denied permission. On the 26th April 2005, the husband in the company of officers of the Jamaica Constabulary Force went to 14 Carvalho Drive, seeking to gain entry. On the 28th April 2005, Mr. Justice Hibbert granted an injunction restraining the husband from visiting the premises or interfering with the wife's possession of the premises.

The Claim

[7] This dispute between the parties is in respect of four properties which were acquired whilst the marriage subsisted. The wife commenced a claim by Fixed Date Claim Form which was amended and filed on the 28th April 2005, in which she sought certain declarations from the Court, in respect of the properties, as follows:

a. That the Defendant has no interest in the property located at Maryland in the parish of St. Andrew registered at Volume 1238 Folio 593 of the Registrar Book of Titles.

b. That the Claimant is entitled to one-half (1/2) interest in the property located at Maryland in the parish of St. Andrew registered at Volume 1303 and Folio 593

c. That the Defendant has no interest in the property located at 14 Carvalho Drive, Kingston 10 in the Parish of St. Andrew registered at Volume 1303 and Folio 984 of the Register Book of Titles.

d. That the Defendant holds his share of the property located at 14 Carvalho Drive in the parish of St. Andrew registered at Volume 1303 and Folio 984 of the Register Book of Titles on trust for the Claimant. Alternatively, the Claimant is entitled to one-third (1/3) share of the property at 14 Carvalho Drive, Kingston 10, in the parish of St. Andrew.

e. That the Defendant is not entitled to an interest in the property located at 39 Mountain Spring Drive, Kingston 6 in the parish of St. Andrew registered at Volume 1081 Folio 861 of the Register Book of Titles.

f. The Defendant is not entitled to one-half (1/2) interest in the property at 39 Mountain Spring Drive, Kingston 6 registered at Volume 1081 and Folio 861 of the Register Book of Titles.

g. That the Claimant is entitled to fifty (50) per cent interest in the shareholding of Easton Douglas & Company Ltd.

A further amendment, sought, "the Claimant is entitled to an account of the income and expense of the Business of Easton Douglas & Company."

Counterclaim

[8] On the 29th January 2007, the husband, filed an amended counterclaim, in which he added the parties' daughter, Jacqui denying either his wife or daughter any interest in 14 Carvalho Drive, and contended for a equal one-third (1/3) share in all the remaining properties.

[9] The husband also claimed:

a. For an account of any rents collected in relation to the property.

b. For an account of his share of profits from Easton Douglas & Company Ltd. from 1989-2005.

c For mesne profits of $75,000.00 for use and occupation of the premises by Myrna and Jacqui from the 1st April 2005.

d. That Myrna or Jacqui to pay him the sum of $41,5000.00 from in or about June 2002 or such other date as the premises was vacated by the Claimant to the present.

Applicable Principles

[10] Both sides agreed that the issues raised fall to be considered under Section 17 of the Matrimonial Property Act, the claim having been commenced on the 27th April 2005, and the amending legislation, the Property Rights of Spouses Act (PROSA) having come into effect, almost a year later, on the 1st April 2006.

[11] In ***Brown v Brown***, the Court of Appeal ruled that the provisions of PROSA applied to divorces or the termination of relationship which took place before PROSA came into operation. The Court of Appeal overturned a preliminary ruling by Marsh J, which he upheld an objection by the respondent, at trial, that the Court had no jurisdiction to hear the matter. On the 28th January 2005, the Claimant had earlier been granted an application to extend the time within which to bring an application for division of matrimonial property, as provided for by S13 (2) of PROSA. Marsh J, comments were quoted, at paragraph 3 in the Judgment of Cooke J *inter alia*:

> *"It is my view that the Act began on the 1st day of April 2006, and provides courts with the powers as of the 1st day of April 2006."*

Marsh J agreed with and cited the Judgment of Sykes J in **Stewart v Stewart** (claim no. 2007 HCV0327) where the latter in paragraphs 19 and 20 so made the following comments:

> *"If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into*

force it was not the law. Thus the law can only speak from the time it came into force"

[12] In overturning Marsh J ruling, Cooke JA said at paragraph 8:

> *"I would think that in a section which deals with the non applicability of the Act, then, if it were not so, I would expect the legislature to say in unambiguous language that the Act does not apply to divorces or the termination of relationships which took place before the date on which the Act came into operation."*

The Court unanimously upheld the appeal, and remitted the matter to the Supreme Court for trial. As a subsidiary issue the Court of Appeal considered whether the learned trial judge was entitled to entertain the jurisdictional point at the trial, the appellant having obtained leave to present her application out of time pursuant to S13(2) of the Act.

[13] Both the husband and the wife are agreed that the parties had separated from July 1994; the application for division was filed in April 2005. The notice of application for division of matrimonial property having preceded the dissolution of the marriage, it is safe to say that for purposes of PROSA, this application would be based on the parties' separation. Under the amending legislation, the application could have been brought, on the grant of dissolution (S13) (1) (a) or pursuant to S13 (1) (c) on the separation of the parties. See ***Chang v Chang***, Supreme Court Claim 2010/HCV3675 where Edwards J, analyses the application on either head.

Married Woman Property Act

[14] The parties would not therefore have the benefit of the reformative provisions of PROSA. Some of the criticisms directed at the regime for the division of matrimonial property under the Married Woman Property Act (MWPA), that are highlighted in ***Brown v Brown*** are relevant to these proceedings. See the comments of Morrison JA, in ***Brown v Brown***, at paragraph 20 where his Lordship refers to ***Petit v Petit*** (1969) 2 All ER 385, and Lord Reid's observation in relation to S17 of the English statute of the judges' powers to make such orders "as he thinks fit." That the section was procedural

only and gave no discretion to the court to override or adjust existing property rights to accord with the courts view of what was fair or reasonable.

[15] The House of Lords also rejected the existence of any general doctrine of "family assets" (See ***Brown v Brown***, SCCA, paragraph 20). In ***Gissing v Gissing*** [1970] 2 All ER 780, one year later, decided that the mechanism for the resolution of disputes between husband and wife as to the beneficial ownership of property vested in the name of one or the other of them is to be found in the law of trust, in particular in the principles governing resulting, implied or constructive trusts.

[16] In Jamaica, the Family Law Committee which was formed in 1970, criticized the resolution of disputes under MWPA, as follows:

> *"The present law relating to ownership of matrimonial property is unsatisfactory, creates injustice between the parties and is out of touch with the social realities. It recognizes only money contribution to the acquisition to the acquisition of property and ignores the contribution made by a wife in the performance of her role as a mother and a homemaker."*

Division under the MWPA was criticized for not providing for the equitable division of property, as the principle appeared to be "you own what you buy." Where there is a dispute as to ownership of property, proof of purchase or contribution to the purchase of the property in question is required. It is based on the separate property law concept.

Section 16 of the Married Woman Property Act

[17] Before me, Counsel for the wife and daughter, submitted that an application under S16, is a declaration for existing rights, and relied on ***Sterling v Sterling*** 2006 HCV 00069, 22 February 2008 (CA), where Smith JA, in following ***Petit v Petit***, held:

> *"This section is purely procedural. The procedure was devised as a means of resolving a dispute or question as to title rather than as a means of giving some title not previously existing .... In an application under S16 the question for the court is –"Whose is this?" And not – "To whom shall this be given?" Accordingly, the*

decision as to the respect beneficial interests of a spouse must be more in accordance with established principles."

[18] The court has to determine the common intention of the parties at the time of the acquisition of the property. The property is deemed by the court to be held in accordance with their common intention. This common intention can be determined by evidence of an express agreement or arrangement between them or by inferences to be drawn from their conduct. Lord Bridge in ***Lloyds Bank v Rosset*** [1990] 1 All ER 1111 said at page 1118, letter L:

> *"The first and fundamental question which must always be resolved is whether ... there has at any time prior to the acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however, imperfectly remembered and, however, imprecise the terms may have been. .... it will only be necessary for the partner asserting a claim to a beneficial interest .... To show that he or she has acted to his or her detriment significantly altered his ... position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels."*

[19] In ***Azan v Azan*** [1988] 25 JLR 301, Forte JA, the Court of Appeal in dealing with an application for division of property, where the legal estate is vested in only one of the parties said:

> *"In determining whether there was a common intention to share the beneficial interest an express agreement to that effect would be sufficient. However, where, as in most cases, there is no such agreement, the common intention of the parties may be inferred from their words or conduct."*

39 Mountain Spring

[20] The property was purchased in 1974, and was "wholly - owned" by the husband and wife. There was no evidence that the couple resided other than at 39 Mountain Spring up until the husband left there in July 1994. At the time of its acquisition, there was no evidence that the events that were to lead to the breakup of the marriage had started. Both names of husband and wife were placed on the title. Both were employed at the time of the acquisition. They had by then had three children. In 1993, the wife and husband transferred their interest to themselves and to their daughter, Jacqui. The wife and daughter testified in cross-examination that 39 Mountain Spring, was owned by the parties in equal share. The Fixed Date Claim Form, filed on 27th April 2005, was silent on 39 Mountain Spring.

[21] The husband avers in his affidavit 21st September 2005, that the wife made no contribution to the acquisition of the property, however, according to his evidence, he added the wife's name as he considered Mountain Spring the matrimonial home. According to the husband, he agreed with his wife, to transfer an interest in 39 Mountain Spring, by way of a gift to their daughter, in the expectation that she would be fair to their son, Easton Douglas Jnr., in the event that anything happened to them.

[22] It was contended on behalf of the wife that the husband has no interest in the property. The wife contends that the husband's interest in 39 has been extinguished by effluxion of time pursuant to the provisions of the Limitation Act, as the husband had left the house voluntarily in July 1994. The husband admits that the house is occupied by his sons. Counsel for the wife submits that the Court should have regard to the acts of indirect financial contribution by the wife.

[23] There is unchallenged evidence from both the husband and wife, that there was an arrangement or agreement between the husband and wife in relation to this property. Although there was no evidence of any such agreement understanding or arrangement at anytime prior to the acquisition of the Mountain Spring property. The husband in his affidavit of the 21st September 2005, at paragraph 4 says *inter alia*:

> *"However on or about 1993, my wife and I decided that we should add to the title the name of our daughter, the Defendant to the Counterclaim, herein, by way of a gift. The gift was made on the expectation that Jacqueline would be fair to her brother Easton Douglas Jnr. in the event anything happened to her parents."*

[24] This to my mind is evidence of an express agreement between the parties, albeit this agreement is at a date, some nineteen years after the acquisition of the property. The agreement is unchallenged by either the wife or the daughter. This agreement must have been based on what was married couple's concern for the welfare of their child in the eventuality of their passing. They would have agreed that Jacqui had the qualities that would allow her to deal with Easton Jnr., should their fears be realized. The agreement as recorded in the husband's affidavit of 21st September 2005 (paragraph 5), has not been amended or altered, and exceptionally for these matters, appears to have been perfectly remembered and the terms have been precisely recorded. The agreement culminated in Transfer No. 758246, which has the consent of the mortgagees under both mortgages endorsed on the title.

[25] Both the wife and husband, since the implementation of this agreement in 1993, have had the comfort or advantage of knowing that their son's welfare would be protected in case of their passing. By the transfer of an interest to their daughter, there is a demonstration of detriment by the husband and the wife. The daughter would have had the responsibility for her brother's welfare, imposed on her since 1993. The parties have altered their position significantly in reliance on the agreement.

[26] In ***Gillette v Holt and anor***, the House of Lord, had to consider the question of detriment. The agreement between the parties had caused the appellant to forgo Agricultural College, and go in the employ of the respondent instead. The respondent had intimidated that on his passing, the appellant would be the beneficiary of the 536 acres farm on which the appellant had been employed. The trial court, having focused on whether the appellant had been under-paid whilst in the employment, Lord Justice Walker's Judgment quoted the trial judge:

> *"The Gillettes (appellant) decided at an early age that their future lay with Mr. Holt, and as with most human relationships, that involved obligations and compensations. I cannot find in them such a balance of "detriment" as to support the case for a legal enforceable obligation, Lord Walker's judgement continued; the overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances."*

In overturning the trial judge's finding that the detriment was not established, opined:

> *"I think that the judge must have taken too narrowly financial a view of the requirement of detriment."*

[27] Lord Bridge's speech in ***Lloyds Bank v Rosset*** (supra), in referring to the relevant date of the express agreement that it can determine the common intention of the parties said:

> *"Any time prior to the acquisition, or **exceptionally** at some later date." (emphasis mine)*

[28] I find these circumstances exceptional, in that despite as the case law notes; it's an area that is fraught with conflicts in the evidence. The evidence of the terms of the agreement is not in dispute. The agreement has been acted on by all parties. There is no conflict between the agreement and legal entitlement of the husband and wife at the time of acquisition. Both husband and wife had a legal ownership, which was not challenged before the entering into the express agreement, and were therefore quite capable of transferring their interest to their daughter.

[29] The wife does not rely on the express agreement, she claims a one-half (1/2) entitlement, based on her contentions that:

> *"She was left with the primary responsibility of completing the mortgage repayments and the paying of all the taxes, rates and outgoings in respect of the property."*

In her affidavit dated the 28th September 2005, she states, at paragraph 7:

> *"That after the Defendant left the matrimonial home, I was left with the primary responsibility of paying the mortgage, in fact the Defendant refused and/or neglected to pay the mortgage at all and I had to complete the repayment without his assistance."*

She further states, she had to pay the mortgage from her salary and from the company's accounts. In order to facilitate these payments, lodgements would be made to the company's accounts and that there was an arrangement to sell the property, between the husband, wife and daughter. She further testified that her nephew, Mr. Michael De Pass, has deposited $8,000,000.00 towards such a sale and is now in occupation.

[30] In cross-examination, the wife admits that there was a bill of about $200,000.00 towards the repairing of the road that access the property, which the husband met. It was also suggested to the wife that there was a sales agreement completed by both the wife and husband some seven (7) years after the husband, left the matrimonial home. Of the sum paid by Mr. De Pass, the wife said that the husband did not receive any funds of the $8,000,000.00, but she paid the husband's bills for him although she had not received any directions from him to do so. It was suggested that the husband had no knowledge of any sale to Mr. De Pass.

[31] In ***Pye***, Lord Browne-Wilkinson [2003] 1 AC 419, 438, para 45, after quoting from Bramwell LJ in ***Leigh v Jack*** (1879) 5 Ex D 264, 273, said this:

> *"The suggestion that the sufficiency of the possession can depend on the intention not of the squatter but of the true owner is heretical and wrong. The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use*

made by the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner."

[32] The effect of the contention by the wife that herself and the husband had agreed to sell Mountain Spring and that he had made payments towards the repair of the roadway; serve to uproot the argument that the husband had abandoned the property. The agreement for sale was seven (7) years after he had left the house that is 2001. If he had no interest, what could he agree to sell? That his action of paying for repairs is only referable to his intention to continue to control and own the land. I find as a matter of fact that, the husband did make payments towards the repair of the roadway, after he had left. I find that there is no single and exclusive possession of the property in the wife. I find that the wife had also left the matrimonial home, and there was no abandonment on the part of the husband. That the sons have been in occupation of the property. The wife has admitted to the receipt of $8,000,000.00, she has not alleged her total expenditures on Mountain Spring, is in excess of that sum.

Carvalho Drive

[33] The wife and the daughter submit that the husband's interest has been extinguished by the Limitation Action Act, and that the husband did not contribute to the purchase price for the acquisition of the property, because having taken out a bridging loan, secured by a mortgage, he did not pay any portion of that loan. The wife alleges that she had to repay the bridging loan from her own funds. It was further submitted that she made the repayments. to her detriment.

[34] The husband counter claimed that the wife had no interest in the property because there was no intention that she should gain a beneficial interest. The wife and daughter allege, that there was an intention, that the wife should benefit based on the arrangements. The daughter said she did not contribute to the purchase price, but to the extent that the husband claims that he paid the loan through the company's accounts,

she made indirect contributions, in that she and the wife's efforts kept the company going from 1989.

The Wife's Claim

[35] The wife and daughter main attack on the husband's interest, is that his interest is extinguished, such as to defeat his counterclaim and any entitlement to an interest in the premises. In their written submission, it was said, that the husband had admitted in cross-examination he left Carvalho Drive in 1988 on his entry into representational politics, and never returned. His visits were likened to Elma's visits in the case of ***Wills v Wills***. It was submitted, the principle enunciated in ***Wills v Wills*** and ***Sterling v Sterling*** was relevant to the resolution of this matter. His interest has been extinguished since August 2000.

[36] The wife claim the purchase price was paid by her. There is no evidence that a deposit was paid. The purchase price was $380,000.00, a mortgage in the sum of $477,113.00 with interest was registered on the title. This despite the property being subdivided between the husband and his brother, and therefore, should have cost $190,000.00. The wife contends that because the bridging loan was not paid in a timely manner, the loan had increased to $238,556.50. The husband did not himself pay any money on the loan. The wife said she used her personal funds and earnings to pay for the property and discharge the mortgage. Easton Douglas & Co. ceased operations in January 1992 when it was converted to a limited liability company. The mortgage was discharged in August 2002. It was submitted in the alternative that in the absence of a finding that the husband's interest has been extinguished pursuant to S14, of the Limitation Act, he holds his share on resulting trust wholly for the claimant.

[37] The wife has alleged that there was some discussion, in which it was agreed that her interest was safe in the hands of the husband and daughter. She would have agreed to that course, according to her evidence, by the way the family does things, and "with what was happening." On the other hand, the husband says:

> *"The wife agreed to the premises being registered In the name of myself and Jacqueline, well aware that her name was not being included on the title because it was never intended that she should have a share of it."*

Counsel for the wife submitted that her actions are only referable to someone with a beneficial interest in the property According to Counsel, she had ensured that all mortgages were cleared by the time the company was closed and she took care of the family. There is no evidence that the husband directly contributed to the upkeep of the family, after the separation in July 1994. Counsel further submitted that in the absence of an expressed common intention as to the beneficial ownership of property the common intention can be inferred from direct financial contribution to the acquisition of the property. This beneficial interest will be held by way of constructive trust. There is evidence of direct financial contribution. See ***Gissing v Gissing*** and ***Grant v Edwards*** 1986 Ch. 638.

The Husband's Claim

[38] It was submitted on behalf of the husband, that the property was purchased in 1988 by the husband and his brother, after negotiations with one Danny Williams. The un-contradicted evidence is that the husband added the daughter's name to the title although she had made no contribution and that there was no agreement with the wife for her to have an interest. However, the wife had admitted both in cross-examination and in her affidavit that she agreed that the premises be registered in the names of her daughter and the husband. The wife gave evidence that she had taken the agreement for sale overseas to her daughter for her signature. It was submitted that she was aware of the arrangements in respect of the ownership and agreed to it.

[39] On behalf of the husband it was, further submitted that at the time of acquisition, the express agreement between the husband and wife was that the property was to be owned by the husband and the daughter. This agreement represented the common intention of the parties at the time of acquisition of Carvalho Drive. The wife's claim that she paid off the mortgage and the demand loans by personal funds drawn on the accounts of the business is unsupported by documentary evidence. The wife says that

she was a co-signee of the account on which the loan was drawn, namely, Easton Douglas & Company, Chartered Surveyors. That business was wholly owned by Easton Douglas, who was a sole trader. There is no denial that there were receivables due to Chartered Surveyor business. Cheques were still being paid on the account in 2003, after the business had ceased operations.

Analysis

[40] In the absence of a finding of an express agreement or arrangement. The wife and daughter would carry the "onus of proof, to show that the beneficial interest is different from the legal ownership. Baroness Hale in ***Stack v Dowden*** says at paragraph 56, of her Judgment:

> *"So in sole ownership cases, it is upon the non-owner to show that he has any interest at all, in joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."*

The wife could discharge this onus by demonstrating a constructive trust by showing that it would be inequitable for the husband and daughter to claim beneficial ownership. This the wife could do either by way of direct evidence or it could be inferred from the conduct of the parties. It must be shown that she has acted to her detriment by acting on the common intention.

[41] In ***Gissing v Gissing***, Lord Diplock, at page 268, said:

> *'Parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another, or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case – a common one where the parties are spouses whose marriage has broken down – it may be possible to infer their common intention from their conduct."*

[42] The wife claimed to have paid the purchase price by herself . No evidence was given of the actual source of the funds that were used to pay the mortgage. The wife says that she used her personal funds and earnings to pay for the property and discharge the mortgage. The husband contends prior to the incorporation of the business, on the 14th February 1992 that the loans were paid from Easton Douglas & Company's account, to which the wife was co-signatory. Both the wife and the husband agree that there were receivables in relation to the first entity. There is no documentary evidence of the source of the funds that paid the purchase price. In ***Gissing v Gissing***, Lord Reid raised the spectre of a "sophisticated" witness who is aware of the requirements of the law making an answer to enable a Judge to make a finding in the favour of the witness. I respectfully agree with Lord Reid's conclusion that: *"that would not be a creditable state in which to leave the law."* To address this particular concern we place emphasis on the fact that the onus is on the wife to establish her contribution to the acquisition of the property.

[43] In respect of the daughter, she was 25 years old and a student at the time of the acquisition of the property of 14 Carvalho Drive. It was submitted on her behalf that: "where the nominee is a child of the purchaser the circumstance serves to rebut the presumption of the resulting trust, counsel relied on the observations of Lord Upjohn in ***Petit v Petit***, at page 814E:

> *"It has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing landmarks if we suffered either of these propositions to be called into question, namely, that such circumstances shall rebut the resulting trust, and it shall do so as a circumstance of evidence."*

The daughter was the acknowledged, if not the legal responsibility of the husband and wife.

[44] The agreement or arrangement, between the husband and the wife is relied on substantially by the husband for his interest, in Carvalho, and for the exclusion of any interest to the wife. He cannot disregard the same agreement, in so far, as it confers an

interest on the daughter. He can't approbate and reprobate. The agreement between the parties was that the daughter would take an interest. The wife's admission that she took the Agreement for Sale which excluded her from any interest in Carvalho, to her daughter, for her signature, demonstrates clearly, that there was an arrangement, or some discussion with the husband, as to who are the owners of Carvalho. The wife is an intelligent woman who had managed an office which had a part of its function the valuation of property. She would have appreciated the consequence of her not being placed on the title.

[45] The terms of the agreement are clear and unambiguous. I accept the wife's evidence that she carried the document overseas for the daughter's signature. I find that the agreement represented the common intention of the parties. I find that Carvalho is owned jointly by the husband and the daughter.

The Limitation Act

[46] The premises were purchased as an office building for the husband's business, of being a Chartered Surveyor. It traded until 1992, and cheques were still being drawn on its accounts in 2003. The wife could not be said to have been in single and exclusive possession of the premises, when it was the address of Easton Douglas Co. Ltd. (See **JA Pye (Oxford) Ltd** at page 435 letter a). It was submitted that, the wife could only claim possession after the obtaining of an injunction. The wife and daughter had gone to 14 Carvalho Drive, with the acquiescence of the husband. There was no ousting of the husband. The business that was being carried on whilst the husband was at Carvalho was the same business that the wife and daughter pursued. Unlike the matter of ***Wills v Wills***, where Elma had abandoned the house, leaving only an old wedding band, the files of the husband, a sole trader, remained there up to the time of the action.

[47] In ***Moses v Lovegrove*** {1952} 2 QB 535,539, Sir Raymond Evershed MR, speaking of the Limitation Act 1939 said:

> *"The notion of adverse possession, which is enshrined now in Section 10, is not new, the section is a statutory enactment of the law in regard to the*

matter as it had been laid down by the courts in interpreting the earlier Limitation Statutes."

Those observations were cited with approval by the Board in ***Ramnarace v Lutchman*** [2001] 1 WLR1651 in which Lord Millet said, at paragraph 10:

"Generally speaking, adverse possession is possession which is inconsistent with and in denial of the title of the true owner. Possession is not normally adverse if it is enjoyed by a lawful title or with the consent of the true owner."

[48] The Judgment in ***Wills*** after noting that that the Courts in England and Jamaica, in the second-half of the last century, tended to give the expression "adverse possession," a more technical meaning and required proof that the squatter used the land in a manner inconsistent with the owner's intentions said at paragraph 19:

"All those decisions may have been correct on their special facts. All of them rightly stressed the importance, in cases of this sort, of the Court carefully considering the extent and character of the land in question, the use to which it had been put, and other uses to which it might be put. They also rightly stated that the court should not be ready to infer possession from relatively trivial acts, and that fencing although almost always significant, is not invariable either necessary or sufficient as evidence of possession. Nevertheless the decision must be read in light of the decision in ***Buckinghamshire County Council v Moran*** *[1990] Ch623 and even more important decision of House of Lords in* ***Pye****."*

[49] In **Buckinghamshire County Council v Moran** [1990] Ch 623 each member of the Court approved the following passage from the dissenting Judgment of Stamp LJ in ***Wallis*** (1975) QB94, 109-110:

"Reading the Judgments in ***Leigh v Jack*** *5 EX D 264 and* ***Williams Brothers Direct Supply Limited v Raferty*** *[1958] 1QB159, I conclude that they establish that in order to determine whether the acts of user do or do not amount to dispossession of the owner, the character of the land, the nature of the acts done*

> *upon it and the intention of the squatter fall to be considered. Where the land is wasteland and the true owner cannot and does not for the time being use it for the purpose for which he acquired it, one more readily conclude that the acts done on the wasteland do not amount to a dispossession of the owner .But I find it impossible to regard those cases as establishing that so long as the true owner cannot use his land for the purpose for which he acquired it, the acts done by the squatter do not amount to possession of the land. One must look at the facts and circumstances and determine whether what has been done in relation to the land constitutes possession."*

[50] The Judgment quoted with approval, Lord Browne-Wilkinson, statement from **Pye** [2003] 1AC419, 438 where at para 45, he said *inter alia:*

> *"The highest it can be put is that, if the squatter is aware of a special purpose for which the paper owner uses or intends to use the land and the use of the squatter does not conflict with that use, that may provide some support for a finding as a question of fact that the squatter had no intention to possess the land in the ordinary sense but only an intention to occupy it until needed by the paper owner. For myself I think there will be a few occasions in which such inference could be properly drawn in cases where the true owner has been physically excluded from the land. But it remains a possible, if improbable, inference in some cases.*

[51] The Privy Council, described **Wills** "as an exceptional case." Elma had since 1964, been living apart from her husband. She had never set foot at the disputed property at Sunrise Crescent from 1976, from which time Myra and George, were living openly as co-owners of the property, and as man and wife. Although Elma visited the island in 1976 she didn't go to the property. The only possession of hers remaining there was her wedding ring. The Court found that in those circumstances, Elma had discontinued possession or had been dispossessed. The Court found that it was not Elma's but George's state of mind, along with his actions, that was decisive. She had been totally excluded from the property. There is no such evidence of total exclusion, on

the part of the wife and the daughter? George had behaved as the sole owner. The Court also noted that Elma had neither taken steps to have the property sold or rearrange its ownership; this is a comment which is relevant to the wife and daughter in this case. The husband is an equal shareholder in the business that was located at Carvalho Drive.

[51] I find that there was no ousting of the husband, that the husband had not abandoned the premises and that the initial entry of the wife and daughter onto the premises were in agreement with the husband. I find that the wife and daughter did not have exclusive possession that the company since its incorporation was in possession of the premises. That there was nothing in the conduct of the wife and daughter that was inconsistent with the use with which the husband had made of the premises.

Land part of Maryland

[52] The wife in her affidavit dated 20th September 2005, at paragraph 22, said that on the 1st August 1991, her daughter, and herself entered into an agreement for the purchase of a parcel of land at Maryland. She claimed that she felt "guilty" to have excluded her husband, although he had made no contribution to the purchase-price or at any time. She therefore caused his name to be added on the 11th day of September 1991. The husband recollection of the events not surprisingly is different; he claims to have been consulted before the purchase. When he discovered that his name was not on the title, he made an inquiry as to why he was left off, when the funds were from the business. The wife said the funding for the property came from her pension funds. This is in conflict with her evidence that she had given up her pension fund to run the "family business." I reject her testimony on this point and prefer the husband's version. This finding is also of importance on the question of the viability of the business. The husband has maintained throughout in respect of Maryland and the other properties that the business functioned profitably and was able to pay all outgoings in respect of the properties and fund the acquisitions. The wife has maintained that the business operated on an overdraft. The endorsement on the title, that the transfer was a "gift", goes no further to identify the source of the funds that purchased the property and paid to discharge the mortgage. The onus of proof is upon the joint-owner who claims to

have other than a joint beneficial interest. The wife has failed to discharge the onus on her. There is no resulting trust on behalf of the wife in the property held by the husband.

Lady Musgrave Road

[53] The property was acquired, and registered in the names of wife and daughter, in 1995. Importantly, this property was acquired after the wife and husband had separated. The wife resist the defendant's claim for a one-third (1/3) share in the property; on the basis that there was no common intention that the townhouse would be the joint property of the three parties. The wife contends further, that there is no evidence of contributions on the part of the husband and his allegations that the funds for the purchase came from the business are mere assertions, incapable of proof of the evidence presented.

[54] The onus is on the person seeking to show that beneficial ownership is different from the legal ownership. So it lies with the husband, in respect of his claim to a beneficial ownership in Lady Musgrave to so prove. His claim hinges on the main activity of the business, the valuation of property which requires the signature of a registered real estate dealer. The husband failed to prove that payments were made from the business. Even if payments were made from the account of the incorporated business, that those payments were referable to him. The husband in any event has failed to prove for the purposes of this claim, that he made any contribution. His application therefore fails. The wife and daughter contend that early mortgage payments came from the wife's relatives and from the daughter's salary. I find, as a fact, that the daughter in her profession capacity was practicing and did establish a credible source of income, separate and apart from Easton Douglas & Company Ltd.

Shareholding in the Company

[55] The company was incorporated on the 12th March 1992; it had retained the business name under which the husband had practiced as a Chartered Surveyor from around 1982. The husband had entered into representational politics around 1988, and was, on his evidence not available to the business on a full-time basis. It is unchallenged that the wife had the business incorporated. She had left her employment

at the University of the West Indies, where she worked as a deputy office manager. There is a clear divergence between the parties as to the involvement of the husband in the operations of the business. The parties were the only shareholders and directors of the company. They had equal shareholdings in the company. It was important to note that, at the time of the incorporation of the company, the husband would have been in representational politics for three years. The wife in her affidavit of the 20th September 2005 said, "From the time he became a Member of Parliament, he took no active part in the management and operations of Easton Douglas & Company and absolutely no part in the company except since the grant of the injunction. That from in or around 1989, I was solely responsible for the management and day to day operations. On occasions, she found it necessary to send documents overseas for the daughter's signature, when he was at the Ministry of Housing." The wife in her affidavit of the 22nd April 2005, states: *"The incorporation of the business was as shown by the interest of all three."*

[56] In the state of the evidence, the lack of documentary evidence, the inability of the accountant to provide a sufficient accounting and the stark divergence in the evidence between the husband and wife. The wife has failed to discharge the onus on her, her claim for a beneficial share in excess of express shareholdings therefore fails.

[57] On the claim:

i. Application for declaration that defendant has no interest in Maryland refused.

ii. Application for declaration of half (1/2) interest in Maryland to the claimant refused.

iii. Application that defendant has no interest in Carvalho Drive refused.

iv. Claimant's application for one-third (1/3) share interest in Carvalho Drive refused.

v. Application for declaration that defendant has no interest in Mountain Spring refused.

vi. Application that defendant has not got half (1/2) interest in Mountain Spring refused

vii. Application for one-third (1/3) interest in Easton Douglas & Company refused.

The Orders sought on the defendant's counterclaim are refused.

Each side to bear it own cost.