IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2005 HCV 5301

IN THE MATTER OF 16 NORBROOK DRIVE, KINGSTON 8 IN THE PARISH OF ST. ANDREW

AND

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT

BETWEEN	MARGUERITE	MCKENZIE	CLAIMANT
AND	ANTHONY	MCKENZIE	DEFENDANT

IN CHAMBERS

Hilary Phillips Q.C. and Andrea Bickhoff-Benjamin instructed by Grant, Stewart, Phillips and Company for the claimant
Hyacinth Griffith and Rose Duncan-Ellis for the defendant

January 10, 11, 16, 17, and February 15, 2007

DIVISION OF MATRIMONIAL PROPERTY, SECTION 16 OF THE MARRIED WOMEN'S PROPERTY ACT, POST ACQUISITION IMPROVEMENTS, WHETHER MAINTENANCE OF PROPERTY AND PAYMENT OF TAXES TAKEN INTO ACCOUNT, EQUITABLE ACCOUNTING

SYKES J.

1. Mrs. Marguerite McKenzie by way of a fixed date claim form dated November 28, 2005, claims:

    a. a declaration that the claimant is solely entitled to the property known as all that parcel of land part of Spring Garden and Constant Spring Estate in the parish of Saint Andrew being the lot numbered two section 5, now known as number 16, Norbrook Drive, Kingston 8 in the parish of St. Andrew, registered at volume 801 folio 64 of the Register Book of Title.
    b. a declaration that the defendant holds his interest in the property known as all that parcel of land part of Spring Garden and Constant

Spring Estate in the parish of Saint Andrew being the lot numbered two section 5, now known as number 16, Norbrook Drive, Kingston 8 in the parish of Saint Andrew, registered at volume 801 folio 64 of the Register Book of Titles, on trust for the claimant.

c. an order that the defendant do execute an instrument of transfer, thereby transferring his interest in the said property to the claimant.

d. an order that, in the event of the defendant refusing and/or failing to execute the said instrument of transfer, the Registrar of the Supreme Court be authorised to execute the said instrument of transfer.

2. Mr. McKenzie while not filing a counter claim submitted that his wife is not entitled to greater than fifty percent of the equitable interest in the property.

3. Miss Phillips Q.C. made the remarkable submission that Mrs. McKenzie is entitled to the full one hundred percent beneficial interest because she made improvements to the property and these improvements enlarged her proportion of the beneficial interest. The first issue is whether any such principle exists and has ever existed. Mrs. Hyacinth Griffith, for her part, submitted that in the absence of an express agreement between the parties concerning the beneficial ownership, it is possible, on the facts of this case, to infer that the parties intended to share the beneficial interest in equal shares.

The principles relating to division of matrimonial property

4. It is over thirty years since ***Pettitt v Pettitt*** [1969] 2 All ER 385 and ***Gissing v Gissing*** [1970] 2 All ER 780 were decided and seventeen years post ***Lloyd' Bank v Rosset*** [1991] 1 A.C. 107. The first two cases have been applied in Jamaica without exception or qualification by the Court of Appeal and Judges of the Supreme Court. The last case from the Court of Appeal in which ***Pettitt*** and ***Gissing*** were applied is ***Chin v Chin*** SCCA No. 161 of 2001 (delivered December 20, 2005). Before examining the facts I shall set out the law as I understand under the various headings argued before me. These are acquisition of property; post acquisition improvement, mortgage payments - past and future; maintenance/repairs and payment of taxes and the determination of the common intention of the parties.

(a) acquisition of property

5. The Property (Rights of Spouses) Act of 2004 which came into force last year does not apply to this application. After ***Pettitt*** and ***Gissing*** there are a number of principles that have been firmly established and are applicable to this case. These are:

a. section 16 of the Married Women's Property Act is procedural only and does not give the court the power to alter the beneficial interest under the guise of what is reasonable or just in all the circumstances of the case;

b. the role of the court is to declare the existing rights of the couple;

c. trust law applies to the division of matrimonial property;
d. the same principles of trust law apply to spouses, former spouses and strangers. There is no special law applicable to property acquired by parties to a marriage.
e. the rights of spouses in property do not change merely because the marriage has broken down.
f. the relevant time which is the focus of the examination of the courts is the time of acquisition of the property. Unless, there is an allegation that the share of the beneficial interest changed after acquisition, what happened after the time of acquisition is generally irrelevant to the issue of determining the beneficial interest of each party.

6. In the case before me, there is no allegation that the beneficial interest of either party was altered by agreement. The relevant time must therefore be the time of acquisition of the property. I shall deal with Miss Phillips' proposition first.

7. There are those who believe that because the equitable jurisdiction of the Supreme Court is invoked, a judge can do any thing to achieve a "fair" result. That is not so. They would have us behave in a manner that drew this uncomplimentary commentary several hundred years ago from John Selden: *"For law we have a measure, and know what to trust. Equity is according to the conscience of him that is chancellor; and as that is larger, or narrower, so is equity. 'Tis all one as if they should make the standard for the measure the chancellor's foot; another a short foot; 'a third an indifferent foot. It is the same thing with the chancellor's conscience."* (see Randall, *Commentaries on Equity Jurisprudence by Justice Story*, 1920 (3rd English Ed) p 13 citing Selden's Table Talk).

8. Bagnall J. in ***Cowcher v Cowcher*** [1972] 1 All ER 943, 948 d -e observed, in less picturesque language but equally to the point:

> *In any individual case the application of these propositions may produce a result which appears unfair. So be it; in my view, that is not an injustice. I am convinced that in determining rights, particularly property rights, the only justice that can be attained by mortals, who are fallible and are not omniscient, is justice according to law; the justice which flows from the application of sure and settled principles to proved or admitted facts. So in the field of equity the length of the Chancellor's foot has been measured or is capable of measurement. This does not mean that equity is past childbearing; simply that its progeny must be legitimate -- by precedent out of principle. It is well that this should be so; otherwise, no lawyer could safely advise on his client's title and every quarrel would lead to a law suit.*

(b) post acquisition improvement

9. In ***Pettitt***, the actual issue before the House of Lords was whether post acquisition improvement by the husband to property held beneficially by his wife gave him any proprietary interest. This is to state the issue fairly broadly. The answer was no. The issue may be framed narrowly, that is, whether the kind of post acquisition improvement done by the husband to the property gave him a beneficial interest in the property. The answer was no. This narrow formulation was sufficient to dispose of the appeal and there was no necessity to look at the question more broadly. Nevertheless the House took the opportunity to examine thoroughly and comprehensively, the law developed by the Court of Appeal in the previous thirty years. At the end of the examination the House rejected the idea that was anything such thing known as family assets which attracted special law. The House made it very clear that post acquisition improvement did not alter the beneficial interest of either party unless there was some agreement to that effect.

10. What is the position regarding improvements? I shall take the judgment in ***Pettit*** as the starting point. Lord Reid said at page 389F-H:

> *Let me suppose that a house which requires extensive renovation or improvement is acquired by one spouse putting down the deposit and taking the title. Installments of the purchase-price and the cost of the improvements will then have to be paid. The other spouse may be willing and able to help, and as a pure matter of convenience, without any thought of legal consequences and without making any agreement, one spouse may pay the installments of the purchase price and the other may pay for the improvements. On this view the legal position will be different according as the contributing spouse pays the installments or the cost of the improvements. Payment of the installments will obtain for him or her a proprietary interest in the house, but payment of the cost of the improvements will not give him or her either an interest in the house or a claim against the other spouse. That seems to me to be entirely unsatisfactory. It is true that the court will do its best to spell out an agreement to prevent this, but I shall return to that matter.*

and at 390E-H:

> *But it is, I think, proper to consider whether, without departing from the principles of the common law, we can give effect to the view that, even where there was in fact no agreement, we can ask what the spouses, or reasonable people in their shoes, would have agreed if they had directed their minds to the question of what rights should accrue to the spouse who has contributed to the acquisition or improvement of property owned by the other spouse. There is already a presumption which operates in the absence of evidence as regards money contributed by one*

spouse towards the acquisition of property by the other spouse. So why should there not be a similar presumption where one spouse has contributed to the improvement of the property of the other? I do not think that it is a very convincing argument to say that, if a stranger makes improvements on the property of another without any agreement or any request by that other that he should do so, he acquires no right. The improvement is made for the common enjoyment of both spouses during the marriage. It would no doubt be different if the one spouse makes the improvement while the other spouse who owns the property is absent and without his or her knowledge or consent. But if the spouse who owns the property acquiesces in the other making the improvement in circumstances where it is reasonable to suppose that they would have agreed to some right being acquired if they had thought about the legal position, I can see nothing contrary to ordinary legal principles in holding that the spouse who makes the improvement has acquired such a right,

11. Lord Reid was prepared to deal with the case of improvement, if necessary, on basis of acquiescence on the part of one of the beneficial owners. It is clear that he was not of the view that absent an agreement or evidence of acquiescence improvements done to the property can generate a proprietary interest. But one cannot acquiesce to something that one does not know about. Lord Reid was in a minority in dealing with improvement by way of acquiescence. The three other Law Lords preferred to find an agreement.

12. Lord Morris dealt with the issue at page 397I - 398E:

Where improvement has been effected to property belonging to one party, the evidence, when examined, might lead to various conclusions. One might be that work was done or expense incurred without any thought that any contractual liability or any ownership disposition would ever result. The spouse who does some work of repair or renovation or decoration in a matrimonial home which, in fact, belongs to the other spouse, would probably do so in circumstances which would create neither a claim nor a right in law. ***There are so many agreements between spouses which are not contracts, for the reason that the parties never intended that the agreements should be attended by legal consequences*** ***(Balfour v. Balfour [1919] 2 K.B. 571)****. In some set of circumstances the conclusion might be reached that some expense incurred by one spouse was to be the subject of reimbursement by the other. Or it could be that work by one was to be paid for by the other. Another conclusion might be that ownership which had hitherto been separate was thereafter to be a common ownership on some newly agreed basis. But each of these conclusions would have to be the result of some agreement. Sometimes an agreement, though not put into express words, would be clearly implied from what the*

parties did. But there must be evidence which establishes an agreement before it can be held that one spouse has acquired a beneficial interest in property which previously belonged to the other or has a monetary claim against the other.(My emphasis)

13. Lord Morris insists that when it comes to improvement capable altering beneficial interests the court must find some agreement between the parties.

14. Lord Hodson page 404B-C said:

This particular case is not concerned with contributions as such, it is concerned with improvements, and although I recognise, as my learned and noble friend, Lord Reid, points out, there is but a fine distinction between contributions to the purchase of property and improvements subsequently made thereto which increase its value, I cannot find any basis for the proposition that the making of improvements by one spouse on the property of the other gives a claim to the structure any more than if the same improvements had been made as between strangers.

15. Lord Hodson was not as generous as Lords Reid and Morris on this issue.

16. Lord UpJohn at pages 409G - 410B had this to say:

My Lords, the facts of this case depend not upon the acquisition of property but upon the expenditure of money and labour by the husband in the way of improvement upon the property of the wife which admittedly is her own beneficial property. Upon this it is quite clearly established that by the law of England the expenditure of money by A upon the property of B stands in quite a different category from the acquisition of property by A and B.

It has been well settled in your Lordships' House (Rams den v. Dyson (1865) L.R. 1 H.L. 129) that if A expends money on the property of B, prima facie he has no claim on such property. And this, as Sir William Grant M.R., held as long ago as 1810 in Campion v. Cotton (1810) 17 Ves. 263, is equally applicable as between husband and wife. If by reason of estoppel or because the expenditure was incurred by the encouragement of the owner that such expenditure would be rewarded, the person expending the money may have some claim for monetary reimbursement in a purely monetary sense from the owner or even, if explicitly promised to him by the owner, an interest in the land (see Plimmer v. Wellington Corpn. (1884) 9 App.Cas. 699). But the respondent's claim here is to a share of the property and his money claim in his plaint is only a qualification of that. Plainly, in the absence of agreement with his wife (and none is suggested) he could have no monetary claim against her and no estoppel or mistake is suggested so, in my opinion, he can have no charge upon or

interest in the wife's property.

It may be that as counsel for the Queen's Proctor quite rightly pointed out this case could be decided somewhat on the Balfour v. Balfour [1919] 2 K.B. 571 principle, that the nature of the work done was of the type done by husband and wife upon the matrimonial home without giving the worker a legal interest in it. See Button v. Button [1968] 1 W.L.R. 457. But I prefer to decide this appeal upon the wider ground that in the absence of agreement, and there being no question of any estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other.

17. Lord UpJohn was not prepared to countenance the idea that unilateral expenditure of funds on a property could elevate itself, absent an agreement, estoppel or encouragement, to a proprietary interest.

18. Finally, we come to Lord Diplock. He did not deal much with improvements. He decided the case on the narrow ground. From this examination it is fair to say that there is no justification for saying that substantial improvement done to a property by either spouse, without more, gives that spouse a beneficial interest where none existed or increases the proportion of the beneficial interest of that spouse. Nothing has been said in ***Gissing*** to undermine this conclusion drawn from the judgments in ***Pettitt***. If my understanding of ***Pettitt*** is correct then any case, whether in Jamaica or England that purports to accept the authority of ***Pettitt*** in an unqualified manner must necessarily be taken as accepting the legal position regarding improvement to property stated in that case. So far there is no support for Queen's Counsel's unusual proposition.

19. Miss Phillips Q.C. relied on the Jamaican Court of Appeal's decision of ***Whitter v Whitter*** (1989) 26 J.L.R. 185 in support of the proposition that when the beneficial interest of matrimonial property is being declared improvement was taken into consideration. There is not much in the way of examination of the issue of improvement and accounting in the judgment of Wright J.A., the only full judgment in the case. It is true to say that the Court of Appeal did order that accounts be taken including "all expenditure on improvement and outgoings by the appellant be verified by bills and vouchers" (see page 196B). The issue was whether Monica Whitter was entitled to a beneficial interest in the property via the route of the presumption of advancement. Mrs. Witter did not predicate her case on improvement. The Court held that she was entitled to benefit from the presumption of advancement. If this judgment is to be accommodated within existing law then it must be on the basis of after the beneficial interest of each party is declared and before the proceeds of sale is divided, assuming a sale is ordered, then the expenditure by one co-owner is brought into account under the principle of equitable accounting. The accounting is directed at taking account of expenditures between the co-owners so as to ensure that either one who spent money on the property was

recompensed. This is nothing more than an application of the maxim, he who comes to equity must do equity, that is to say, the co-owner who did not expend the money derived a benefit from the expenditure and equity, demands that in taking the benefit of improvement, then he should do equity by compensating the other co-owner when the property is sold. The liability when equitable accounts are taken is personal. It may be that when the accounts are taken, the co-owner who is to compensate the other may use his proprietary interest to meet his personal liability. If this is done, the person may give up such proportion of his beneficial interest to meet the liability. So understood, ***Whitter v Whitter*** provides no basis for the submission of Miss Phillips.

20. Her next port of call was the case of ***Edmonson v Edmonson*** (1992) 29 J.L.R. 234. In that case Rowe P. said at page 237F: *"In the instant circumstances the fact that the respondent took out a loan to improve the property is relevant to determine the respective interests".* Neither ***Pettitt*** nor ***Gissing*** was cited in the judgment. There was no discussion of the juridical basis, in light of those decisions, of the route by which a loan to improve the property is relevant to determine the respective beneficial interest. The case does not establish the proposition contended for by Miss Phillips. The highest that it could go and it does not is that there was a post acquisition agreement that the beneficial interests of the parties would be altered by some means that was connected to the loan. The case actually was resolve by an agreement between counsel for the litigants that taking the loan into account the property would be shared 60:40. If one wanted to stretch the facts in ***Edmonson*** then it could possibly be accommodated within Lord Reid's acquiescence principle in Pettitt. The evidence of his is found at page 235 of the report. The report indicates that in May 1988 the respondent borrowed money to improve the property. The parties then separated on January 12, 1989. It is unlikely that the husband would not have seen and known of the repairs. It is possible therefore to suggest that there was acquiescence on his part. It can be said that when the Court of Appeal referred to increased beneficial interest perhaps what they meant was that on an accounting the expenditure could be taken into account and after that process the beneficial interest of the husband could be used to satisfy his personal liability as far as the improvements were concerned. As in the case of ***Whitter***, the court may well have had in mind equitable accounting and one party, voluntarily, using his proportion of the property to meet his liability. The point then is that ***Edmonson*** can be easily explained by existing law. There is no need to resort to extraordinary propositions to explain the decision.

21. Queen's Counsel next produced ***Forrest v Forrest*** (1995) 32 J.L.R. 130. At page 131E Forte J.A. (as he was at the time) is reported as saying: *"In Edmonson v Edmonson there was an addition to the home which was financed solely by the wife and which must have increased its value and accordingly she was entitled to a greater share."* His Lordship cited ***Pettitt*** and the judgment of Lord Diplock. As I have already demonstrated, four of the Law Lords in ***Pettitt*** dealt with

improvement, and from the passages cited, it is not easy to derive the conclusion that improvement to the property increases the improver's share with a corresponding reduction of the other party's share in the absence of an agreement to that effect or some form of estoppel or an application of the ***Ramsden v Dyson*** principle. Forte J.A. was citing ***Edmonson*** to distinguish it from the case before him. This case too, like ***Whitter*** and ***Edmonson***, can be explained on the basis that if equitable accounting is done then the party who expended money may recover the sum spent from the other beneficial owner who may use his beneficial interest to meet his personal liability. This is quite likely what the Court of Appeal had in mind. What Miss Phillips overlooked is that the Court may not have explained all the steps in arriving at its conclusion but the route to the conclusion is now illuminated.

22. Not to be stymied by this analysis, learned Queen's Counsel presented the case of ***Myrie v Myrie*** (1996) 33 J.L.R. 95. A decision of Bingham J. (as he was at the time). His Lordship relied on the case of ***Re Nicholson*** [1974] 2 All ER 386, in which Vice Chancellor Pennycuick stated that *"the share of the party who makes the improvement as enlarged by a proportionate amount corresponding to the increase in value represented by the improvement"* (see page 392e). The basis on which the Vice Chancellor in ***Nicholson*** could take this position was section 37 of the Matrimonial Proceedings Property Act 1970. This provision was described in ***Nicholson*** as "entirely novel" (see page 392a). The provision empowered courts in England to take account of improvements and in so doing the court had the power to give the improver an enlarged share of the beneficial interest. There is no similar statute in Jamaica.

23. There are two more Jamaican cases referred to by Miss Phillips. These are ***Nembhard v Nembhard*** SCCA No. 49/98 (delivered May 10, 1999) and ***Patten v Edwards*** SCCA No. 29/95 (delivered December 20, 1996). These are cases of estoppel. The case before me did not proceed on this basis. Having exhausted her stock of Jamaican cases, Miss Phillips alighted on the shores of England and Wales. I examine those cases now.

24. In this area of law, Lord Denning M.R. was quite active. It would not be long before the Master of the Rolls was pressed into service on behalf of Mrs. McKenzie. Queen's Counsel cited Lord Denning's decision in ***Davis v Vale*** [1971] 2 All ER 1021. The Master of the Rolls declared that section 37 of the Matrimonial Proceedings Property Act (UK) did not alter previous law but was a declaration of the common law. Suffice it to say, Lord Denning is not supported by the logic of the matter. It is clear that the legislation was a direct response to ***Pettitt*** and to give the court the power to make adjustments to the beneficial interests of married couples. The interest of the improver may even be enlarged. Therefore, the statute, as I understand it, could not have been declaratory of the common law because of the passages from ***Pettitt*** that I have cited above.

25. The last case from Miss Phillips to which I shall refer is ***Young v Young*** [1984] FLR 376. The court held that the defendant had indeed acquired a beneficial interest but looking at the matter broadly, whatever interest he had was lost because he only paid a very small part of the mortgage. The judgment referred to ***Pettit*** and ***Gissing*** but nowhere does Lord Justice May deal with the principle stated by the House of Lords that a beneficial interest that is acquired can only be varied by evidence showing an agreement or estoppel to that effect. No authority was cited for the proposition that one can lose a proprietary interest by "assessing the matter broadly". The court must be understood as saying that whatever interest the husband had was so miniscule that it need not be quantified. This must indeed be a rare case.

26. From this review of the cases, it can be safely concluded that none of them supported Miss Phillips' proposition that, after the property has been acquired, the beneficial interest of the parties can be varied by one co-owner expending money on the property.

(c) mortgage payments - past and future; maintenance/repairs and payment of taxes

27. In ***Whitter's*** case, Wright J.A. ordered that accounts be taken includes the maintenance and property taxes as well as "improvement and outgoings". From this Miss Phillips submitted that these expenditure can reduce the equitable interest of Mr. McKenzie. In light of my conclusions on the law above, this is an impossible argument. The proper way to deal with this issue is not by seeking to subvert well established trust and property principles. Resort should be had to what is known as equitable accounting. In this regard I am indebted to Elizabeth Cooke, author of ***Equitable Accounting***, Convpl 1995 (Sept. - Oct.), 391 - 403. I have drawn heavily from her article.

28. The underlying philosophical idea of equitable accounting springs from the notion that co-owners of property are each entitled to occupy and enjoy the property. Thus during the continuation of the tenancy where there is no intention or any act done to divide the property, one co-owner could not unilaterally decide to spend money on the property and then seek to recover the money from the other. However, when the property is being partitioned then equity demands that the co-owner who did not expend any money on the property during the co-ownership but benefited from the expenditure of the other should repay to the co-owner who spent the money such proportion as appropriate. It seems that initially this principle applied only to tenants in common. Later, it came to apply to joint tenants and finally to spouses who owned matrimonial property whether as joint tenants or tenants in common. I should indicate that until the nineteenth century when legislation was enacted that empowered the courts to order a sale of jointly owned property (i.e. tenants in common) partition literally meant parting the real estate. When the

power to order a sale was granted to the courts, the equitable accounting principles were still applied and the deductions made from the share of the party who was to be charged.

29. I shall cite the cases and passages from the various judgments to show the gradual development of the law from 1884 to the present. Lord Brett M.R. in ***Leigh v Dickeson*** (1884) 15 Q.B. D. 60, 64 - 66 expresses the legal position in relation to tenants in common:

> *What are the legal conditions which enable a man who has expended money to recover it from another? If money has been expended at the express request of another, an action will lie at the suit of the person expending it against the person pursuant to whose request it has been expended. If a person is employed as agent in a business which requires an expenditure in order that it may be carried on, it is equally clear that the principal must indemnify his agent for the expenditure which he incurs. But the law has gone further; it has been laid down that if one person has requested another to do an act which will cost him money, that is, which will expose him to a legal liability to pay money, the law will imply a promise on the part of the person making the request to indemnify the other for the expenditure to which he has been subjected. But the law has gone even further, and it has been held that if a principal employs an agent in a business, in which, by the usage thereof known to both parties at the time of employment, the agent, although he is under no liability by law, is bound, on pain of suffering an injury or loss in his business, to pay money, the principal is bound to indemnify the agent for the money which the latter may expend in the transaction of the business on his principal's behalf. That, no doubt, is an extreme case, but it has been so decided. But it has been always clear that a purely voluntary payment cannot be recovered back. Voluntary payments may be divided into two classes. Sometimes money has been expended for the benefit of another person under such circumstances that an option is allowed to him to adopt or decline the benefit: in this case, if he exercises his option to adopt the benefit, he will be liable to repay the money expended; but if he declines the benefit he will not be liable. But sometimes the money is expended for the benefit of another person under such circumstances, that he cannot help accepting the benefit, in fact that he is bound to accept it: in this case he has no opportunity of exercising any option, and he will be under no liability. Under which class does this case come? Tenants in common are not partners, and it has been so held: one of them is not an agent for another. The cost of the repairs to the house was a voluntary payment by the defendant, partly for the benefit of himself and partly for the benefit of his co-owner; but the co-owner cannot reject the benefit of the repairs, and if she is held to be liable for a proportionate share of the cost, the defendant will get the advantage of the repairs without allowing his co-owner any liberty to decide whether she will*

refuse or adopt them. The defendant cannot recover at common law; he cannot recover for money paid in equity, for that is a legal remedy: there is no remedy in this case for money paid. But it is said that there is a remedy in equity: a suit for a partition may be maintained in equity: that is a remedy which is known and recognised in a court of equity: in a suit in the Chancery Division expenditure between tenants in common would be taken into account. Reference has been made during the argument to an old form of writ; it looks to be a writ of a mandatory nature: but it has proved to be wholly unworkable in a court of common law. Therefore the rights of tenants in common went into Chancery, where a suit for a partition might be maintained. That is the only remedy which exists either at law or in equity. No such claim as that put forward in the present counter-claim can be found to have been upheld either at law or in equity. If the law were otherwise, a part-owner might be compelled to incur expense against his will: a house might be situate in a decaying borough, and it might be thought by one co-owner that it would be better not to repair it. The refusal of a tenant in common to bear any part of the cost of proper repair may be unreasonable: nevertheless, the law allows him to refuse, and no action will lie against him.

30. There is no evidence that the expenditure on improvement by Mrs. McKenzie after Mr. McKenzie left the house was undertaken at the request or encouragement of Mr. McKenzie. The evidence is that she did not communicate with him about the expenditure. In this case Mr. McKenzie did not have the opportunity to agree or disagree with the expenditure but he undoubtedly benefited since the asset has been preserved and may even have been enhanced in value by Mrs. McKenzie's efforts and for that there must be accounting so that Mrs. McKenzie can recover her money.

31. However, if the tenancy in common is being terminated, the legal position is stated by Lord Justice Cotton at page 67 in ***Leigh***. His Lordship said:

Therefore, no remedy exists for money expended in repairs by one tenant in common, so long as the property is enjoyed in common; but in a suit for a partition it is usual to have an inquiry as to those expenses of which nothing could be recovered so long as the parties enjoyed their property in common; when it is desired to put an end to that state of things, it is then necessary to consider what has been expended in improvements or repairs: the property held in common has been increased in value by the improvements and repairs; and whether the property is divided or sold by the decree of the Court, one party cannot take the increase in value, without making an allowance for what has been expended in order to obtain that increased value; in fact, the execution of the repairs and improvements is adopted and sanctioned by accepting the increased value. There is, therefore, a mode by which money expended by one tenant in

common for repairs can be recovered, but the procedure is confined to suits for partition. Tenancy in common is an inconvenient kind of tenure; but if tenants in common disagree, there is always a remedy by a suit for a partition, and in this case it is the only remedy.

32. These two passages reinforce the conclusion I had come to already, namely, that improvement on property by one co-owner cannot increase his beneficial interest. If a co-owner who has spent money on the property cannot force the other to compensate him during the co-ownership, it would be more than remarkable that such expenditure could result in the alteration of the beneficial interests. Cotton L.J. has stated that equity would not allow one party to take the benefit of the increased value without any contribution to the cost of repairing or improvements when dissolution of the tenancy in common is taking place.

33. This principle was extended to beneficial joint tenants by Millet J. (as he then was) in ***In Re Pavlou (A Bankrupt)*** [1993] 1 W.L.R. 1046, 1048:

In my judgment there is no distinction for this purpose between a beneficial tenancy in common and a beneficial joint tenancy. In neither case could a co-owner formerly obtain contribution from his or her co-owner; any reimbursement had to await a suit for partition or an order by the court for sale of the property. On a partition suit or an order for sale adjustments could be made between the co-owners, the guiding principle being that neither party could take the benefit of an increase in the value of the property without making an allowance for what had been expended by the other in order to obtain it: see Leigh v. Dickeson (1884) 15 Q.B.D. 60. That was a case of tenants in common, but in my judgment the same principle must apply as between joint tenants; the question only arose on a partition or on the division of the proceeds of sale, the very point of time at which severance occurred if there was a joint tenancy. The guiding principle of the Court of Equity is that the proportions in which the entirety should be divided between former co-owners must have regard to any increase in its value which has been brought about by means of expenditure by one of them.

34. I see no reason to disagree with Millet J. on this point and I adopt his reasoning and conclusion. I shall apply them in this case.

35. Equitable accounting has been applied in matrimonial property cases, though this did not occur until the last quarter of the twentieth century. Thus Lord Justice Griffith in ***Bernard v Joseph*** [1982] Ch. 391, 405:

When the proceeds of sale are realised there will have to be equitable accounting between the parties before the money is distributed. If the woman has left, she is entitled to receive an occupation rent, but if the

*man has kept up all the mortgage payments, he is entitled to credit for her share of the payments; **if he has spent money on recent redecoration which results in a much better sale price, he should have credit for that, not as an altered share, but by repayment of the whole or a part of the money he has spent.** These are but examples of the way in which the balance is to be struck. The judge did it in this case; I see nothing wrong in his approach.* (My emphasis)

36. I now turn to the issue of mortgage payments and how they are to be treated. The principle of equity that applies here is that a person cannot take out of the fund until he has paid what he owes the fund. The supporting principle is that the person who pays another's secured obligation has a right to be repaid out of the security any sums paid by him (see ***Kirkham v Smith*** I Ves Sen 258; 27 ER 1019 ***Cowcher*** page 950j - 951a; per Forte J.A. in ***Forrest*** at page 113H). These principles are specific manifestations of the maxim, he who wants equity must do equity. Equity would not allow the person who has not met his legal obligations to be able to receive his full share of the equitable interest without reimbursing the party who spent his money to meet the obligation of the other co-owner. This liability is personal. The co-owner who has spent the money does not have a proprietary interest in the other's property unless they have agreed that is to be the case.

(d) determination of common intention

37. In ***Pettitt v Pettitt*** the House of Lords spoke in terms that suggested that inferring a common intention where there was no express intention would not be lightly done. The examples given in Lord UpJohn's judgment can be taken as typical of the attitude of the courts. He said at pages 407F - 408B:

So in such a case as a practical matter where the property is in joint names the presumption is in effect no more than a joint beneficial tenancy.

Then in In re Young (1885) 28 Ch.D. 705 the spouses, who died within five days of one another, had opened a joint account mainly contributed to by the wife, principally, but not only, for housekeeping expenses, but with the consent of the wife (as Pearson J. held) the husband drew on the joint account to make substantial investments in his own name alone. Held, that the joint account belonged beneficially to the spouses jointly and so passed to the survivor by survivorship but that the investments purchased by the husband in his own name (there being no evidence that he was thereby acting as a trustee) belonged to his estate. This sound principle has recently been followed in In re Bishop, decd. [1965] Ch. 450.

So that, in the absence of all evidence, if a husband puts property into his wife's name he intends it to be a gift to her, but if he puts it into joint names, then (in the absence of all other evidence) the presumption is the same as a joint beneficial tenancy. If a wife puts property into her husband's name it may be that in the absence of all other evidence he is a

trustee for her, but in practice there will in almost every case be some explanation (however slight) of this (today) rather unusual course. If a wife puts property into their joint names I would myself think that a joint beneficial tenancy was intended, for I can see no other reason for it.

But where both spouses contribute to the acquisition of a property, then my own view (of course in the absence of evidence) is that they intended to be joint beneficial owners and this is so whether the purchase be in the joint names or in the name of one. This is the result of an application of the presumption of resulting trust. Even if the property be put in the sole name of the wife, I would not myself treat that as a circumstance of evidence enabling the wife to claim an advancement to her, for it is against all the probabilities of the case unless the husband's contribution is very small.

Whether the spouses contributing to the purchase should be considered to be equal owners or in some other proportions must depend on the circumstances of each case: see Rimmer v. Rimmer [1953] 1 Q.B. 63 and many other cases. But for very good reasons for treating the spouses on an equality when one puts up the deposit and the other assumes liability for the building society mortgage: see Ulrich v. Ulrich and Felton [1968] 1 W.L.R. 180, per Lord Denning M.R., at p. 186, and Diplock L.J. (as he then was) at p. 189.

But if a spouse purchases property out of his or her own money and puts it into his or her own name, then (in the absence of evidence) I can see absolutely no reason for drawing any inference save that it was to be the property of that spouse; bought of course for the common use or common occupation during the marriage, but if sold during the marriage the proceeds belong to the purchasing spouse as does the property upon termination of the marriage whether brought about by death or divorce.

38. Thus if purchase by one spouse of property in his name alone with money from a joint account, absent other evidence, was not sufficient to make the inference of that it was the common intention that both should share in the beneficial interest that clearly any evidence that produced this inference had to be quite compelling. The question is, what kind of evidence other than contribution to the purchase price could produce this kind of inference? Bagnall J. in ***Cowcher*** made the important observation that despite the judgments in ***Pettitt*** and ***Gissing*** suggesting that an inference may be drawn from evidence other than monetary contribution, whether directly or indirectly or some evidence from which a constructive trust (of the kind designed to prevent a party from resiling from a promise made to the other), neither of the claimants in those cases succeeded. In both cases neither of the spouses contributed to the purchase price, directly or indirectly to the acquisition of the property. Not even Lord Diplock's formulation in ***Gissing*** cited below was able to assist Mrs. Gissing in her quest for a proprietary interest. His Lordship said at pages 790g - 791e:

But 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.

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 as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences 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.***

In drawing such an inference, what spouses said and did which led up to the acquisition of a matrimonial home and what they said and did while the acquisition was being carried through is on a different footing from what they said and did after the acquisition was completed. ***Unless it is alleged that there was some subsequent fresh agreement, acted upon by the parties, to vary the original beneficial interests created when the matrimonial home was acquired, what they said and did after the acquisition was completed is relevant if it is explicable only upon the basis of their having manifested to one another at the time of the acquisition some particular common intention as to how the beneficial interests should be held.*** *But it would in my view be unreasonably legalistic to treat the relevant transaction involved in the acquisition of a matrimonial home as restricted to the actual conveyance of the fee simple into the name of one or other spouse. Their common intention is more likely to have been concerned with the economic realities of the transaction than with the unfamiliar technicalities of the English law of legal and equitable interests in land. The economic reality which lies behind the conveyance of the fee simple to a purchaser in return for a purchase price the greater part of which is advanced to the purchaser upon a mortgage repayable by installments over a number of years, is that the new freeholder is purchasing the matrimonial home upon credit and that the purchase price is represented by the installments by which the*

mortgage is repaid in addition to the initial payment in cash. The conduct of the spouses in relation to the payment of the mortgage installments may be no less relevant to their common intention as to the beneficial interests in a matrimonial home acquired in this way than their conduct in relation to the payment of the cash deposit.
It is this feature of the transaction by means of which most matrimonial homes have been acquired in recent years that makes difficult the task of the court in inferring from the conduct of the spouses a common intention as to how the beneficial interest in it should be held. Each case must depend upon its own facts but there are a number of factual situations which often recur in the cases. (My emphasis)

39. Yet it is ironic that it is this passage that is commonly used in the attempt to secure a beneficial interest where there is not much or no direct or indirect monetary contribution to the acquisition of the property. In terms of sheer logic there is much to be said for Lord Diplock's analysis. The passage from Lord Diplock, particularly the opening paragraph, has engendered much hope in litigants and their legal advisers that a court may infer common intention from the slenderest of evidence. Mrs. Griffith is one of them. In his judgment, Lord Diplock's apparent generosity led him to say that it was not necessary to distinguish between resulting, implied or constructive trust once the conduct of the trustee made it inequitable for him to deny the beneficiary a beneficial interest. As wide as this was, Mrs. Gissing still could not mount the rostrum of success. Indeed, despite all the reference to common intention inferred from conduct, the empirical data from decided cases show a clear correlation between monetary contribution and success in claiming a beneficial interest. The lesson is obvious. Those spouses who do not contribute monetarily to the acquisition of the property are going to be left without a beneficial interest unless they can raise an estoppel or a remedial constructive trust and even then, the cases point to the virtual necessity of evidence of acting to one's detriment based on the conduct of the other spouse. A good example of this is the case of ***Grant v Edwards*** [1986] 2 All ER 426 where the male partner of an unmarried couple led his female partner to believe that if she undertook certain expenses she would have a beneficial interest in the property. He sought to back out of the agreement but he was held to be a constructive trustee for his partner. The court found that she had acted to her detriment. The court imposed the trust because it was the common intention that she should have benefited. Another example is the Jamaican case of ***Nembhard v Nembhard*** SCCA 49/98 (delivered May 10, 1999). Incidentally, the couple in ***Grant v Edwards*** were Jamaicans. In ***Nembhard***, Bingham J.A. found that "when the insurance policy was used as collateral to enable the down-payment to be realised, this amounted to a detriment suffered by the appellant as a result of or in reliance on the common intention of the parties. This would be conduct sufficient to enable the appellant to seek the aid of a court of equity in imposing a trust on the legal estate in her favour" (see page 6). It is to be noted that in neither case was the constructive trust imposed merely

because it was fair, just or equitable, without any regard to the agreement made between the parties. In both cases, the court found that the common intention was that the complaining party should have either a beneficial interest or a particular proportion of the beneficial interest and that the claimant acted to her detriment in reliance on the common intention.

40. In light of this empirical data it is not surprising that in ***Springette v Defoe*** (1993) 65 P. & C. R. 1. the Court of Appeal held (the headnote accurately summarises all three judgments) that "*in the absence of any express declaration of the beneficial interests, joint purchasers will hold property on a resulting trust for themselves in the proportions in which they contributed directly or indirectly to the purchase price unless there is sufficient specific evidence of their common intention that they were entitled to other proportions. A common intention could only be established if it were a shared intention communicated between them. A common intention could not be established if both parties had similar intentions but there had been no communication between themselves of those intentions. In the present case, there had been no discussion between the parties as to their respective beneficial interests. Consequently, no common intention could be established. The parties therefore held the property in the proportions to which they contributed to the purchase price.*"

41. Similarly in ***Walker v Hall*** [1984] FLR 126, Lord Justice Dillon said at pages 133 - 134:

> *Where, as here, the house has been conveyed into the joint names of the man and the woman, it is relatively easy to conclude, ... that they should each have a beneficial interest in the house. To determine the extent of those beneficial interests - whether they are to be equal or not - is more difficult.*
> *If there is evidence that both parties were to have beneficial interests in the house, and there is no further evidence at all to indicate the extent of those interests, the conclusion would be that equity follows the law, and the parties holding the legal estate as joint tenants, are entitled beneficially as joint tenants also. ...*
> *...*
> *In particular, the law of trusts has concentrated on how the purchase money has been provided and it has been consistently held that where the purchase money for property acquired by two or more persons in their joint names has been provided by those persons in unequal amounts, they will be beneficially entitled as between themselves in the proportions in which they provided the purchase money. This is the basic doctrine of the resulting trust and it is conveniently and cogently expounded by Lord UpJohn in Pettitt v Pettitt.*
> *This purely financial approach would seem to be in accordance with the inherent probabilities where a property has been acquired in joint*

names as an investment or for business or commercial purposes. It is much more debatable, however, where a house bought as a family home is concerned, and may people would be disposed to think that when a man and woman, contemplating a long-term cohabitation where in lawful matrimony or not, buy a house as the future family home in their joint names wit the intention that each shall have a beneficial interest, they would intend that their beneficial interests should be equal even though their financial contributions to the purchase price may have been unequal. But the House of Lords has indicated - see, for instance, per Lord UpJohn in Pettitt v Pettitt [1970] AC 777 at 817 and per Viscount Dilhorne in Gissing v Gissing [1971] AC 886 at pp. 899 - 9-- - that there is no special class of family assets which fall to be treated under the law of trusts in some way different from other assets.

42. In the case of ***Walker*** Lord Justice Dillon concluded, on the facts, that in the absence of specific evidence of the parties' intention, it was not open to the court to find that they held the property in equal shares, "notwithstanding their unequal contributions to the purchase price, simply because it was bought to be their family home and they intended that relationship should last for life" (see page 134C). This passage from the judgment of Dillon L.J. captures the issue perfectly. His Lordship observed that common sense would readily accept that an inference that the beneficial interest would be apportioned according to the contribution to the purchase price is more likely to be correct when one is dealing with property purchased by business partners. Intuition and common sense would suggest that when one is dealing with a matrimonial home purchased by the couple the hardnosed approach of the resulting trust applicable in business relationships might have been softened in the matrimonial context. Dillon L.J. appreciated that that was not so particularly if one reads and appreciates Lord UpJohn's judgment in ***Pettitt***. It was Lord UpJohn who in ***Pettitt*** said due allowance must be made for the marriage relationship. This dictum at first blush would suggest that the inferences drawn when the law is dealing with married couple, the law would tend towards a less rigid position. However, this is not so. For Lord UpJohn, making due allowance did not involve a more benevolent approach to matrimonial property. With this in mind, I now turn to the aberrant case of ***Midland Bank plc v Cooke*** [1995] 4 All ER 562.

43. In light of this review, cases such as ***Midland Bank plc v Cooke*** are difficult if not impossible to reconcile with the legal position already stated. One is not quite sure how Lord Justice Waite arrived at this proposition he propounded at page 574d -e:

The general principle to be derived from Gissing v. Gissing and Grant v. Edwards can in my judgment be summarised in this way. When the court is proceeding, in cases like the present where the partner without legal title

has successfully asserted an equitable interest through direct contribution, to determine (in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burdens and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that search proves inconclusive does the court fall back on the maxim that "equality is equity".

44. The only possible way of reconciling ***Midland Bank*** with existing orthodoxy is to say that the Court of Appeal found the other evidence sufficiently strong that even in the absence of an express agreement the result that would have been arrived by an application of normal resulting trust principles were displaced. Mrs. Griffith submissions had more in common with this case than with the orthodox understanding I have endeavoured to state.

45. ***Midland Bank*** is all the more striking in the face of Lord Browne-Wilkinson's judgment in ***Westdeutsche Landesbank Girozentrale v. Islington London Borough Council*** [1996] A.C. 669 in which the Law Lord modified Megarry J.'s classification of resulting trusts in ***In Re Vandervell's Trusts (No. 2) [1974] Ch. 269, 288***, when he stated at page 708:

Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer: see Underhill and Hayton, Law of ***Trusts*** *and Trustees, pp. 317 et seq.; Vandervell v. Inland Revenue Commissioners [1967] 2 A.C. 291, 312 et seq.; In Re Vandervell's* ***Trusts*** *(No. 2) [1974] Ch. 269, 288 et seq. (B) Where A transfers property to B on express* ***trusts****, but the* ***trusts*** *declared do not exhaust the whole beneficial interest: ibid. and Quistclose Investments Ltd. v. Rolls Razor Ltd (In Liquidation) [1970] A.C. 567. Both types of* ***resulting trust*** *are traditionally regarded as examples of* ***trusts*** *giving effect to the common intention of the parties. A* ***resulting trust*** *is not imposed by law against*

*the intentions of the trustee (as is a constructive **trust**) but gives effect to his presumed intention.*

46. ***Midland Bank*** stands out even more given that it was delivered after the House of Lords decision in ***Lloyd's Bank v Rossett*** [1991] A.C. 107 in which Lord Bridge attempted to rigidify the significance of actual monetary contribution and to make it make it very difficult for a court absent some exceptional evidence to conclude that without monetary contribution, direct or indirect, a court could find that there existed in the non-contributing spouse an equitable interest; or if there was monetary contribution a finding that the beneficial interest was to be held in proportions other than the proportion to the purchase price would only be arrived at in extraordinary circumstances. Lord Bridge said at pages 132 – 133:

I do, however, draw attention to one critical distinction which any judge required to resolve a dispute between former partners as to the beneficial interest in the home they formerly shared should always have in the forefront of his mind.

*The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to 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 their terms may have been.** Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.*

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do. (My emphasis)

47. I therefore agree with the conclusion of Bagnall J. in ***Cowcher*** when he made the point that in order to arrive at what the common intention is, the best evidence is monetary contributions and not trying to infer a common intention from other conduct where there is no express agreement on how the beneficial interest should be held. His reasoning as I understand it is this. Under trust law, when property is purchased the beneficial interest results to those who provide the purchase money and if there are several purchasers, the beneficial interests that results, is in proportion to the contribution of each purchaser. This is the law that applies to spouses as well as strangers. If there is to be a holding of the beneficial interest in proportions other than in the proportionate contribution to the purchase price such a conclusion could only be arrived at by express agreement and in the absence of such agreement by inference. This inference would be from the conduct of the parties. This conduct would have to be strong enough to displace the application of the normal resulting trust that would arise out of contribution to the purchase money. As I read his Lordship's judgment, such conduct would have to have the strength of an express agreement before the inference is drawn that the parties intended to hold the beneficial interest in proportions other than that which corresponds to their respective contributions. Significantly his Lordship stated that the maxim, equality is equity is only arrive at where there is evidence of substantial contribution by both parties to the acquisition of the property and the precise amounts cannot be quantified. From this, I infer that the maxim, equality is equity is not a default position just because there is no express agreement and that the property was bought, for joint use. This exposition stand in sharp contrast to the passage from Lord Justice Waite cited above.

48. It follows indubitably from the application of trust law that the beneficial interest does not exist in some amorphous condition waiting to be crystallised when the union breaks down. Generally, one cannot have a trust without the full extent of the beneficial interest being established at the time of the creation of the trust. I leave out of account for the moment those cases in which a constructive trust is imposed even when it is doubtful what the trust property is before the constructive trust is imposed. In these kinds of cases the imposition of the trust seems to have more affinity with a personal liability to account that with a trust but nonetheless such constructive trusts are too well established to be regarded as anything other than as a trust.

49. When a marriage breaks down and the courts are called upon to declare the beneficial interest, that is exactly what the courts do - declare what had already existed even if the parties were not aware of the legal consequences of their conduct. Thus so far as Lords Justices Griffith and Kerr said in ***Bernard v Joseph*** that the beneficial interest is to be determined at time of breakdown they were at variance with the House of Lords in ***Pettitt*** and the majority in ***Gissing*** and ought not to be followed. I say the majority in ***Gissing*** because of the section of Lord Diplock's judgment I am about to cite. Lord Diplock in ***Gissing*** spoke in terms that do

suggest that the quantum beneficial interest may be determined at some later date. Lord Diplock was not here speaking of an alteration of the beneficial interest after the date of purchase but rather some kind of understanding that holding and quantum of the beneficial interest was not to be determined at the date of acquisition but postponed for some future time. This is the passage at page 793e - f:

> *And there is nothing inherently improbable in their acting on the understanding that the wife should be entitled to a share which was not to be quantified immediately upon the acquisition of the home but should be left to be determined when the mortgage was repaid or the property disposed of, on the basis of what would be fair having regard to the total contributions, direct or indirect, which each spouse had made by that date. Where this was the most likely inference from their conduct it would be for the court to give effect to that common intention of the parties by determining what in all the circumstances was a fair share*

50. This portion of Lord Diplock's judgment does not fit comfortably with the rest of his judgment. It has led at least one commentator to launch a stinging attack on the judgment. He described it as "loosely reasoned and difficult to reconcile with principle or precedent" and "giving birth to a giving birth to a "Frankenstein" doctrine". (see Rotherham, Craig, *The Property Rights Of Unmarried Cohabitees: The Case For Reform*, Conv. 2004, Jul/Aug 268 - 292). It is fair to say that Mr. Rotherham was quite agitated by Lord Diplock's judgment.

51. I might not have used some of the adjectives to describe the judgment but I think there is some indeed a basis to attack the reasoning of Lord Diplock. It is important to observe that Lord Diplock did not say that this position was arrived at by express agreement. He seems to be relying on an inference to find the common intention that the parties agreed to postpone the allocation of the beneficial interest to some later date. If I am correct, then Lord Diplock's position is difficult to accept. If it is that the absence of monetary contributions makes it difficult for the court to find any common intention in the absence of an express agreement, then it is hard to see, in the absence of extremely cogent evidence, that a court can infer not only that there was an intention that the beneficial interest is not to be determined at the time of acquisition but also that the common intention was that the beneficial interest is to be arrived by doing what is a fair share in all the circumstances. If there are such cases, then they could not be very often. In the thirty years since ***Gissing***, as far as reported cases go in England and Jamaica (including unreported cases) there does not seem to have been a single case where such an intention has been found. If the laws of probability mean anything then such a case would have made its way to court. That no such cases have made to the courts is not surprising because any evidence, in the absence of express agreement,

capable of grounding such a conclusion must be, in the nature of things, quite extraordinary.

52. This passage was cited, by the Court of Appeal in ***Midland Bank*** for deciding as it did. However, not even Lord Justice Waite, as liberal as he was with his inferences, was able to find the intention spoken of by Lord Diplock. It may be that this aspect of Lord Diplock's judgment has not been fully appreciated and explored in later cases. Be that as it may, the fact remains that even on this analysis Mrs. Gissing was unable to recover and apart from unusual cases such as ***Midland Bank***, the courts have been reluctant to find any intention inconsistent with monetary contribution, direct or indirect, unless there is a remedial constructive trust or estoppel that is imposed to prevent the party holding the legal interest from backing out of understanding arrived at which led the other to act to their detriment.

53. Two last points. The first: a suggestion has been made by at least three judges in England that attorneys should ask the parties, when they are acquiring property, how they wish to hold the beneficial interest and capture this agreement in the instrument of transfer or some other document. One judge has even gone as far as suggesting that failure to do this may result in a negligence claim against the lawyer (per Bagnall J. at 959h in ***Cowcher*** ; ***Bernard v Joseph***, at 403 per Griffith L.J. ***Walker v Hall*** [1984] FLR 126, 129 per Dillon L.J.). There may be good practical reasons, unknown to judges, why practioners have not taken up the suggestion.

The facts

(a) acquisition of 16 Norbrook Drive

54. Mrs. McKenzie, a Jamaican, and Mr. McKenzie, a citizen of the Republic of Trinidad and Tobago, were married on October 10, 1987, approximately one year after they met. He moved to Jamaica in August of 1987. Prior to coming to Jamaica he was employed to the National Brewing Company as a sales manager, in Trinidad. His wife is now a management consultant. After his arrival in Jamaica, Mr. McKenzie, worked at Grace Kennedy for one year, then on to Daniel Finzi Limited, a subsidiary of a company known as J. Wray & Nephew Ltd.

55. Shortly after the marriage, the couple purchased a town house at lot 18 Sherbourne Heights in the parish of St. Andrew. The purchase price was $325, 000.00. She paid, from her personal savings, the deposit of $50,000.00 as well as closing costs. The figure for closing costs was not provided. The balance of $275,000.00 was obtained by way of mortgage from Victoria Mutual Building Society. The property was transferred to both parties as joint tenants. There is no evidence that the holding of beneficial interest was captured in the title deeds or reduced into writing. The fact that both were liable on the mortgage as well as the transfer being in both names suggests that there was a common intention that both should have a beneficial interest in the property.

56. The monthly mortgage was paid by both parties. Mrs. McKenzie states that she paid 2/3 and her husband 1/3. There is no evidence from Mr. McKenzie directly challenging this. What he says in his affidavit is that his wife paid a larger portion of the mortgage because her salary was more than three times his (see para. 10 of the affidavit dated November 28, 2005). In cross examination he said that her salary was approximately five times his. Nothing turns on the magnitude of her salary save to make it more probable than not that she paid most of the mortgage on the Sherbourne Heights property. I therefore accept Mrs. McKenzie's evidence that on the Sherbourne Heights property the proportionate contribution to the monthly mortgage is as she has said.

57. In February 1990, a further mortgage of $90,000.00 was secured. Mrs. McKenzie says that she continued with the 2/3:1/3 arrangement. Mr. McKenzie in reply to this said that he neither agrees nor disagrees and puts the claimant to strict proof. I accept her evidence on this point as well.

58. The Sherbourne Heights property was sold in 1992 and the family moved to 16 Norbrook Drive, the property that is in dispute. The purchase price was $4,300,000.00. The property was transferred in both names. It is common ground that Mrs. McKenzie paid the deposit of $645,000.00. The balance of the sale price of Sherbourne Heights, $1,293,057.00, was applied to the purchase of the disputed property. A loan of $2,500,000.00 was secured from Worker's Trust & Merchant Bank. Mrs. McKenzie said that she paid a further $17,488.00. Both were liable on the mortgage. The conclusion I draw from this is that it was the clear intention of the parties that each should have a beneficial interest in the property. The task from this point is to quantify the beneficial interest of Mr. and Mrs. McKenzie.

59. Shortly after the purchase or at the time of the purchase of Norbrook Drive it was improved at a cost of $107,414.00. Mrs. McKenzie said she paid for the improvements. Mr. McKenzie has not produced any reliable counter to this evidence and I accept it.

60. As it was at Sherbourne Heights, so it was at Norbrook Drive, Mrs. McKenzie paid 2/3 of the mortgage and her husband 1/3.

61. In June 1996, Mr. McKenzie was made redundant and received a sum of $1,100,000.00. Mrs. McKenzie said that the sum was $800,000.00. I prefer his evidence on this point because he is more likely to know the size of his redundancy payments. Mrs. McKenzie has not produced any reliable evidence to convince me that it was $800,000.00. I therefore accept Mr. McKenzie's figure. Mr. McKenzie said that he continued to contribute to the mortgage payments until his source of funds was exhausted.

62. The marriage collapsed. By December 21, 1998, Mr. McKenzie had left the home and returned to Trinidad. He says that he has not been able to find employment since he lost his job. Even on his return to Trinidad he has not been able to secure employment. In fact, he has not worked since 1996. His sister's generosity, perhaps more accurately described as unlimited munificence, has sustained him over these years since he left Jamaica.

63. In 2004, Mrs. McKenzie swore that she spent $780,000.00 on extending the living room, adding closets to the children's room, painting the entire house, interior and exterior. She exhibits a receipt in support of this.

64. Mr. McKenzie stated that he used his redundancy money to defray household expense, contribute to the mortgage and pay off bills until the fund was exhausted by early 1997. It is not clear what was meant by early 1997 but I shall choose the first quarter ending March 31, 1997, to be the time at which he ceased making his one-third payment to the mortgage. Thereafter his financial contribution ceased and he has not contributed anything to the upkeep, maintenance and repair of the property. He has not contributed to property taxes and he certainly did not pay for the improvement said to have occurred in 2004. Under cross examination he was prepared to accept that his wife has continued paying the mortgage from the time his redundancy fund was depleted until the present time.

65. It is common ground that Mr. McKenzie bought a Mitsubishi Buzz motor car in 1996. He says it was purchased for the consultancy his wife had started. He added that it was bought in the name of her company, Options Limited. Mrs. McKenzie's affidavit in reply does not deal with this point specifically. She does say, however, that she agreed to use the Buzz for transportation while her husband used her Suzuki Vitara. I accept Mr. McKenzie's evidence on this point.

66. Based on the evidence Mr. McKenzie has not contributed to the mortgage payments since he left the house and there is no indication that he intends to contribute to such payments in the future.

Analysis

67. The authorities as I understand them have indicated that what the spouses said and did up to and during the acquisition of the property stand on a different footing from what they said and did after the acquisition. The post acquisition conduct is relevant if the case is that the beneficial interests were altered after the initial acquisition. That is not the case being argued before me. There was much evidence in this case about the conduct of Mr. McKenzie. There was evidence that after he left in 1998 he did not contribute to the mortgage; he did not contribute to the household expenditure and the maintenance of either wife or children. All this evidence is irrelevant to the question of the common intention of the parties at the time of the acquisition.

68. In applying the legal principles, the relevant conduct is what they did after disposing of Sherbourne Heights. The cheque was made payable in both names. Mrs. McKenzie said in cross examination that they payment of the mortgage 2/3:1/3 was purely the result of her greater income. This represented an important alteration in her testimony at paragraph 8 of her second affidavit dated October 31, 2006 in which she said that "it was a mutual understanding that I would pay two thirds of the instalments and the defendant would pay the remainder". The impression I formed in hearing both parties is that when the property was acquired no one gave thought to the proportion in which the mortgage payments would be made and they followed the pattern that had been established at Sherbourne Heights. That pattern at Sherbourne Heights was not the outcome of deliberate thought but a function of income of the parties.

69. Mrs. McKenzie said that while servicing the mortgage at Norbrook Drive there was no discussion of her having more than half of the beneficial interest of the property. This is a factor to be taken into account when determining the common intention at the time of the acquisition.

70. The property was acquired by way of deposit paid exclusively by Mrs. McKenzie and a mortgage on which both were jointly and severally liable. The interposition of the mortgage between the vendor and purchaser led Mrs. Griffith to submit that since (i) the parties were joint tenants with no evidence that there was any agreement on the division of the beneficial interest; (ii) both parties were equally liable on the mortgage; and (iii) the property was intended to be the matrimonial home, then both should hold equally. It is not quite as simple as this. The cases have universally held that the contribution to mortgage payments is an important indication of how the beneficial interest should be divided. The undeniable fact in this case was that Mrs. McKenzie contributed 2/3 of the mortgage payments from the time of acquisition to the time of Mr. McKenzie's departure. The question is whether this proportion was a reflection of the common intention that Mrs. McKenzie should hold that proportion of the beneficial interest.

71. At the time of the purchase of Norbrook Drive it was known by the parties that Mrs. McKenzie was the larger income earner. It was also known that Mr. McKenzie's income could not carry the full mortgage payments. The couple knew from the experience with Sherbourne Heights that Mrs. McKenzie's income could carry as much as 2/3 of the mortgage. There is evidence that Mrs. McKenzie received a concessionary mortgage from the institution because of she was a board member.

72. Applying the law as I understand it to the case, I cannot find any conduct sufficient to cause me to conclude that the conduct of Mr. and Mrs. McKenzie is sufficient, absent an express declaration, was such that they had a common intention that the beneficial interest should be shared equally. Lord Justice Waite's

analysis in ***Midland Bank*** is contrary to the trend of the law both before and after that case. Waite L.J.'s analysis was the only way, on the facts of this case, that Mr. McKenzie could have hoped to secure any beneficial interest greater than 1/3.

73. It seems to be that the resulting trust principles should be applied and that the beneficial interest is in proportion to the mortgage payments. On this basis I find that Mrs. McKenzie's beneficial interest is 2/3 and Mr. McKenzie's is 1/3.

Mortgage payments and other expenditure

74. I propose to make an order along the lines of Bagnall J.'s in ***Cowcher***. I conclude that Mrs. McKenzie having met the liabilities of Mr. McKenzie on the mortgage since April 1, 1997, those sums should be deducted from Mr. McKenzie's beneficial interest. This is the past mortgage payments. For future mortgage payments, his share should also be deducted from his beneficial interest. I have so concluded because it is quite clear, during the hearing, that Mr. McKenzie has no intention of meeting his mortgage obligation and this would fall to Mrs. McKenzie. This could only mean that if Mrs. McKenzie is to continue making the payments then his obligation under the mortgage has to be deducted from his share of the beneficial interest. The accounting ought to take account of the amount to which Mrs. McKenzie would be liable on the outstanding mortgage balance. When these amounts are determined they are to be deducted from Mr. McKenzie's share of the beneficial interest. I have also taken into account that Mrs. McKenzie wishes to live in the home. In light of this I am not prepared, at this point to order a sale of the house because it is quite possible that when the deductions identified in this paragraph and other deductions which I shall identify are made, Mr. McKenzie's beneficial interest may either be exhausted or near exhaustion or may be of a sufficient size that Mrs. McKenzie may be prepared to pay off that amount. Thus, any order for sale is postponed until the accounting before the Registrar is completed and the parties have had an opportunity to assess their position.

75. I now say, contrary to my earlier position, that the money paid as deposit (JA$645,000.00) on Norbrook Drive as well as the additional payment (JA$17,488.00) should be divided 2/3:1/3 with the 1/3 being deducted from Mr. McKenzie's beneficial interest.

76. I now turn to the question of expenditure by way of the improvement and expenses made after 1998 to the present. There is no evidence that the value of the house increased as a direct result of the improvements. However, the fact is that Mrs. McKenzie, one of the beneficial owners spent money preserving the property and for this she ought to be credited. These sums are the money for painting the house, payment of property taxes and other maintenance costs. Mrs. Griffith said that these expenditures were like those of the husband in ***Pettitt*** and should be discounted. I disagree. In ***Pettitt*** the husband was trying to claim a beneficial interest. Here Mrs. McKenzie cannot claim an increased beneficial

interest but if Mr. McKenzie wants the house or his interest to be purchased by Mrs. McKenzie then equity demands that he compensates Mrs. McKenzie for her expenditure that obviously preserved his interest so that he is able to turn up nine years after he left the matrimonial house to claim an interest in the property. She also ought to be credited with the sum expended on converting the garage into an office.

77. If at the end of the accounting Mr. McKenzie's beneficial interest has been exhausted then there is no point in ordering a sale. If he has a positive balance then Mrs. McKenzie should have the option of purchasing his interest and if good sense prevails, she should only be paying the balance left after subtracting what the sums for which he would be personally liable and the value of the beneficial interest.

78. Mrs. Griffith raised an important issue about the documents appended to Mrs. McKenzie's affidavit of November 28, 2005. She did not go as far as saying that those relating to the schedule of mortgage payments and mortgage statement were not genuine but one would have expected them to be on some official document from the mortgage company. This is a fair point to make. In the accounting that is to take place proper documentation ought to be used. In the absence of documentation but there is evidence that expenditure was done, then it is hoped that the parties arrive at a reasonable amount that would reflect the particular item of expenditure.

79. There is also a document headed costs of maintaining the children. This is not relevant and must be left out of account. There is no claim for maintenance of the children.

80. Also there are documents purporting to be from a Mr. Donovan Anderson. These documents are headed "quotation". Mrs. Griffith submitted and I agree that a quotation is not evidence of the value of the work actually done. Therefore if the proposed work indicated in the quotation documents was actually done then proper receipts or some other suitable method of proof ought to be used in the accounting.

81. The property should be valued by a reputable valuator between the parties. The cost of the valuation to be shared equally.

82. When I delivered my oral judgment, Mrs. Rose Duncan-Ellis raised the issue of an occupation rent. She submitted that her client was asked to leave the property. That meant, she submitted, that he was excluded and should be credited with occupation rent. I declined to take this into account because that possibility was raised after Mr. and Mrs. McKenzie were cross examined. Mr. McKenzie had returned to Trinidad. Had the facts surrounding Mr. McKenzie's departure been fully explored, then I might have been placed in a position to include occupation rent in the accounting to take place.

83. Mrs. Duncan-Ellis also asked that the expenses be calculated on a 2/3:1/3 basis in the same way that the mortgage payments since April 1997 would be calculated. She said that this would be consistent with the declared beneficial interest. Initially, I was not in agreement but having thought about the matter there is no objection to this submission and I so order.

84. Miss Phillips raised the question of valuation of the expenditure of Mrs. McKenzie. Her point was that the market value of the house has increased but Mrs. McKenzie's expenditure was incurred some years ago and if her expenditure is calculated using the time of expenditure then Mr. McKenzie would be getting the benefit of the increased value of the house, valued in 2007, whereas Mrs. McKenzie would be getting back the dollar amount spent but not the true value. This is indeed a fair point to make. I am sure that there must be some mathematical solution that is available. Queen's Counsel asked me to make an order that would permit the parties to make an attempt to come up with such a formula and apply it to this case. She added that in the event of disagreement then they would be at liberty to come back before me for a resolution of the matter.

85. I have every sympathy for Miss Phillips' position but in the end I declined to make the order she sought because I am not sure that the solution is at hand, meaning that it could be quickly derived and applied. There is the risk of additional hearing which would prolong this application and there may be the need to hear expert evidence which itself may be subject to cross examination. I see nothing wrong in principle with making an attempt to do what Miss Phillips requested and perhaps if such a formula is developed, I see no harm in presenting it before the courts for examination.

86. Counsel are to submit a draft order. The parties have liberty to apply if there are difficulties in working out the terms of the order.