

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. E 400 of 2002

BETWEEN RICHARD LINDSAY DOWNER APPLICANT
AND ERICA ANNE DOWNER RESPONDENT

Derrek Jones and Maliaca Wong instructed by Myers Fletcher and Gordon for the applicant.

Pamela Benka-Coker, Q.C. instructed by Debra E. McDonald for the Respondent.

Heard 15th, 16th, 17th and 18th July 2003, 5th, 6th and 7th November 2003, 16th January 2004, 5th April 2004, 17th, 18th, 19th, 20th and 21st May 2004, 14th, 15th and 16th July 2004, 12th January 2005, 1st February 2005 and 24th May 2007

Campbell, J.

(1) The court has oftentimes bemoaned the paucity of documentary evidence to support or rebut applications for division of matrimonial property and maintenance, the two issues with which the Court is here confronted. No such complaint can properly be made in this case, the court had the benefit of the evidence of chartered accountants, the parties joint income tax returns for several relevant years, a plethora of exhibits, consisting of mortgage statements, bank statements, drawings, account statement, property transfers, rental receipts, security deposits and lease agreements. The parties were cross-examined exhaustively at the hearings which took place over a period of 25 days.

(2) The parties were married on 7th April 1979. The marriage lasted for 22 years. There is one child of the marriage who is now an adult. For both of them this was a second marriage. Each had two children from the previous marriage. The husband is a Chartered Accountant, and a partner with PricewaterhouseCoopers (Pricewaterhouse). The wife is an interior designer and a businesswoman.

(3) In 2002 the wife presented a petition for the dissolution of the marriage and applied under the Matrimonial Causes Act sections 20 (2) and 25 for maintenance. Previously, the wife had applied under the Maintenance Act and had been met by the husband's preliminary point alleging her adultery or that the husband reasonably believed that she had committed adultery.

(4) The husband now seeks certain declarations and orders by way of Originating Summons dated the 4th July 2002, under the Matrimonial Causes Act. All the properties stated in the summons are registered in the name of the wife. The husband is therefore claiming a beneficial interest in these properties.

The properties were:

- (a) 22 Manor Court Mews, Kingston 8
- (b) 1 Caramel Avenue, Kingston 8
- (c) Sea Haven, Discovery Bay
- (d) Enchanted Garden, Ocho Rios
- (e) Long Lane Limited, a company that owns 6 Long Lane, Kingston incorporated 1981.
- (f) 405 Sombero Beach Road, Marathon, Florida.

The couple lived at four addresses during their twenty two years together.

The Applicant's Case

(5) The applicant, Richard Downer states that the couple was concerned with planning for their financial security. They thought that their combined assets and ability could help them achieve these goals. Mr. Downer felt that given the "economic climate" in which interest rates were below inflation, they would acquire houses, which would appreciate in value, in excess of the interest rate, and could be rented to cover the mortgage cost and sold from time to time to buy more houses. He said it was he who suggested the property owning activity to leverage the value of 1 Caramel Avenue. He states that at the time of the acquisition of the properties the parties shared a common intention "for the rewards of ownership to inure to the benefit of both of us. He explained that the reason an experienced man like himself allowed the properties to be registered in the sole name of his wife was that he believed that they would remain married to each other for the rest of their lives. He claimed that the funds he provided came from his capital account at his firm. As a result, the account became woefully deficient and was a constant source of embarrassment to him. He claims that this detriment, he would not have undergone were it not to fulfill the common intention that he and his wife shared that he should enjoy a beneficial share of the properties.

The Respondent's Case

(6) Mrs. Downer in her affidavit in response to Richard Downer's (first of five affidavits) states that at the time of her marriage to the applicant, she already was in possession of 1 Caramel Avenue, two acres of land in Stony Hill, \$25,000 cash, a part of her mother's estate. She cited that in the 1970s that property values experienced an unprecedented fall. She claimed to have taken advantage of a rebound in the real estate market and rental properties that took place just prior to and following the general elections of 1980. This resurgence, which continued peaking in 1990 and finally ending with the passage of hurricane Gilbert. This brought about an increase in insurance costs, devaluations and increasing maintenance costs. She did not purchase another house. She denies the applicant's claim that there was a discussion about a joint economic effort. She claims that the parlous state of his capital account with his firm existed prior to their marriage, and he resisted her efforts by way of savings advice to remedy the situation.

The properties

Caramel Avenue

(7) It is agreed, that Caramel Avenue was a divorce settlement from Mrs. Downer's first husband. Mrs. Downer states that the applicant ascertained an appropriate rental figure and paid half of that figure when the family occupied that property. In addition, the applicant paid for the utilities, the staff, the pool maintenance, and for minor repairs. The husband has provided documentary support that he paid for an electronic gate. The wife's testimony is, it was a security measure brought on by his job. He bought a satellite dish, as it was "portable." The single item, according to the wife, that the husband can lay claim to was a set of wicker furniture that had been purchased in Montego Bay. The wife claimed that virtually all of the property acquisitions depended on the involvement of Caramel Avenue as security, and at one point it carried four loans.

(8) The applicant's case in respect of Caramel Avenue is that in 1996 a loan was taken secured on Sea Haven to substantially expand Caramel Avenue. The applicant claims that the first Long Lane rental had been used in the acquisition of Sea Haven, or alternatively, the Eagle Merchant Bank (Eagle) loan for Sea Haven was repaid from the jointly owned Long Lane rent as well. It was submitted on behalf of the applicant that since Sea Haven was used as security for the loan to expand Caramel Avenue, the applicant can be credited with a direct contribution to the expansion of Caramel Avenue.

Manor Park Drive

(9) The respondent claims this was the first house she purchased, her commitment to do so was on the same day she gave birth to her youngest son. She had purchased it, **with proceeds from the equity in Caramel**, for \$125,000 on the 9th **September 1980** and sold it for \$400,000 on the 18th December 1982. Nonetheless she did not discharge the mortgage loan, using the capital in the interim.

(10) Mrs. Downer states that in August **1981**, 8 Tennis Way was purchased, with rental from 1 **Caramel Avenue**, and the remainder with a mortgage from BNS trust. This was sold in 1990 and the entire net proceeds of \$1,000,000 were utilized to purchase the applicant's shareholding in **Long Lane Limited**.

(11) 22 **Manor Court Mews** was purchased in **1982** with part proceeds from sale of 17 Manor Park Drive, and the balance borrowed from JNBS. The property was sold in December 2000 to reduce consolidated loan from Trafalgar Commercial Bank, claims Mrs. Downer.

(12) Mrs. Downer claims that, **Sea Haven** was purchased on **3rd October 1985**, and the title is still held by First Global Bank as security for the consolidated loan. The wife claimed that the applicant paid the staff at Sea Haven, at her insistence, since he used the facilities. For that same reason, she claims he bought a set of curtains for the property. The husband in cross-examination was not sure where the money came from to purchase **Sea Haven**. The contracts

were in the wife's name only, and he was unable to say which company she had secured the mortgage from. There was no evidence of any direct contribution on the part of the husband.

(13) Marathon, situated in Florida, USA, was purchased in 1998. The wife claims to have been put on the title in recognition of her efforts to locate the property and supervise the furnishings thereof and at no point claimed that it was a gift. The applicant agrees that she made no financial contribution to the acquisition or the maintenance of the property.

(14) In 1986 found **21 Norbrook Mews**, after leasing Long Lane to the British High Commission. Secured full purchase price from the Bank of Nova Scotia (BNS), plus six months mortgage. Norbrook Mews was sold in December 1992.

Long Lane Ltd.

(15) In respect of **Long Lane**, the wife claimed her initial input was approximately \$300,000 in cash from the proceeds of sale of 17 Manor Park Drive. The applicant's input, despite the sale of Oakridge, was the proceeds of a loan. Long Lane cost \$750,000.00, the mortgage being \$500,000.00. The husband states that the loan that he took from Eagle in the sum of \$1.1m was taken on November 22, 1988 one-half of which went to pay off the BNS mortgage. The house was purchased in the name of Long Lane Limited, a company wholly owned by the couple. He claims that Long Lane had been purchased to house the couples combined families, the space was not adequate however, and they could not afford the required expansion. In 1986 it was leased to the British High Commission.

(16) The husband contends that it was their common intention that he alone pay off the mortgage on Long Lane, this was \$79,200 per annum, in addition, he would pay the maintenance charges. This position he said would only be tenable if he would not have to pay the rental at 22 Norbrook Mews as well. He states that he had to undertake both the mortgage and the rental.

He states that he accepted this position because the rental so secured on Long Lane was more than double the mortgage payments. He accuses the wife of retaining the rental income for the duration of the tenancy whilst assuring him that it was being used to make other acquisitions for the benefit of the parties. He complains that the rentals withheld by the wife was greater than the investment she had made, whilst he was forced to continue to invest in the property beyond what he could afford or he had intended. He further complains that this call on his resources caused his capital account at Pricewaterhouse to be well below the level required.

(17) The husband charges that because of his problem with his capital account he requested of his wife that one of the houses be sold. He claims that his spouse's response was to ask that he transfer his shares in Long Lane Ltd. to her. His wife recounts that her husband was insistent that Long Lane be sold to a third party to facilitate him liquidating some of the debts in his capital account. She said she felt that Long Lane had not started to realize its full potential and therefore sold Tennis Way and paid one half of the valuation quoted by the applicant for his

share in Long Lane Ltd, .i.e. \$1,100,000.00, which was the entire proceeds of the sale of 8 Tennis Way.

(18) On the husband's account, the wife insisted on the transfer of his shares in Long Lane Ltd. to her in order to secure her agreement to sell a property in which the parties had an equal beneficial interest. However, he claims the consideration for the transfer (exhibited at paragraph 3 to the fifth affidavit of Richard Downer dated 5th July 2003) was \$19. He calls into support, the wife's inability to provide documentary evidence of the sum she claimed was paid. The Court is asked to say that the transfer was not intended to dispose of his beneficial interest in Long Lane. The applicant offers as proof of this continued beneficial interest is the further guarantee of two loans from Victoria Mutual Building Society (VMBS) for Long Lane Ltd.

(19) Mrs. Downer's actions of insistence on the transfer of his shares are in a context where the funds the applicant sought were to mitigate "the dire trouble" he found himself in at the firm. Nonetheless, he states in his affidavit dated 24th April 2003 (see paragraph 12) "I was still told by the Respondent, and relied on this, that Long Lane and other acquisitions were for our old age security?" Was the wife's conduct consistent with an equal beneficial interest residing in both parties? Or was it more consistent with a belief that the property sold was her sole property? I find that it was unreasonable for the applicant to rely on those words, at that juncture, to believe that his wife was assuring him that the properties belonged to them jointly.

(20) The wife refutes the husband's claim that the state of his capital account in his firm was as a result of the demands made on him by her for funds for the houses and argues that his accounts were in dire straights before they got married. That he had borrowed to make an investment in Long Lane Ltd. She also mentions his high interest loans. She said his spending was wasteful and ill considered.

Exhibit E

(21) The husband complains that he has negative net worth because of the losses of the property business over the years. He sets out in his first affidavit dated 24th April 2003, an accounting in relation to his direct contributions 'these constructed from tax returns and other documents, between 1980 and 1998. The applicant explains that the surplus represents the net fund produced by the properties after taking into account all rentals, loans, sales of properties and the gifts from the wife's former husband, being funds either provided by her or generated internally by the project. He asserts that the differences between the surplus and operating cost were covered by him. He reasons that there were no other sources of funds available to his wife. Apart from the house at Caramel, she had two cars, some \$25,000 in cash, some inherited land at Mt. Pleasant, jewelry, furniture and artwork and a further US\$100,000 was given to her by her former husband. He contends that she contributed no cash or assets to the property business because she had nothing else except the occasional and small design fees. He claims that the cash losses over the years amount to \$20,940,428, and adjusted for interest at three to six months, Bank of Jamaica Treasury Bill rate is \$118.7 million.

(22) He argues that his wife does not provide any explanation as to how the operating losses were paid for on an ongoing basis. The increase in value of the properties does not represent an

inflow of cash. The husband contends that his wife could not use an increase in equity to pay bills. She may have had enough rental income to pay the mortgages, there was never enough to do that as well as pay the operating expenses. He claims that they were items drawn directly on the account at Pricewaterhouse, which were directly referable to one of the disputed properties; satellite dish and equipment drapery fabric, and wages for the staff at Sea Haven.

(23) The wife claimed that the experience of her first marriage was that she would not again put herself in a position of there being any doubt as to what was “mine.” She exhibits to her first supplemental bundle, a projected statement of income and expenditure for the properties, which showed an excess of income over expenditure of \$1,696,346. There is also exhibited evidence that payments for the mortgages were paid from Mrs. Downer’s personal account, firstly at Canadian Imperial Bank of Commerce (CIBC) and from the Trafalgar Development Bank account. The wife exhibits, in the Third Supplemental Affidavit, numerous invoices made out in her name relating to work done at the disputed properties.

(24) The wife, claimed to have loaned the applicant \$1,000,000.00 from cash in hand to take out a loan that he had secured at an exorbitant 65% or 68% he drew up a repayment schedule, and he repaid the loan. The applicant subsequently loaned her \$1,000,000.00, the applicant made up a re-payment schedule in US dollars. All the payments were met. This evidence which has not been denied is important because it supports the wife’s claim that her husband was prone to keeping meticulous records and details and was therefore unlikely to have “the property owning business” undocumented. The wife claimed that the applicant filed joint tax returns in order to benefit from her tax losses. She claims that, the “paper losses” that were submitted to the revenue department were solely hers.

Analysis

Was there a common intention to start a property business?

(25) The law applicable to these proceedings is well settled. There is not known to our law any principle of community of property, neither are there any separate rules directed at family assets. There is no presumption of a beneficial interest, simply because the parties are married to each other. Therefore, if one party acquires property which is intended for common use with the other, this does not, without more give the later any proprietary interest. In relation to the myriad circumstances that can arise in these applications, Lord Morris of Borth-y-Gest, in **Gissing v Gissing** (1970) 2 ALL ER 780, said at Pg 783;

“...there will be cases where there is separate ownership of property in a husband and cases where there is separate ownership in a wife and cases where there is joint ownership; there may be a payment which gives rise to resulting implied or constructive trust; there may be a gift of money from one to the other there may be a loan from one to the other, there may be services rendered in respect of which some reward was expressly or impliedly promised; there may be services rendered without any contemplation of any such result. There may be services rendered or payments made without any thought that any property rights could be or would be in any way affected.....The court cannot devise arrangements

which the parties never made. The court cannot ascribe intentions which the parties never had.”

(26) Where the property in dispute is in the name of one of the parties only, the party in whose name the property is held, will hold it on trust for the other party, by virtue of direct evidence that the other party should have a beneficial interest or in the absence of express agreement by inference from their actions or other circumstances. In cases where there is no direct evidence of an express agreement, it must be shown that the claimant has acted to his or her detriment on the basis of conduct which is indicative of the common intention.

(27) The relevant principles were enunciated by Lord Diplock in **Gissing v Gissing** 1979 2 All ER 780 and followed in the Court of Appeal in **Azan v Azan**, per Forte:

“Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate is not vested must be based on the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestu queue trust. The legal principles applicable to the claim are those of the English Law of trust and in particular, in kind of disputes between spouses that comes before the courts, the law relating to the creation and operation of a resulting, implied or constructive trust – and it is unnecessary for present purposes to distinguish between these three classes of trust.”

(28) The husband has to adduce evidence to prove such a trust in his favour by showing that it would be inequitable, for the wife as legal owner, to claim the sole beneficial ownership in the “property business.”

Viscount Dihorne at pg. 785, letter f, expressed the principle thus;

“I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a cestui que trust.

Where there is a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest”.

(29) In order to prove this, evidence must be adduced to demonstrate

- (a) a common intention, that is, an agreement, understanding or arrangement between the defendant and himself that he should have a beneficial interest in the properties.
- (b) and that he acted to his detriment on such agreement, understanding or arrangement, that he would beneficially share in the property.

The common intention must be shown to have existed at the time of the acquisition of the properties and may be inferred from the parties' words and conduct prior to and contemporaneously with the acquisition, the only relevance of their intentions after acquisition is to assist in finding the parties' intention at the time of acquisition. The burden of proof to satisfy the court on a balance of probabilities rests on the husband. Whilst the wife has an evidential burden to establish her claim.

(30) Was there prior to or contemporaneously with the acquisition of the properties "an agreement to share in the beneficial interest based on evidence of express discussions however imperfectly remembered and however imprecise the terms" (see **Lloyds Bank Plc v Rosset (1991) 1 A. C. 107**). There is here a dispute as to the existence of any express agreement between the parties. The husband contends that because of the "economic climate", he was of the view that houses would appreciate in excess of interest, and could be rented to cover mortgage cost and sold from time to time to buy more houses. He said it was he who *suggested* the property owning activity to leverage the value of 1 Caramel Avenue, Kingston 8. And states that at the time of the acquisition of the properties the parties shared a common intention "for the rewards of ownership to inure to the benefit of both of us." There is no evidence of when these *suggestions* were given and what was his wife's response to them.

(31) On the other hand, the wife refutes such a claim. She contends she had been married before and had contributed one-third of the start-up capital of her former husband's company, Appliance Traders Ltd. When that marriage was ended she never realized a proportionate share of what was a major company. The wife claimed that the experience of her first marriage was such; she resolved that she would never permit her affairs to be entangled with anyone else. She claimed to have taken advantage of an upswing in the real estate market. This is a period defined in the wife's case that lasted until 1990 – 1992. The wife repeats throughout her testimony that these years provided her with surplus income that she was able to spend. After that period, the properties were only able to maintain themselves. The question I ask myself, if it is, as the applicant claims that the business was started because of the 'economic climate' that existed at a particular time, why as a prudent business man he kept plowing funds in the business long after that climate had changed dramatically.

(32) To my mind, the fact that both parties had been previously married would have affected their outlook on the marriage. Is it reasonable to expect that the wife having had such an experience previously would make an effort not to repeat it. I cannot accept that the husband, a chartered accountant, having started the "property owning business" for such standard business reasons, would apply such "un-business-like" standards to its formation and operation. It is noteworthy that he failed to have it named, or have it incorporated, or to provide it with a bank account. In fact the couple had no joint bank account. The husband has not stated in what

proportion the parties were to share the beneficial interest. The evidence is not clear as to when this discussion would have taken place.

(33) There is nothing in the evidence to explain why the husband having incorporated Long Lane Ltd would have failed to bring the subsequent acquisitions onto its books. The parties' penchant for order and detail was evidenced by notes prepared to their respective executors at the time of purchase of Long Lane. The husband states that his statement was written "in case of my own or Erica's untimely death this has to be written in order for our estates to be settled in an orderly fashion." Why did he not feel the need that the other properties be settled in an equally orderly fashion by similarly detailing their respective ownership?

(34) He says he was content to have the property registered in the wife's sole name, because he expected to predecease the respondent and he expected that taxes might arise on his death in respect of properties. Those considerations would not prevent an expression of their respective beneficial interest as was done in respect of Long Lane Ltd, and are inconsistent with his "complaining bitterly" about being excluded from Mrs. Downer's will. Despite the imperfections and imprecision that usually attend these domestic arrangements, the inconsistency with which the applicant deals with the properties suggest that he dealt with Long Lane in a different manner than with the other properties.

(35) I find that there was no suggestion put by the applicant to the defendant as to their embarking on a "property owning activity." I reject the husband's contention that the consideration for the transfer of his shares in Long Lane Ltd. was \$19. How did the consideration of \$19 assist him to avoid defaulting on the Long Lane debt or made his position at his firm less hazardous? Why would he have felt obliged to accept such a bad bargain? I accept the wife's evidence that she sold a house, **Tennis Way**, and the entire proceeds of sale went to pay what the husband had demanded for his one-half portion of the valuation of Long Lane Limited. I also find that the husband's need for the funds was to clear some of the outstanding in his capital account at his firm.

(36) The sale of shares in Long Lane Ltd. is also important in ascertaining what inference was to be drawn from the wife's conduct. The inescapable inference from the sale of Tennis Way is that she considered Tennis Way her sole property. It would not be logical to sell joint property to buy out the husband's share in Long Lane without crediting him with proceeds from the sale of Tennis Way. If one accepts what the husband says in relation to the wife's conduct, which he described as duress, how could he reasonably maintain that he thought that the business was being "all done for the common good" (ex. to the Third Affidavit of Richard Downer). The comments he attributes to his wife, after being forced by her to sell his shares, "that Long Lane and the other acquisitions were for our old age security "could *not reasonably be construed to mean that he has a beneficial interest in the properties*" At the most, if it was said, and I find it was not, all it could mean is that she would not allow him to suffer in old age, she would use her properties to secure his future.

(37) The wife cannot be bound by any unreasonable inferences her husband draws from her conduct. This is expressed by Lord Diplock in **Gissing v Gissing**, at page 790, letter h-j as follows;

“As in so many branches of English law in which legal rights and obligations depend upon the intentions of the parties to a transaction, the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. **On the other hand he is not bound by any inference which the other party draws to his intention unless that inference is one which can reasonably be drawn from his words or conduct.** It is in sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inference as to the intentions of parties to a transaction **which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention** which was not made manifest at the time of the transaction itself. It is for the Court to determine what those inferences are.” (Emphasis mine)

The conduct of the husband in detailing the ownership of the shares in Long Lane Ltd. could reasonably be understood by the wife as signalling how he would deal with property in which he has a beneficial interest. The e-mail message of the 18th September in which he refers to the properties as belonging to his wife is conduct from which she could reasonably infer that her husband was acknowledging that the properties were hers.

(38) The husband was persuaded to suggest this ‘property–owning business, because he thought it would be self-financing. (See Para. 8 First affidavit) and maintained that it was until the family removed from Long Lane in 1986. However the income tax returns on which he relies indicate that the properties recorded losses from their inception until 1988, which was the first time on the computations presented to the Income Tax authorities that tax was payable. I find it incredulous that the husband would have persisted in the face of those prolonged losses in a business that was being operated in an economic climate contrary to what he thought was necessary for its success. I find that “the economic climate” which to the applicant was a necessary pre-condition for the business, never existed if one accepts the evidence he presents to the court.

Conduct of the parties

(39) Is there anything in the conduct of the parties from which it may be inferred that there was a common intention at the time of acquisition for the parties to share in the beneficial interest of the property and whether the defendant had acted to his detriment in reliance on such common intention?

Sir Nicholas Browne-Wilkinson stated in **Grant v Edwards (1986) 2 All E.R 426** that substantial contributions are relevant for four reasons;

- (1) In the absence of direct evidence of intention, evidence from which the parties intention can be inferred;
- (2) As corroboration of direct evidence of intention.
- (3) To show the claimant has acted to his detriment on reliance on the common intention.
- (4) To quantify the extent of the beneficial interest.

(40) The husband exhibits a bundle of documents to his Second affidavit. The husband asserts that funds were contributed by him in various ways on hundreds of occasions, he itemizes losses of \$30,000.00 per year on Marathon, renovation work on Long Lane in 1999, the refund of the Long Lane tenants security deposit in 1999, wages and supplies for Sea Haven in 1999, an expensive printer for the office, the internet connection and refurbishing at Sea Haven at a cost of \$400,000.00. The bills date from 1980 to 1999 and include items such as advertising of the premises, pool equipment, cement, lumber, paint, air conditioning, insurance coverage, plumbing, toilet fixtures, electrical installation and fixtures, security lighting and equipment, generator, items of furnishings and drapery.

(41) The wife claims that the exhibits are misleading. In relation to advertising; she says she would have paid him back for the cost of the advertisements. She similarly disputes that he paid the legal bill. The claims in respect of **Long Lane**, according to the wife, "were in order" as Long Lane was owned by the parties. **Norbrook Mews** had the rent fixed below the market rate in consideration for expenses to be incurred by the applicant. She claims that the cement bill would have been for either **Long Lane** or **Norbrook Mews**. In respect of Sea Haven she explained that the understanding was the applicant would pay for groceries and cleaning materials for the use his family made of the facilities. The wife claimed that they were agreed that in respect of Caramel, he would pay to her half the market rent for that property, in consideration for his being responsible for maintenance costs. She testified that he only paid for insurance coverage for the contents of whichever house the couple occupied, never the insurance of any building. She explained that, the Spectrum radio receivers were a communication device which facilitated the family. The wife considered the electric gate, a mere security measure brought on by the nature of the applicant's job.

(42) At the beginning of 1999, wife states that she insisted that her husband assume the wages bill for Sea Haven. He would pay the, water bills, "as a token in recognition of the pleasure he derived from it". The wife claim that the offer of satellite dish receiver came from the applicant. Curtains and soft furnishings for Sea Haven were agreed to by the applicant claims the wife. The applicant exhibits a bill for \$406,000 and his cheque in deposit of \$215,000. The wife's response was she did not believe that in any year his expenses ever amounted to the cost of one of their three week family holiday. Of the telephones, they concerned four lines, inclusive of one 1-888- contact number for Sea Haven. From 1995 – 1999, the Supermarket supplies in respect of Sea Haven totalled \$736,685.12. Lists of 44 payments to Alfred Miller totals \$739,045.00, included on the list were payments 1999 salary and supermarket supplies, food handlers permit, plumbing cost. The wife says that even with a reduce staff Sea Haven cost

US\$2,000.00 to maintain. Of cheque of \$74,736.00 payable to the wife for salaries etc. for Sea Haven.

(43) The husband has produced numerous bills in support of his claim that he contributed to the houses. He has been unable to prove any direct payment to the acquisition of any of the properties. He answers his inability to prove direct payments by asserting that money is fungible. This is a point that the law recognizes, in **Gissing v Gissing** Lord Diplock said:

“It may be no more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if goes out to work and uses her private income to meet joint expenses of the household which would otherwise be met by the husband so as to enable him to pay the mortgage instalments out of his money, this would be consistent with and might be corroborative of an original common intention that she should share in the beneficial interest in the matrimonial home and that her payments of other household expenses were intended by both spouses to be treated as including a contribution by the wife to the purchase price of the matrimonial home.”

(44) The wife’s response to the exhibited bill by the applicant of \$409,000 is important, that nothing that he exhibits is out of proportion with their lifestyle. That bill is not more than they would spend on a three-week vacation abroad. What is clear is that the Downers enjoyed an opulent lifestyle. Their children attended public school in the United Kingdom, they had frequent expensive vacations, they hosted Ambassadors, Ministers of Government, business associates of the husband and high public personages at soirees frequently at their homes. These events were often had catering services in attendance. The wife had an outboard motorboat as did their son. They entertained and hosted guests frequently at the north coast resort property, Sea Haven and consequently had to pay for the utilities and staff services when they did so. They had a domestic staff inclusive of driver and at one period –security, stationed at the gate. They purchase homes for their household staff and a motor car. The wife estimated they had 116 trips together during the currency of their marriage. The husband alludes to this lifestyle in his e-mail message, of the 19th September 1999, where he remonstrates with his wife. The message reads in part, you used to say that “I like the life privately and in front of other people, as if you provided some sort of lifestyle that I could not have had anyway.”

(45) I find that the applicant’s status and lifestyle demanded outlays of expenditures for maintenance and refurbishment and accept the wife’s testimony that such expenditures were not referable to demonstrate that their was a common shared intention for the parties to share the beneficial interest in the property. I find that the husband made no contribution which was referable to any common intention of the parties that he should have a beneficial interest to any of the properties, with the exception. I find that in the single case where the husband paid a legal charge, that sum was refunded by the wife. I find that there was no contribution to the mortgage payments by the applicant.

Further, I find that the husband’s e-mail message of the 19th September 1999 is a cogent admission by the husband that he did not consider himself a beneficial owner of the houses,

registered in his wife's name, that were acquired during their marriage. I find that the statement "Your houses are your houses and I never want any part of them" is clear and unambiguous, and lends itself only to one meaning. The statement corroborates the wife's testimony that the houses were her sole property. I reject the husband's evidence that he did not mean it and he was labouring under the stress of the situation.

(46) He is claiming that he had invested over \$100,000,000.00 (inclusive of interest) in these properties but was prepared to walk away from them because of the break-down of his marriage. I find that the conduct of the husband in the prosecution of the claims, consequent on the breakdown of his marriage, negatives his assertion that there was a common intention for him to share the beneficial interest in the properties. Why then did he fail to raise the point in October 2000 in proceedings brought by the wife under the Maintenance Act, neither did he when the wife filed for ancillary relief in divorce proceedings filed in June 2001. He had stated that the properties belonged to the wife and "he wanted no part of them." The wife's will and testament, I accept as cogent evidence that there was no common intention for the properties to be acquired for the benefit of both parties.

(47) Did the defendant act to his detriment? I think not. His lifestyle, encouraged by his spouse was lavish and perhaps beyond his means. I accept the wife's evidence that his "capital account" was already overdrawn before they were married and as a result, it affected his relationship with his firm. His wife says he benefited from their joint income tax returns to an amount of forty million dollars, his estimate is \$3,000,000. During the years of his joint returns, a period of 16 years he only paid income tax on three occasions. He suffered no detriment.

Income Tax Returns

(48) Income tax returns were filed in respect of the wife from 1977 to 1983 and the joint returns of the couple from 1984 – 1998. It is important to note that for the period when the wife filed her separate return, only in one year 1979, was tax payable. For the period of the joint returns, tax was payable on only three occasions. The losses reported on the property in her returns and on the joint returns provided the basis of the husband's assertion that the houses operated at a loss which is quantifiable from an examination of the income tax return for the period. The husband contends that his contribution was responsible for maintaining the properties throughout that period. The total of the losses that accrues on the properties amounts to \$16,736,053, if interest is added the outstanding amount is \$105,694,413. The argument is that the court is to infer that the husband would not have made such an outlay unless there was a common intention for the husband to acquire an interest in the properties. I am unable to do so, because it conflicts with the reason the husband gave for starting the business. He said that because of the economic climate he had encouraged the "house owning activity", but if the tax records indicate that the first year in which tax was payable after the marriage was in 1988, how then could he have persisted so long in an endeavour, when it is clear from the tax returns he must have misread the economic climate.

(49) The wife claims that the figures are farcical, the husband counters that they have withstood the rigours of a tax audit. I have no doubt that a substantial part of the expenditure would have been incurred by the husband, however I find that the nature of the expenditure cannot assist the

court in finding the common intention that the applicant contends. Mr. Millen, Chartered Accountant, having analysed Mr. Downer's drawing account for the years 1998, 1999 and for January to April 2000 concludes that, in 1998 there was a net withdrawal of \$5m, total withdrawal was over \$20m; in 1999 that figure rose to approximate \$31.1m. In 1999 he expended nearly 18 million on his various credit cards. It is clear that even after the wife's call on his resources should have come to an end, the withdrawals from his capital account still soared.

I have indicated that despite the large sums spent, those expenditure are referable to the lifestyle and domestic needs of this couple and not to any common intention that the husband should acquire a share in the beneficial interest of the property.

I find support for my stance, from the speech of Viscount Dilhorne, at page 786 of **Gissing v Gissing** (supra).

“My Lords, in determining whether or not there was such a common intention, regard can of course be had to the conduct of the parties.... To establish this intention there must be some evidence which points to its existence. It would not suffice if the wife made a mortgage payment whilst the husband was abroad. Payment for a lawn and provision of some furniture and equipment for the house does not of itself point to the conclusion that there was such an intention. I appreciate that there may be very great difficulty in establishing such an intention where the dispute is between former spouses but that does not alter the question to be decided. In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive in favour of the claimant to a beneficial interest or share in it. In case of former spouses that will ordinarily depend on whether it can be inferred from the evidence that there was such a common intention.

My Lords, I do not think any useful purpose will be served by my expressing any views on what will suffice to justify the drawings of such an inference.... But what is important is that it should be borne in mind that proof of expenditure for the benefit of the family by one spouse will not of itself suffice to show any such common intention as ownership of the matrimonial home.”

The properties

(50) **The subjects of the litigation** are 1 Caramel Avenue, Long Lane, Sea Haven and Carinosa. The property at **Long Lane**, was the only property where there is documentary evidence to identify the ownership of the parties at the time of acquisition. I find that the price agreed for the husband's share in Long Lane would have reflected a reconciling of the statement of accounts between the parties. I reject the suggestion put to Mrs. Downer that she had withdrawn \$1.3m from Long Lane Ltd. I accept her evidence that it was from the proceeds of sale of 8 Tennis Way that was used to purchase her husband's shares in Long Lane. The husband's claim for a

declaration of a beneficial interest in Long Lane is refused. The application for a declaration of a beneficial interest in Norbrook Mews is refused. The application in respect Sea Haven is refused. The application in respect of 1 Caramel Avenue is refused. The applications are refused. Costs to the respondent to be agreed or taxed.

Maintenance

(51) The application is made under section 20(1) of the Matrimonial Causes Act. The Court must consider the wife's means, the husband's ability to pay, all circumstances and the standard of living that the wife enjoyed prior to the breakdown of the marriage.

It was urged that the 'circumstances of the case' is wide enough to encompass conduct of the type taken from **Wathcel** case, as stated by Rowe in **Valentine v Valentine (1992) 129 JLR 25**. This, according to the written submission on behalf of the husband, would include 'wholly unacceptable social behaviour.' In this regard it was submitted that the financial exploitation of her husband, her affair and the allegations made at trial against Mr. Downer constituted such unacceptable behaviour.

(52) Chartered Accountant, Mr. Lee, called by Mrs. Downer to prove her husband's income. Admitted that, "Based on the figures that are likely to cause double-counting then the summary would be unreliable and misleading and cannot be relied on as a summary of the expenditure of Mr. Downer." Another Chartered Accountant, called by Mrs. Downer, admitted that he never consulted with Mr. Downer and said that without talking to Mr. Downer, it is impossible to discern which payments from drawing account went to credit card purchases. This inability would likely lead to double-counting.

(53) Mr. Downer's claims that his income in retirement will be J\$4m before tax. During his working life he earned \$11m. He has no capital assets and is heavily indebted to his firm in the sum of \$17.5m. He refers to his wife's lavish lifestyle and claims that she can maintain herself. Mr. Millen, having analysed Mr. Downer's drawing account for the years 1998, 1999, and for January – April 2000. In 1998 there was a net withdrawal of \$5m, total withdrawal was over \$20m; in 1999 that figure rose to approximate \$31.1m. In 1999, he expended nearly 18 million on his various credit cards in the first four months he expended 4 million dollars. He has no dependants.

(54) The wife had been married for over 20 years; she was 35 years at the time of her marriage. She seeks an order from the court for her to be paid \$450,000.00 per month. Mrs. Downer's evidence as to her net worth to be in the order of \$90m. She agreed that if she sold the properties and invested the proceeds she could earn J10m per year. Her net monthly income from her properties would be \$250,000 and claims expenses of \$417,377.00 Mrs. Downer has exhibited medical certificates to show that she has hypertension, emphysema, and peripheral vascular disease. I find that Edwards is not relevant for these proceedings.

(55) On the evidence before the Court, it is open to the wife to manage her properties to provide an income to allow her to live in the manner she did during her marriage. The income so derived should be greater than that available to Mr. Downer. The evidence of Mr. Downer's income is

\$4m before tax; that effectively leaves him with an income of \$2.7m or \$230,000 per month. It is clear that an application for \$450,000 per month or \$5.4m per annum is clearly unsustainable on the evidence. Apart from the weakness of the evidence of the Accountants brought by Mrs. Downer is the fact that their evidence deal with his capital account on which he will have no rights after his retirement. Mr. Downer will from that sum have to meet a monthly rental. In the circumstance, I make an award of \$100,000.00 per month for the maintenance of the applicant for the joint lives of the parties.