[2013] JMSC Civ. 172

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV03665

BETWEEN LEROY MCGREGOR CLAIMANT

AND VERDA FRANCIS DEFENDANT

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the claimant

Miss Gillian Mullings instructed by Mullings & Co. for the defendant

Heard: December 10 and 11, 2012 and November 12, 2013

REGISTRATION OF TITLES ACT – CANCELLATION OF TITLE – LIMITATION PERIOD

REGISTRATION OF TITLES ACT - CANCELLATION OF TITLE - FRAUD – WHETHER CLAIM IS STATUTE BARRED

EQUITY - DIVISION OF PROPERTY – LIMITATION OF ACTIONS ACT

EQUITY – RESULTING TRUST – CONSTRUCTIVE TRUST

SIMMONS, J

[1] The parties in this matter were involved in a common law relationship up to 1978. The union produced four children. The property, which is the subject of the dispute in this matter, is now registered at

Volume 1218 Folio 526 of the Register Book of Titles (the property). The defendant is endorsed as the sole registered proprietor.

[2] The claimant contends that it is he who used his own resources to purchase the property. His intention, according to the evidence was that it was to be the family home of the parties and their children. The defendant on the other hand, states that she purchased the property with the assistance of her parents who were resident abroad.

[3] In 2003 the claimant filed an action in which he claimed a fifty percent interest in the property. That claim was struck out by the Court as a result of his failure to comply with the orders made at the Case Management Conference.

[4] Mr. McGregor subsequently filed this action and by way of an amended Claim Form, seeks the following relief:-

i. an order cancelling Certificate of Title registered at Volume 1218 Folio 526 of the Register Book of Titles on the grounds that the issuing of the said Certificate of Title was procured by the fraud of the defendant;

ii. alternatively, an Order cancelling Certificate of Title registered at Volume 1218 Folio 526 of the Register Book of Titles on the grounds that the said Certificate of Title as it presently exists in the sole name of the defendant as proprietor of the land comprised therein, was procured by the fraud of the said defendant and the fraud of other persons acting in concert with the defendant;

iii. alternatively, an Order that the defendant holds the said property comprised in Certificate of Title registered at Volume 1218 Folio 526 of the Register Book of Titles, on trust for both the benefit of the claimant and the said defendant in equal shares;

[5] There is also a claim for damages and other orders needed to facilitate the transfer of the property if the claimant is successful.

[6] The claimant in his amended particulars of claim has pleaded that he is either the sole owner or that he and the claimant are co-owners of the property. He also stated that in or about 1974 he purchased the property using his own funds.

[7] The claimant has also alleged that the defendant obtained the Certificate of Title for the property by fraud and has set out the particulars of the alleged fraud.

[8] The defendant in her defence has denied that the claimant was either the sole owner or a co-owner of the property and has alleged that it was purchased by her using her own funds. She has also denied the particulars of fraud.

[9] In addition to the above, the defendant has also pleaded that the limitation period has expired in respect of the claim for the cancellation of the Certificate of Title on the basis that it was obtained by fraud. A limitation defence has also been raised in respect of the claim that the defendant holds the property on trust for the claimant and herself.

The issues

[10] The issues which arise in this matter are as follows:

i. Whether the claim for cancellation of the Registered Certificate of Title for the property is statute barred;

ii. Whether the claim for a declaration that the property is held on trust by the defendant for the benefit of the claimant and herself is statute barred;

iii. Whether the defendant procured the Certificate of Title for the property by fraud; and

iv. Whether the defendant holds the property on trust for the claimant and herself.

[11] In the event that one or both claims are not caught by the limitation defence advanced by Miss Mullings, I will proceed to consider issues iii and iv.

Is the claim for cancellation of the Registered Certificate statute barred?

[12] Counsel for the defendant submitted that based on the fact that the claimant learnt in 2001 that a Certificate of Title had been issued for the property, the claim is statute barred. Reference was made to section 168 of the ***Registration of Titles Act (the Act)*** in support of that submission. That section which imposes a six year limitation period states:-

> *"No action for recovery of damages sustained through deprivation of land, or of any estate or interest in land,*

shall lie or be sustained against the Registrar or against the Assurance Fund, or against the person who applied to be registered as proprietor in respect of such land, unless such action shall be commenced within the period of six years from the date of such deprivation:

Provided, nevertheless, that any person being under the disability of coverture, infancy or unsoundness of mind, may bring such action within six years from the date on which such disability shall have ceased; so, however, that such action be brought within thirty years next after the date of such deprivation. The plaintiff in any such action, at whatever time it may be brought, and the plaintiff in any such action for the recovery of land shall be nonsuited in any case in which the deprivation complained of may have been occasioned through the bringing of land under the operation of this Act, if it shall be made to appear to the satisfaction of the Judge before whom such action shall be tried that such, plaintiff, or the persons through or under whom he claims title, had actual notice that application had been made to bring such land under the operation of this Act, and had wilfully, or collusively or negligently omitted to lodge a caveat forbidding the same, or had allowed such caveat to lapse".

[13] She stated that the expiry of the limitation period in which to bring an action is a complete defence and the court has no discretion in the matter. Reference was made to the case of ***Attorney General v. Desnoes &***

Geddes Civil Appeal No. 70 of 1969 (delivered on the 11th June 1970) in support of this submission

[14] Counsel for the claimant did not address this issue.

[15] It is settled law that where a defendant raises the defence that a claim is barred by virtue of the expiry of the relevant limitation period, this provides him with a complete defence to the action. This statement of the law was dealt with at paragraphs 7.01 and 7.02 of Sime, ***A Practical Approach to Civil Procedure***, 14th edition where it was stated:-

> *"Expiry of a limitation period provides a defendant with a complete defence to a claim. Lord Griffiths in Donovan v Gwentoys [1990] 1 WLR 472 said, 'the primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is a claim with which he never expected to have to deal'. If a claim is brought a long time after the events in question, the likelihood is that evidence which may have been available earlier may have been lost, and the memories of witnesses who may still be available will inevitably have faded or become confused. Further, it is contrary to general policy to keep people perpetually at risk.*
>
> *Limitation is a procedural defence. It will not be taken by the court of its own motion, but must be specifically set out in the defence...Time-barred cases rarely go to trial. If the claimant is unwilling to discontinue the claim, it is usually possible for the defendant to apply successfully for the claim to be struck out ...as an abuse of the court's process."*

[16] It is also accepted that where a defendant raises the defence of limitation, the burden is on the claimant to prove that the action was brought within the limitation period. In ***London Congregational Union Inc. v. Harris & Harris (a firm)*** [1988] 1 All E.R. 15 at 30, Ralph Gibson, L.J. said:

> *"The onus lies on the plaintiffs to prove that their cause of action accrued within the relevant period."*

[17] In order to assess whether section 168 of ***the*** A***ct*** assists the defendant the effect of that provision needs to be examined.

[18] At common law an owner of land who was wrongfully dispossessed could bring an action for ejectment. That right enures against the person in possession. Where the person in possession has no lawful title the rightful owner is not deemed to have been deprived of his land.

[19] The question arises as to what is meant by the word "*deprived"* in the section. The learned authors of ***Baalman, The Torrens System in New South Wales*** , 2nd edition at page 405 opined as follows:

> *"The word 'deprived' in s. 126 means much more than 'excluded from possession'. It means irrevocably deprived; a deprivation which could be brought about only by force of some paramount statute. That deprivation is brought about by the indefeasibility of title conferred by the Torrens system. For example, the common law owner may have his title defeated by a primary application made by a person with an inferior title and is deprived of his*

land at the moment when a certificate of title issues to a bona fide purchaser; thereafter that certificate of title must not be disturbed. But there is no deprivation so long as the certificate of title remains in the name of a person from whom the land can be recovered qua land by proceedings for possession or ejectment as permitted by s. 124 or by other appropriate remedy".

[20] Sections 126 and 124 to which the authors referred are similar to sections 162 and 161 of ***the Act*** respectively. Section 161 states:

> *"No action of ejectment or other action, suit or proceeding, for the recovery of any land shall lie or be sustained against the person registered as proprietor thereof under the provisions of this Act, except in any of the following cases, that is to say-*
>
> *(a) ….*
>
> *(b) ….*
>
> *(c) ….*
>
> *(d) the case of a person deprived of any land by fraud as against the person registered as proprietor of such land through fraud, or as against a person deriving otherwise than as a transferee bona for value from or through a person so registered through fraud;…"*

[21] Section 162 of ***the Act*** deals with situations in which someone has been deprived of land or an interest in land as a result of fraud or the bringing of that land under the operation of ***the Act.*** It states as follows:-

> *"Any person deprived of land, or of any estate or interest in land, in consequence of fraud, or through the bringing of such land under the operation of this Act, or by the registration of any other person as proprietor of such land, estate or interest, or in consequence of any error or misdescription in any certificate of title, or in any entry or memorandum in the Register Book, may bring and prosecute an action for the recovery of damages against the person on whose application such land was brought under the operation of this Act, or such erroneous registration was made, or who acquired title to the estate or interest through such fraud; error or misdescription : Provided always that, except in the case of fraud or of error occasioned by any omission, misrepresentation or misdescription, in the application of such person to bring such land under the operation of this Act, or to be registered as proprietor of such land, estate or interest, or in any instrument signed by him, such person shall upon a transfer of such land bona fide for valuable consideration, cease to be liable for the payment of any damage beyond the value of the consideration actually received, which damage but for such transfer might have been recovered from him under the provisions herein*

contained; and in such last mentioned case, and also in case the person against whom such action for damages is directed to be brought as aforesaid shall be dead, or shall have been adjudged bankrupt, or cannot be found within the jurisdiction of the Supreme Court, then and in any such case, such damages, with costs of action, may be recovered out of the Assurance Fund by action against the Registrar as nominal defendant …"

[22] There is no dispute that property is still registered in the name of the defendant. There has been no transfer to a bona fide purchaser. In light of the definition of *"deprivation"* as stated in ***Baalman***, the claimant whilst he has been excluded from possession does not appear to have been permanently deprived of the property. In such circumstances, it is my view that the limitation period as stated in section 168 has not yet begun to run.

[23] I therefore find that the limitation period in respect of the claim for the cancellation of the title has not expired.

Is the claim for a declaration that the defendant holds the property on trust for both the claimant and herself statute barred?

[24] The claimant's evidence is that he moved from the property in 1980 leaving the defendant in possession. The defendant subsequently migrated and the property was rented. The claimant did not receive any of the proceeds from the rental of the property.

[25] In the year 2000 he visited the property to assist the tenant and was asked by the police at the behest of the defendant who was visiting to leave the premises. In 2001 he learnt that a registered title had been issued in

respect of the property in the sole name of the defendant. The claimant then sought a declaration as to his interest in the property by way of an action filed in 2003. The said action was struck out for non-compliance with the orders made at the case management conference. No further steps were taken until he filed this action in 2009. This is some twenty nine years since he discontinued possession and nine years since he learnt that a title had been issued to the defendant.

[26] Counsel for the defendant has submitted that the twelve year limitation period stipulated in section 3 of the ***Limitation of Actions Act (LAA)*** is applicable to this case. She argued that the claimant was dispossessed in either 1975 which was approximately one year after the purchase of the property or 1980 when he moved from the property. Mr. Kinghorn made no submissions in respect of this issue.

[27] Section 25 of the ***LAA*** states:-

> *"No person claiming any land or rent in equity shall bring any suit to recover the same, but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity".*

[28] Section 3 which deals with the right to make an entry is subject to a limitation period of twelve years. It states as follows:-

> *"No person shall make an entry, or bring an action or suit to recover any land or rent, but within twelve years next*

after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to some person through whom he claims, or, if such right shall have not accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry, or to bring such action or suit, shall have first accrued to the person making or bringing the same".

[29] Section 4 of the ***LAA*** prescribes the method by which the accrual of the right to make an entry is to be determined. The section states:-

"The right to make an entry or bring an action to recover any land or rent shall be deemed to have first accrued at such time as hereinafter is mentioned, that is to say-

(a) when the person claiming such land or rent or some person through whom he claims shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession…"

[30] There is no dispute that the claimant has either been dispossessed or has discontinued possession of the property. However, before the issue of whether or not the limitation period has expired can be determined, the date of such dispossession or discontinuance of possession must be ascertained.

[31] Mr. McGregor in his evidence agreed that he moved from the property in 1980 and that he got married in 1985 and subsequently purchased a home with his wife. He also stated that although the roof of the house on the property was damaged during hurricane Gilbert in 1988 he did not effect any repairs. His explanation is that the children would have told him if the house had been damaged to the extent that they could no longer reside there. He did however indicate that he paid the property taxes for the property up to the year 2002. He provided receipts for the years 1986 – 1988 and 1996 – 1998 which were in his name. The receipt for the years 1998 – 1999 is in the name of both parties whilst that for 2000-2002 is in the name of Miss Francis. All of the receipts bear the same Tax Payer Registration Number.

[32] Having examined the claimant's evidence I do not accept that the claimant was dispossessed in 1975 or 1980. It appears that up to the year 2000 when he went to the premises to assist the tenant and was asked to leave there had been no clear indication that he had been dispossessed. I have also noted that the receipt for the years 2000-2002 indicates that the payment was made by the claimant on the 7th May 2001. It would therefore appear that up to that date the claimant had not discontinued possession. However, upon issue of that receipt and certainly when he was advised in

that year that a title had been issued to the defendant, it would have been patently obvious that he had been dispossessed.

[33] Having considered the evidence, I find that the claimant was dispossessed in the year 2001. This action was filed in 2009 which was approximately eight years after such dispossession and is therefore within the limitation period.

Did the defendant procure the registered Certificate of Title for the property by fraud?

[34] As stated previously, the claimant is seeking an order for the cancellation of the Certificate of Title for the property on the basis that it was procured by fraud on the part of the defendant or by others who were acting in concert with her.

[35] The particulars of fraud as pleaded are as follows:-

i.) Making a false declaration or false declarations to the Registrar of Titles that she was the owner in fee simple of the said parcel of land;

ii.) Submitting or causing to be submitted, false declarations by persons that she was the owner in fee simple of the said parcel of land;

iii.) Deceiving the Registrar of Titles by false representations that she was the owner in fee simple of the property in question;

iv.) Causing the said parcel of land to be registered and a Certificate of Title issued, in her name when she knew that she was not the owner of the said parcel of land;

v.) Applying to register the said parcel of land in her name when she knew she was not the owner of the said parcel of land.

[36] It is settled that any charge of fraud must be pleaded and sufficiently particularized. This principle was expressed by Thesiger, L.J. in ***Davy v. Garrett*** (1877) 7 Ch. D. 473 at 489 in the following words:

> *"In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts".*

[37] A claimant is required to set out the facts and the circumstances that are being relied on to prove that a defendant had or was motivated by a fraudulent intention. It is also clear that the court should not be asked to infer that intention from general allegations. This point was made by Selborne, L.C. in ***Wallingford v. Mutual Society*** 5 App. Cas. 685 at 697 who stated that *"…general allegations, however strong may be the words in which they are stated, are insufficient even to amount to an averment of fraud of which any Court ought to take notice".*

[38] It is a settled principle that he who alleges must prove his case. This was clearly stated by the court in ***Paragon Finance plc v. V D B Thakerar & Co. (a firm)*** [1999] 1 All ER 400 at 407 Millett, L.J. said:-

> *"I accept the plaintiffs' submissions. It is well established that fraud must be distinctly alleged and as distinctly proved, and that if the facts pleaded are consistent with innocence it is not open to the Court to find fraud…"*

[39] Counsel for the defendant has highlighted various deficiencies in the defendant's evidence pertaining to the procedure to bring land under the operation of the Act. Specifically, her statement that the receipt for the property and the Survey Diagram which she used to make the application were returned to her. Reference was also made to her testimony that she did not recall giving any other documents to her Attorney. The reason advanced by the defendant for her inability to recall was that at the time she had four children in her care. She was also unable to recall the name of her Attorney or the Surveyor.

[40] Mr. Kinghorn submitted that even if the issuing of the Certificate of Title was not fraudulent it was irregular. He also argued that the evidence of the Defendant established that the issuing of the Certificate of Title for the property was in clear contravention of sections 27-38 of ***the Act***. It was further submitted that based on this alleged irregularity the Court should set aside the Certificate of Title on the basis that it was fraudulently obtained.

[41] Miss Mullings submitted that the defendant's title could not be defeated unless there was actual proof that she obtained the title to the property by fraudulent means. Reference was made to **The Law and Practice relating to Torrens Title in Australasia by E.A. Francis Volume 1** at pp. 602 in support of that submission. The learned author stated:-

> *"With regard then, to the general exception from indefeasibility in cases of fraud, the position, it seems, may be summed up as follows-*

1. No definition is given, either by statute or by judicial decision of what constitutes fraud, nor, it seems, is any such definition possible.

2. Fraud, for the purposes of these provisions, must be actual and not constructive or equitable fraud.

3. Fraud must involve an element of dishonesty or moral Turpitude.

4. Notice of the existence of any trust or registered instrument does not of itself constitute fraud but may be an element in the establishment of the existence of fraud.

5. Abstaining from inquiry, when suspicions have been aroused, may constitute fraud.

6. The presentation for registration of a forged or fraudulently obtained instrument does not constitute fraud if the person presenting it honestly believes it to be a genuine document.

7. The fraud to which the sections refer is that of the registered proprietor or his agent.

8. Gross negligence without mala fides will not be regarded as fraud in New Zealand, or, it seems in Australia."

[42] Reference was also made to the case of **Assets Co Ltd v Mere Roihi** [1905] A.C. 176 at p. 210 where Lord Lindley said:-

"...that by fraud in these Acts is meant actual fraud, i.e., dishonesty of some sort, not what is called constructive or

> *equitable fraud—an unfortunate expression and one very apt to mislead, but often used, for want of a better term, to denote transactions having consequences in equity similar to those which flow from fraud. Further, it appears to their Lordships that the fraud which must be proved in order to invalidate the title of a registered purchaser for value, whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Acts, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part. But if it be shewn that his suspicions were aroused, and that he abstained from making inquiries for fear of learning the truth, the case is very different, and fraud may be properly ascribed to him. A person who presents for registration a document which is forged or has been fraudulently or improperly obtained is not guilty of fraud if he honestly believes it to be a genuine document which can be properly acted upon.*

[43] Counsel also submitted that the claimant had failed to present any evidence to the court from which it could be established that that defendant was guilty of actual fraud.

[44] Section 68 of ***the Act*** establishes the Indefeasibility of registered title. It states:-

> *"No certificate of title registered and granted under this Act shall 'be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power.*

[45] Section 161 of ***the Act*** (supra) does however make it clear that where a party obtains a registered title by fraudulent means there is an exception to the *"paramountcy or priority.."*[1] of that title.

[46] There is no dispute that the claimant has satisfied the requirements to plead and sufficiently particularize the method by which the alleged fraud was allegedly committed by the defendant. He is however, required to present clear evidence to the court that the defendant acted in the ways that have been alleged.

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[1] The Law and Practice relating to Torrens Title in Australasia by E.A. Francis Volume 1 (1972) at pp. 597

[47] The claimant has instead, sought to rely on the poor quality of the defendant's evidence to prove this aspect of the case. He could in my view have sought to utilize the provisions of section 42 of ***the Act*** to obtain documentary proof of the matters alleged in the particulars of fraud. That section makes provision for the disclosure of the documents submitted to the Registrar of Titles in support of an application to register land. The section states as follows:-

> *"Upon registering a certificate of title, the Registrar shall retain in his custody and possession all deeds, instruments and documents, evidencing the title of the person registered, and shall endorse upon the last of them, if there be more than one, a memorandum that the land included in the certificate has been brought under this Act, and shall sign such memorandum:*
>
> *Provided always that if any such deeds, instruments or documents, relate to any property other than the land included in such certificate, the Registrar shall cause such deed, document or instrument (if unrecorded) to be copied at the expense of the applicant, such copy to be retained by the Registrar, and shall return such deed, instrument or document to the person from whom he received the same, having first endorsed upon the same a memorandum signed by him to the effect that the land included in the certificate has been brought under the Act.*

> ***No person shall be entitled to inspection of any such deeds, instruments or documents, except upon the written order of the persons who originally deposited the same, or of some person claiming through or under him, or upon the order of a Judge.***
>
> *No action or suit shall be brought or maintained upon any covenant or agreement for the production of the documents which shall be so retained, or upon any agreement to give or enter into a covenant for the production thereof; and if any such action or suit shall be commenced it shall be a sufficient answer thereto that such documents have been retained under this Act".*

[Emphasis mine]

[48] The documents if they support the claimant's allegations would have provided clear and uncontroverted evidence that the defendant acted in the way outlined in the particulars. The evidence as presented by the claimant invites the court to infer from the circumstances if proved, that the defendant acted dishonestly. In fact, Counsel Mr. Kinghorn has asked the court to set aside the title for fraud on the basis that its issue if not fraudulent was irregular.

[49] In light of the views expressed by Thesiger, L.J. in ***Davy v. Garrett*** (supra), I find that the claimant has failed to prove on a balance of probabilities that the defendant obtained the Certificate of Title for the property by fraud.

Does the defendant hold the property on trust for herself and the claimant?

[50] In this matter the claimant and the defendant in their pleadings assert that each of them was the sole purchaser of the property. In order to determine this issue the respective interest of each party in the property must be ascertained.

The claimant's evidence

[51] Mr. McGregor in his evidence stated that the parties met in or about 1966 or 1967. At the time, he was employed as an electrician at Fabric Manufacturing Company Limited in St. Catherine.

[52] In 1968 after the defendant became pregnant the parties started living together in rented accommodation in Spring Village. They lost that child and the defendant became pregnant again in 1969.

[53] On the 10th May 1969 the claimant began working at the Carreras Group of Companies. He stated that due to her pregnancy the defendant was not working. Their second child was born in 1971.

[54] In 1973 he began working at Berec Caribbean Limited. He stated that in that same year he became aware that lands in Spring Village were being subdivided for sale. That subdivision was done by Mr. Cedric Sespedes. He indicated that he was desirous of building a home for his family and obtained a loan of eight hundred dollars ($800.00) from Barclays Bank in Old Harbour, St. Catherine. That loan was guaranteed by Mr. Louis Bailey and repayment was to be made by way of salary deduction. A copy of a letter dated the 22nd March 1982 from the National Commercial Bank

Jamaica Limited was tendered in evidence in support of that assertion. The letter states:-

> *"This letter confirms that on the 11th April, 1974 Mr. Leroy Anthony McGregor was granted a loan of $800.00 to purchase land at Spring Village, St. Catherine.*
>
> *The loan which was guaranteed by Mr. Louis Bailey was repaid as arranged."*

[55] The claimant stated that he subsequently paid Mr. Sespedes the sum of eight hundred dollars ($800.00) which represented the full purchase price. He obtained a receipt but stated that he was unable to locate same. He also stated that in 1974 he instructed Mr. N.W. Irvine to survey the property and to prepare a Diagram in the names of both parties. A copy of the Survey Diagram bearing dates the 23rd March 1974 and the 16th February 1977 was admitted in evidence. That diagram also states that the survey was done at the instance of *Leroy McGregor* and *Lorna Francis*. A line was drawn through the name *"Lorna Francis"*.

[56] At that time of the purchase, claimant indicated that the defendant was not permanently employed as she was working in the factory at Jamaica Broilers "on and off"**.**

[57] Mr. McGregor indicated that it was he who commenced building on the land having drawn the design of the building. He also gave evidence that he undertook side jobs in order to supplement his income. His brother who had a tipper truck is said to have assisted him with the transportation of sand, gravel and stone. The claimant also stated that there was no running water on the property and as a result he used his car to carry water

in plastic containers. In order to do this, he removed the back and front passenger seats of the said vehicle. According to his evidence, cement was also transported in that vehicle.

[58] It was also stated by the claimant that it was he who paid for the material to build the house. The defendant's contribution according to his evidence was to prepare meals for the workmen. He also contends that he did all of the electrical work on the house. The house was completed in three (3) years.

[59] Mr. McGregor indicated that the relationship between the parties subsequently deteriorated and in 1977 he instructed Mr. N.W. Irvine, the Surveyor to remove the defendant's name from the Survey Diagram.

[60] The relationship between the parties ended in 1980 and the claimant moved from the property. The defendant and the children continued to reside there until 1985 when she rented it and left Jamaica. The claimant left the Island in 1986 and returned in 2000. His evidence is that he visited the Island almost yearly, paid the property taxes and maintained the children. He received no proceeds from the rental of the property.

[61] The claimant's evidence is that he also obtained a valuation from Masters and Johnson in 1988 and through his Attorneys-at-Law sought to realize his interest in the property. The Valuation Report dated the 5th August 1988 and a letter dated the 28th November 1988 addressed to the defendant in care of Pansy Francis, Spring Village P.A., St Catherine were admitted in evidence. The letter states:-

"Re: <u>Division of property situated at Spring Village</u>

I have been instructed by Mr. Leroy McGregor to make contact with you in respect of the Division of the above property.

Enclosed for your information is a copy of the valuation report on the said property. Mr. McGregor has agreed that the property should be sold and the proceeds divided equally between yourself and himself and that:

a) You be given the option to purchase his share or

b) He be given the option to purchase your share or

c) The property be sold on the open market and the proceeds divided equally.

Would you please indicate your preference in the above proposals and let me hear from you at an early date.

Yours faithfully

H.G. Bartholomew"

[62] He stated that in the year 2000 he visited the property to assist a tenant and whilst there the defendant came with the police and he was asked to leave. He subsequently sought legal advice and instructed his Attorneys- at-Law to apply for a title in the names of both parties.

[63] Mr. McGregor indicated that up to the year 2000 no registered title had been issued for the property. Reference was made to a letter dated the 2nd October 2000 from Masters Johnson & Associates, Commissioned Land Surveyors indicating that their*"…searches at the Office of Titles also reveal that there appears to be no properties in Spring Village in the parish of Saint Catherine registered in the name of Verda Francis or Lorna Francis."*

[64] In February 2001 he discovered through his Attorneys-at-law that a title had been issued for the property.

[65] He filed a claim in 2003 for a one half interest in the property but failed to comply with the case management orders and the said claim was struck out.

[66] In cross examination, it was revealed that the claimant graduated from Vere Technical High School and went to the College of Art Science and Technology on a part time basis in 1969 whilst working at Carreras Limited. He became a licensed electrician whilst employed at Carreras. He began working at Berec in 1971. In 1975 he was charged with larceny and left Berec to work at Thermoplastics six months afterwards. He denied being unemployed for two (2) years after he was charged. He also denied that the defendant was the only one working from 1974 to 1975.

[67] Mr. McGregor agreed that he moved from the home in the 1980s and got married in 1985. He and his wife subsequently purchased a house and had two children together.

[68] He indicated that the house that is situated on the property was not insured and that it was damaged during hurricane Gilbert. He also stated that he did not spend any money on repairs at that time. Mr. McGregor had no knowledge of the house being insured by NEM. He also indicated that he did nothing to ensure that the house was safe after hurricane Gilbert and stated that his children would have told him if there was any serious damage.

[69] The claimant stated that he had no knowledge that there was a mortgage on the property as he bought the land for cash and built the house with his own funds.

[70] He indicated that he had no receipts for the payment of property tax for the years 1988 – 1996.

Defendant's evidence

[71] Miss Francis in her evidence stated that she met the claimant in 1965 when she was fourteen (14) years old. They had a visiting relationship "on and off" and she became pregnant with their first child when she was either sixteen (16) or seventeen (17) years old. She says she lived with him "on and off". They separated in 1978.

[72] She stated that the claimant worked briefly as a factory worker and did not contribute to the purchase of the land. Miss Francis said that she purchased the land with the help of her parents who lived in England. At the time she was employed as a factory worker at Jamaica Broilers Limited.

[73] Miss Francis also stated that she caused the property to be surveyed in the late 1970s and followed the procedure to obtain a registered title. She also indicated that she paid the taxes for the property. Her evidence is that she enjoyed undisturbed possession of the property and the claimant would come there to visit his children over the years.

[74] She indicated that she was not aware of any invitation by the claimant for the property to be divided equally between them. She further stated that she extracted title on her own and also had a mortgage on the property which was serviced solely by her.

[75] In cross examination, she said that herself and the claimant lived together from 1976 – 1978 at the property. Between 1965 and 1978 she became pregnant for the defendant four times. The first three times she was living with her grandmother. She lived with the claimant during the fourth pregnancy the claimant having joined her at the property.

[76] She also revealed during cross examination that she had purchased the land in 1974 for $800 from Mr. Sespedes. This sum was paid in full at the time of purchase. She had not stated price and from whom in her witness statement. She was employed at Jamaica Broilers as a factory worker. After she had their second child Kevin in 1969 she became permanently employed. She was given 3 months maternity leave. She could not recall the amount of her salary but stated that it was enough to take care of herself and two children. The defendant also stated that her parents assisted her but the money they sent each week was not more than what she was earning as a factory worker.

[77] From the time that she met the claimant up to when she purchased the property he was learning a trade and not working. She said that he started to work at Carreras in 1974 or 1975. Miss Francis indicated that she did not tell the claimant that she bought the land or that she was building a house and he did not assist her in moving from her grandmother's house to the property. Her evidence is that she only spoke to him about the children and had sex when he visited her at her grandmother's house. She also stated that he would visit her approximately two days per week.

[78] Miss Francis indicated that she had the land surveyed in her name in the late 1970s. She didn't recall when she started to pay taxes or how or

what she had to do to begin paying the taxes. She also stated that she did not know that the claimant's name was on the tax roll in respect of the premises until she was shown the receipts in court. Her evidence is that she still had some tax receipts and the claimant burnt the others when he broke into her house.

Claimant's submissions

[79] Counsel for the claimant asked the court to find that the defendant holds the property on trust for herself and the claimant. He submitted that where a party in whom the legal estate in land is not vested claims a beneficial interest in that land the law of trusts is to be applied.

[80] Mr. Kinghorn stated that where there is a transaction between the trustee and the *cestui que trust* concerning the acquisition by the trustee of a legal estate in land, and the trustee has so conducted himself that it would be inequitable to allow him to deny to the *cestui que trust* a beneficial interest in the land acquired a resulting, implied or constructive trust is created. Such conduct, it was submitted, must have induced the *cestui que trust* to act to his detriment in his belief that he was acquiring a beneficial interest in the land. It was also submitted that where the legal estate in the joint home is vested in one party only, the other party has to establish the existence of a constructive trust by showing that it would be inequitable for the legal owner to retain the entire estate.

[81] Counsel also submitted that in order to establish the existence of a constructive trust it must be demonstrated that there was a common intention that both should have a beneficial interest and that the claimant has acted to his or her detriment on the basis of that common intention. It

was further submitted that where there is no express agreement to share the beneficial interest in the property the issue of whether or not there was a common intention for each party to have a beneficial interest may be inferred from their words or conduct. Counsel relied on the case of ***Grant v. Edwards*** [1986] 2 All ER 426 in support of this submission.

[82] Mr. Kinghorn also stated that where a party makes substantial direct contributions towards the acquisition and improvement of the property this raises a prima facie case that there is a resulting trust in favour of that party. It was also submitted that in order to determine what was the common intention, if any, of the parties the court may also examine their conduct. Reference was made to ***Carroll Nelson v Leonardo Brown*** Claim No. 2007HCV3493 (delivered on the 14th August 2009) where Sykes, J. in reference to the judgment of Nourse, L.J. in ***Grant v. Edwards*** (supra) said:-

> *"This passage must be read carefully. The learned Lord Justice is not saying that the only evidence capable of establishing that there was a common intention that the non-legal title holder is expenditure of money. What he is saying is that expenditure of money is the usual evidence provided from which the court is asked to infer that there was a common intention that the non-legal title holder would have a beneficial interest in the property. His Lordship also appreciated, that there are instances where the act or acts done by the non-legal title holder, are relied on to establish (a) the establishing the common intention and (b) the evidence of acting on the common*

intention. It follows from this that expenditure of money is not the exclusive means of proof of showing that there was a common intention".

[83] Counsel asked the court to accept the claimant as a credible witness and to accept his evidence that he alone provided the funds to purchase the property and that at the time, it was his intention that it he and the defendant would both have a beneficial interest. In this regard Mr. Kinghorn highlighted various aspects of the defendant's evidence as well as her failure to provide any documents in support of her case and asked the court to find that she was not a credible witness.

Defendant's submissions

[84] Miss Mullings in her submissions asked the court to find that the existence of a constructive trust has not been established. Reference was made to the following passage in the case of ***Qayyum v Hameed and another*** [2009] 3 FCR 545 para. 30, in which the court accepted the following submissions of counsel for the appellant:-

"the court will not find a common intention, constructive trust or proprietary estoppel unless, among other things, two requirements are satisfied. The claimant must have relied to his or her substantial detriment on the agreement or arrangement between the parties, and the defendant's conduct must have been such as to make it unconscionable in all the circumstances to deny the

claimant a property interest conforming to the agreement or arrangement".

[85] Miss Mullings stated that in this matter there were no written or oral agreements or arrangements in this matter and there is no indication in the claimant's evidence that the parties had evinced any common intention or that he communicated his purchase of the land to the Defendant. She also stated that the court cannot infer that a trust existed without the communication of an arrangement between these parties. It was also submitted that the purported 1988 letter from Messrs. H.G. Bartholomew & company, the claimant's attorneys-at-law and the payment of taxes after could not be used to establish common intention. It was submitted that in such circumstances the Defendant cannot be a trustee of the subject land.

[86] Counsel also submitted that in order to establish the existence of a constructive trust, the contribution of the person claiming to be the beneficiary of the trust must also be substantial. Reference was made to the case of ***Qayyum v Hameed*** (supra).

[87] Miss Mullings also directed the court's attention to case of ***Kernott v. Jones*** [2010] 2 FCR 372 in which the Judge at first instance said:-

"Whilst the intentions of the parties may well have been at the outset to provide them as a couple with a home for themselves and their progeny, those intentions have altered significantly over the years to the extent that the defendant demonstrated that he had no intention until recently of availing himself of the beneficial ownership in this property, having ignored it completely by way of any

investment in it or attempt to maintain or repair it whilst he had his own property upon which he concentrated"

[88] She argued that after the claimant left the premises he seems to have paid very little attention to the subject property until 1988 when he started paying taxes. This it was said amounted to a change in circumstances even if it was accepted that there was a common intention that both parties were to enjoy a beneficial interest in the property.

[89] Counsel also highlighted the fact that the claimant had no receipt as evidence that he paid for the property. She submitted that the 1988 letter from the National Commercial Bank Jamaica Limited is inadequate to establish payment as it is merely a record of communication between the Claimant and a third party who was not involved in the transaction.

[90] Counsel urged the court to accept the evidence of the defendant that the claimant was incarcerated at the time the property was purchased and did not contribute to its acquisition. She asked the court to reject the claimant's evidence he with the assistance of his brother contributed to the construction of the house on the property as no witnesses have been put before the court.

[91] With respect to indirect contributions, Counsel asked the court to find that the Claimant made no such contributions as he failed to maintain his children or the household.

[92] In conclusion Miss Mullings referred to the cases of ***Burns v. Burns*** [1984] Ch. 317 and ***Abrahams v. Williams*** *claim no.* 2005HVC1779 delivered on the 2nd October 2008 and submitted that the court must

examine the whole course of dealing between the parties in order to make a determination as to whether the defendant holds the property on trust for the claimant. She submitted that the claimant has not proved his case whereas the defendant has shown that she has improved on the property and has also insured it.

The law

[93] In this matter there is no agreement between the parties with respect to any of the factors surrounding the acquisition of the property. The title for the property is in the name of the defendant and as such she is its sole legal proprietor. The claimant is seeking to establish he is beneficially entitled to a share of the property by virtue of his having funded its purchase.

[94] Section 68 of the ***Registration of Titles Act*** makes it clear that registration is proof of ownership and as such the burden of proof is on the claimant to prove that he is the beneficial owner of the property. The section states:-

> *"No certificate of title registered and granted under this Act shall be impeached or defeasible by reason or on account of any informality or irregularity in the application for the same, or in the proceedings previous to the registration of the certificate; and every certificate of title issued under any of the provisions herein contained shall be received in all courts as evidence of the particulars therein set forth, and of the entry thereof in the Register Book, and shall, subject to the subsequent operation of any statute of limitations, be conclusive evidence that the*

person named in such certificate as the proprietor of or having any estate or interest in, or power to appoint or dispose of the land therein described is seised or possessed of such estate or interest or has such power".

[95] As submitted by the parties, the applicable law is the law of trusts. The claimant in seeking a declaration that the defendant holds the property on trust for their joint benefit, is asserting that he is an owner in equity. The general principle is that where someone buys property and it is registered or put in the name of someone else, the said property is held on trust by that person for the actual purchaser. In ***Wray v. Steele*** (1814) 2 V & B 388 at 390 the learned Vice Chancellor in his judgment said that:-

"*The rule was clearly settled by the decision in Ventris (2 Ventr. 361), in the 35th of Charles the Second, about six years after the Statute of Frauds passed, that, where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him, who paid the money".*

[96] This principle was also expressed by Eyre CB in ***Dyer v. Dyer*** (1788) 2 Cox Eq Cas 92 at 93 in the following words:-

"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in

one name or several; whether jointly or successive – results to the man who advances the purchase – money".

[97] The above passage was cited with approval by Lord Upjohn in ***Pettit v. Pettit*** [1969] 2 All ER 385 at 407. The learned Judge stated as follows:-

"First, then, in the absence of all other evidence, if the property is conveyed into the name of one spouse at law that will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, ie, with benefit of survivorship, but it is seldom that this will be determinative. It is far more likely to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.

My Lords, all this is trite law but I make no apology for citing the judgment of Eyre CB in 1788 in the leading case of Dyer v Dyer ((1788), 2 Cox, Eq Cas 92 at pp 93, 94".

[98] In that matter the property had been purchased by the wife and was registered in her name. The husband claimed an interest on the basis that he had done some internal decoration work, built a wardrobe, laid a lawn

and constructed an ornamental well as well as a side wall in the garden. It was held that he was not entitled to an interest in his wife's property. The court found that the projects that he had undertaken were leisure time jobs which husbands would normally do and as such did not give him an equitable interest in the property.

[99] With regard to situations in which the property in question was placed in the name of a wife although purchased by the husband, Lord Upjohn expressed the view that the presumption of advancement *"…* is no more than a circumstance of evidence which may rebut the presumption of resulting trust".

[100] In ***Halsbury Laws of England***, ***4th edition, Volume 16 (2)*** at 853 the principle was expressed in the following terms:-

> "*A resulting trust may arise solely by the operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a resulting trust in favour of the person providing the money unless from the relationship between the two, or from other circumstances, it appears that a gift was intended*".

[101] Therefore, in order to prove that the property is subject to a resulting trust in his favour, Mr. McGregor would have to satisfy the court that:

i.) The purchase of the property was financed solely by him; and

ii.) It was his intention that it was to be jointly owned by the parties.

[102] A constructive trust on the other hand, arises where it would be unconscionable or inequitable for the legal owner of property to claim to be solely entitled to its beneficial ownership (see ***Grant v. Edwards*** [1986] 2 All ER 426 at 436).

[103] With respect to the criteria which is required to prove its existence the judgment of the Court of Appeal in ***McCalla v. McCalla*** [2012] JMCA Civ 31 is instructive. In that case McIntosh, JA who delivered the judgment of the court said:-

> "*It is settled law, approved and applied in this jurisdiction in cases such as **Azan v Azan** (1985) 25 JLR 301, that where the legal estate in property is vested in the name of one person (the legal owner) and a beneficial interest in that property is claimed by another (the claimant), the claim can only succeed if the claimant is able to establish a constructive trust by evidence of a common intention that each was to have a beneficial interest in the property and by establishing that, in reliance on that common intention, the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties".*

[104] It was also accepted by that court that the above principle is equally applicable where the disputed property is not the matrimonial home of the parties. The learned Judge of Appeal referred to the cases of ***Lloyd's Bank v Rosset*** [1990] 1 All ER 1111, ***Peter Haddad v Arlene Haddad*** SCCA No 36/2003, (delivered on 20 April 2007), ***Gissing v Gissing*** [1970]

2 All ER 780 and ***Grant v Edwards*** [1986] 2 All ER 427 and stated that they clearly show what is required to prove the existence of a constructive trust. The court made the point that although most cases involved the matrimonial home and parties whose relationships were broken, *"…the principles are equally applicable where the property in question is not the matrimonial home and the issue to be determined is not as between parties to a marriage".*

[105] In this matter, the circumstances lend themselves to an examination of whether the property is subject to a resulting or constructive trust in the claimant's favour. The view has however been expressed that the distinction between constructive and resulting trusts is largely irrelevant. Lord Diplock in ***Gissing v Gissing*** was of the opinion that it was unnecessary to distinguish between resulting, implied and constructive trusts. Additionally, ***Kodilinye and Carmichael in Commonwealth Caribbean Trust Law 2nd edition*** at page 136 have opined that the *"new model constructive trust is virtually indistinguishable from a resulting trust*".

[106] Similarly, Evan Brown, J. in ***Henry v. Reid*** [2012] JMSC Civ. 109 at paragraph 29 stated:-

> *"So then, the trust, whatever its characterization, rests on a rebuttable presumption that the claimant made a contribution to the acquisition of the property, in the absence of an expressed agreement to share the beneficial interest".*

[107] The claimant in the instant case would therefore have to prove the following:-

i) The existence of a common intention that he and the defendant were to have a beneficial interest in the property;

ii) That the claimant in reliance on that common intention acted to his detriment.

[108] Where there is evidence of an agreement between the parties that would clearly be sufficient proof of the existence of a common intention that they were both entitled to a beneficial interest in the property. However, as noted by Forte, JA. in ***Azan v. Azan***, 25 JLR 301, in most cases such an agreement does not exist. The learned Judge went on to state that where there are no express words evidencing common intention it may be inferred from the conduct of the parties (see also ***McCalla v. McCalla,*** (supra).

[109] In ***Grant v. Edwards*** (supra at 431) Nourse, LJ stated:-

> *"…where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.*
>
> *In most of these cases the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from*

the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: see Burns v Burns [1984] 1 All ER 244 at 252–253, [1984] Ch 317 at 328–329 per Fox LJ. If it is found to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted on it.

There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting on it by the claimant. And, although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so".

[110] The learned Judge went on to state that in such cases a distinction is to be drawn between the conduct from which a common intention can be inferred and that which may be taken into account to determine whether a party has acted on the basis of such an intention. In an attempt to clarify the situation, he posed the question: *"So what sort of conduct is required?"* In answer to that question he said:

> *"In my judgment it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house. If she was not to have such an interest, she could reasonably*

be expected to go and live with her lover, but not, for example, to wield a 14-lb sledge hammer in the front garden. In adopting the latter kind of conduct she is seen to act to her detriment on the faith of the common intention."[2]

[111] The Jamaican Court of Appeal in ***Geddes v. Stoeckert*** , SCCA No. 98/95, (delivered on the 18th June 1997), adopted the approach of the court in ***Hammond v. Mitchell*** [1992] 2 All ER 109 in order to ascertain whether or not there was a common intention between the parties that the respondent was to have a beneficial interest in the appellant's property.

[112] In ***Hammond***, Waite, J stated the position as follows:-

"*The template for that analysis has recently been restated by the House of Lords and the Court of Appeal in Lloyds Bank plc v Rosset [1990] 1 All ER 1111, [1991] 1 AC 107 and Grant v Edwards [1986] 2 All ER 426, [1986] Ch 638. The court first has to ask itself whether there have at any time prior to acquisition of the disputed property, or exceptionally at some later date, been discussions between the parties leading to any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. Any further investigation carried out by the court will vary in depth according to whether the answer to that initial inquiry is Yes or No. If there have been discussions of that kind and*

[2] Grant v. Edwards (supra) at page 432

the answer is therefore Yes, the court then proceeds to examine the subsequent course of dealing between the parties for evidence of conduct detrimental to the party without legal title referable to a reliance upon the arrangement in question. If there have been no such discussions and the answer to that initial inquiry is therefore No, the investigation of subsequent events has to take the form of an inferential analysis involving a scrutiny of all events potentially capable of throwing evidential light on the question whether, in the absence of express discussion, a presumed intention can be spelt out of the parties' past course of dealing. This operation was vividly described by Dickson J in Canada as: 'The judicial quest for the fugitive or phantom common intention' (see Pettkus v Becker (1980) 117 DLR (3d) 257), and by Nourse LJ in England as a climb up 'the familiar ground which slopes down from the twin peaks of Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777 and Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886': see Grant v Edwards [1986] 2 All ER 426 at 431, [1986] Ch 638 at 646. The process is detailed, time-consuming and laborious".

[113] In ***Plummer v. Plummer C***laim No. 2006HCV00864 (delivered on the 15th June 2009), R. Anderson, J in dealing with the question of intention referred to the case of ***Lloyd' Bank v. Rossett*** [1990] 1 All ER 1111 at 1118 to 1119 in which *Lord Bridge* stated as follows:-

> *“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 proprietary estoppel".*

[114] Similarly, in ***Liu Wai Keung*** *v.* ***Liu Wai Man*** [2013] HKEC 1567 at paragraph 47 Godfrey Lam J said:-

> *“In ascertaining whether there was a common intention, it is the objective intention of each party "which was reasonably understood by the other party to be manifested by that party's words and conduct" that one must examine: Gissing v Gissing[1971] AC 886, 906; Jones v Kernott [2012] 1 AC 776, 794 at para. 51”.*

[115] It is however important to note that this intention must have existed at the time when the property was acquired (see ***Plummer v. Plummer*** (supra).

[116] In this matter, the claimant has failed to satisfy the court of the existence of any express agreement between the parties concerning the acquisition of the property. The claimant has said that he decided to

purchase the property with the intention of building a family home for himself, the defendant and their children. There is however no evidence that this intention was ever communicated to Miss Francis.

[117] As to whether such an agreement may be inferred I am mindful of the fact that the court must be careful not to impute an intention to the parties. In this regard, I find Lord Neuberger's definition of an inferred intention as against an imputed one in ***Stack v. Dowden*** [2007] 2 AC 432 at 472 to be of assistance. He said:-

> *"An inferred intention is one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements. An imputed intention is one which is attributed to the parties, even though no such actual intention can be deduced from their actions and statements, and even though they had no such intention. Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend".*

[118] Where Miss Francis is concerned, her evidence is that she purchased the property without any input from the claimant financial or otherwise. When both accounts as to the circumstances in which the property was acquired are considered there can in my view, be no reasonable inference that there was a common intention for both of them to share in its beneficial ownership.

[119] In the circumstances, I find that the claimant has also failed to satisfy me that there was either an actual or an inferred agreement between the

parties that they should both enjoy beneficial ownership of the property. I find that the claimant has failed to establish the existence of a constructive trust.

[120] In the circumstances, there is no need to examine the course of dealings between the parties in order to arrive at the respective share to which they each would have been entitled.

[121] I will now proceed to consider whether the claimant has satisfied me on a balance of probabilities that the defendant holds the property on a resulting trust for the benefit of both parties.

[122] In the instant case both parties have asserted that they alone financed the purchase of the property. Clearly both positions cannot be true. There is also no documentary evidence before the court which definitively speaks to the fact of who advanced the money for the purchase of the property. The court therefore has to rely to a large extent on the viva voce evidence. An assessment of their credibility is in the circumstances, critical to the resolution of this matter.

[123] In this case both parties were rigorously cross examined. The court therefore had the opportunity to hear their evidence and assess their credibility. In seeking to determine which one of the parties is the more credible witness, I will now proceed to highlight certain aspects of their evidence.

[124] The first point I have noted is that whilst the claimant in his evidence in chief spoke to the amount of the purchase price and provided the name of the vendor the defendant said nothing about these matters until she was

being cross examined. These factors in my view are critical to the case although it is the claimant on whom the burden of proof lies.

[125] The defendant in cross examination stated that she was employed as a factory worker at Jamaica Broilers Limited and purchased the land in 1974 with the assistance of her parents who resided in England. She was unable to recall any details pertaining to her income. Her evidence is that she paid the purchase price of eight hundred dollars ($800.00) in one instalment whilst maintaining the children wholly and solely.

[126] She also stated in cross-examination that when she had her first child in 1968 she was not working. At that time she said she was either sixteen or seventeen years old. She worked “on and off” after the birth of her second child in 1969 and was given permanent employment later that year. However, it is important to note that she also gave evidence that between 1965 and 1978 she became pregnant four times.

[127] With respect to the claimant’s ability to fund the purchase of the property, Miss Francis maintained that the claimant did not work consistently and that he was learning a trade at the time when the property was purchased and during the construction of the building. She also asserted that he was incarcerated for larceny and did not work for approximately two years after his release. This is in contrast to Mr. McGregor’s evidence that when the parties met in or about 1967 he was an electrician and that in 1973 he began working at Berec Caribbean Limited. Miss Francis he said was working at Jamaica Broilers “on and off”. In cross examination he said that he began working at Berec in 1971 and began attending the College of Arts, Science and Technology on a part time basis

in 1969 whilst employed at Carreras. He became a licensed electrician whilst working at Carreras.

[128] Secondly, the claimant gave a detailed account of the construction process and certain tasks which had to be performed. The defendant in chief said nothing about the construction of the house.

[129] In addition, the claimant has provided some documentary evidence in support of his claim. Exhibit 1 which is a letter from the National Commercial Bank Jamaica Limited states that on the 11th April 1974 the sum of eight hundred dollars ($800.00) was loaned to the claimant and that it was guaranteed by Mr. Louis Bailey. Whilst this is not evidence of the purpose for which the loan was granted it supports Mr. McGregor's evidence that he received a loan at about the same time that he said that he purchased the property. I have also noted that the loan amount is the same as that which the parties have stated was the purchase price for the property.

[130] The claimant has also provided a copy of a survey diagram bearing the dates March 23, 1974 and February 16, 1977(exhibit 2). His name and that of Lorna Francis appear in the column which lists the persons on whose behalf the diagram was prepared. It was agreed by the parties that Lorna Francis is the same person as Verda Francis, the defendant. The defendant's name is crossed out and this is consistent with the claimant's evidence that he asked the surveyor to remove her name when the relationship between them deteriorated.

[131] Miss Francis provided a copy of Duplicate Certificate of Title for the property which is registered at Volume 1218 Folio 526. The plan which is

annexed to the said title bears the dates the 20th January and 14th March 1981. This is contrary to her evidence stated that she caused a survey of the land to be done in the late 1970s.

[132] With respect to her application to obtain that title, the defendant's evidence was that she gave the receipt for the property and the survey diagram to her Attorney-at-law who subsequently returned both documents to her. She also stated that she did not sign any documents in support of that application.

[133] In addition, Mr. McGregor provided a copy of the valuation certificate for the property which states that he is the owner. The valuation number is 18904005187. The certificate is dated the 1st September 1983 and it was issued on the 27th March 1986 (exhibit 3A).

[134] He has also provided copies of the property tax receipts for the years 1986 - 1988, 1996 - 1998 and 2000 - 2002. All receipts except for those for 2000 - 2002 bear the name of the claimant as the owner of the property. The defendant has failed to present any documents to the court. By way of explanation, she stated that some of her documents were destroyed by the claimant when he allegedly broke into the premises. She indicated that on that occasion he stole her furniture and burnt some of the documents that were being stored in the trunk of her bed. I have noted that the police were involved but no action seems to have been taken against the claimant. I have also noted that no documentary evidence was presented on her behalf although she indicated that she still has some of them in her possession.

[135] With respect to the taxes for the property, Miss Francis was unable to recall when she commenced those payments but indicated that receipts were issued in her name. She indicated that she was just now being made aware that the claimant's name had been endorsed on the Valuation Roll /Tax Roll in respect of the property.

[136] Whilst it is accepted that the presence of the claimant's name on the tax roll is not indicative of ownership, when considered with the survey diagram it does lend some credibility to his viva voce evidence.

[137] Where the relationship between the parties is concerned, the claimant maintained that he and the defendant moved into the house on the property and lived together until 1980. Miss Francis in her evidence in chief stated that she lived with the claimant *"…on an on and off basis…".* In cross-examination, she denied that they ever lived together and asserted that they only had a visiting relationship. She later changed her testimony and stated that they lived together from 1976 to 1978. This was subsequently changed towards the end of her cross examination when she denied that they had lived together.

[138] The defendant also gave evidence that she did not tell the claimant that she was purchasing the property or that she was building a house. She indicated that when he visited her they only spoke about the children and engaged in sexual intercourse. In addition, she employed an electrician to do the necessary electrical installations although the claimant was an electrician. She also said that she did not tell him when she and the children were moving into that house. This evidence at best, can only be

described as curious and certainly does not in my view strengthen the credibility of the defendant.

[139] Having assessed the evidence of both parties I find the claimant to be a more credible witness.

[140] I accept the claimant's evidence that he alone financed the purchase of the property. I also find that no evidence has been advanced to rebut the presumption of the creation of a resulting trust. I also accept his evidence that at the time when the property was purchased it was his intention that he and the defendant were to be joint owners in equal shares.

[141] In addition I also accept the claimant's evidence that he undertook the various tasks connected with the construction of the house. I also accept his evidence that the parties lived together at the property with their children until 1980 when the claimant moved.

[142] As a result of the above, I find that the purchase of the property was financed solely by the claimant and that it was his intention that the property be jointly owned by the both parties. I therefore hold that there is a resulting trust arising in favour of the claimant.

[143] In the circumstances it is ordered that:

i) The defendant holds the property registered at Volume 1218 Folio 526 of the Register Book of Titles on trust for the benefit of both the claimant and herself;

ii) The claimant is entitled to a fifty percent (50%) share in the said property;

iii) The defendant is to execute a transfer of the said property of which she is the sole registered proprietor to the joint names of the claimant and the defendant as joint owners

iv) The Registrar of the Supreme Court do execute the said Transfer and any other document required to carry out the terms of this order in the event that the defendant fails or refuses to do so;

v) The defendant bears the cost of the transfer.

vi) Each party to bear its own costs