

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN EQUITY

SUIT NO. E.247/86

IN CHAMBERS

Originating Summons under the Married  
Women's Property Act.

|         |            |           |
|---------|------------|-----------|
| BETWEEN | ALVA MCKOY | PLAINTIFF |
| A N D   | OWEN MCKOY | DEFENDANT |

David Muirhead Q.C., instructed by Gordon Steer of Chambers Bunny and Steer  
for Plaintiff.

J. Kirlew and Mrs. Pamela Benka-Coker for Defendant. (Mr. Kirlew was not in  
attendance).

OCTOBER 31, NOVEMBER 1, 2 & 24, 1988; JANUARY 24,  
OCTOBER 18, 1989; MARCH 16, 1990; FEBRUARY 12 & 14, 1991,  
AND JULY 29, 1992.

MALCOLM, J:

By Originating Summons dated the 10th October, 1986, the plaintiff  
sought the Court's determination of the following questions and for Orders  
to be made with respect thereto:

1. What are the respective interests of the plaintiff and the  
defendant in the undermentioned premises -
  - (a) 86 Main Street, Ocho Rios, St. Ann;
  - (b) Lot 30 Windsor, St. Ann, registered at Volume 1116 Folio 782;
  - (c) Lot 66 Buena Vista, St. Catherine, registered at Volume 1118  
Folio 416;
  - (d) 25 Kirkland Crescent with two houses thereon registered at  
Volume 586 Folio 100;
  - (e) Tower Cloisters, Dixon Avenue, St. Ann, Apartment No. 1A.
2. What is the respective interest of the plaintiff and the defendant  
in Champion Battery Company situated at 59 Constant Spring Road,  
St. Andrew;

3. Should the defendant be ordered to give an account to the the plaintiff of the profits and or rental collected from the properties or businesses mentioned above;
4. What are the proper values of the properties;
5. What further and other relief is the plaintiff entitled to and that the Court do order accordingly;
6. That the Court should order as follows -
  - (a) A Declaration of the value of the properties mentioned above and to what amount is the plaintiff entitled;
  - (b) Payment to the plaintiff of such sums as the Court may determine is due to the plaintiff in accordance with the answers to the questions herein asked;
  - (c) An Order for an Injunction restraining the defendant from dealing with the properties mentioned above which would detrimental to the plaintiff ..... etc.

The plaintiff's affidavit in support provides a short history of this matter and to my mind it will be helpful to allude to certain portions of it.

Both parties will readily agree with me when I say that neither of them was "born great" paragraphs 2 to 12 of the affidavit reads:

2. " That I was lawfully married on the 21st day of August, 1953, to Owen McKoy and the marriage produced five children, the last of which is now over the age of sixteen (16) years;
3. That when we were married my husband was employed as a mechanic at Halsall May Pen, Clarendon and we lived in May Pen on the Hayes Road, in Clarendon;
4. That my husband at that time rode a bicycle and I was employed at a store in May Pen;
5. That I got a job at Hannas at Port Royal Street, Kingston and my husband continued to work as mechanic;
6. That in 1964, my husband got a job at Tropical Battery on Ashenheim Road and the family moved to Kingston. We lived in rented premises in Pembroke Hall;
7. That in 1964, we bought a lot of land at 15 Woodlawn Avenue, and we built a home there which became the matrimonial home;

8. That the defendant was promoted to Factory Manager and in 1969 he left Tropical Battery to form his own company known as Reliable Battery Company;
9. That a few months after I gave up my job and began working in the Company. I was a Shareholder and Director;
10. That although I was paid a salary this was never commensurate with the amount of work done by me as my husband kept telling me that everything was for both of us and the children;
11. That Reliable Battery was sold in 1974 and my husband took all the money from the proceeds of sale;
12. That in 1976 myself and my husband opened Champion Battery Company and I was again a Shareholder and Director".

The rest of the plaintiff's affidavit recited, inter alia, that she participated in every aspect of the business and worked alongside her husband and in that way they built up the business. From the profits the defendant bought a farm in Linstead and she raised chickens and pigs and sold oranges from door to door and the money was utilised in the home, paragraph 15 of her affidavit reads:

" That several businesses and properties were bought by my husband out of the earnings and profits of Champion Battery Company and he would tell me not to worry as I was protected and he would look after me".

Then paragraph 16 sets out the properties he acquired including the Champion Battery Company. She further deponed that 15 Woodlawn Avenue was sold and the money used to buy a house at Kirkland Crescent where extensive renovations were done to it and the land was subdivided and another house was built which now accommodates their son. Mr. McKoy left 25 Kirkland Crescent in April 1986, and subsequently prevented her from working in the business.

On the 1st day of the hearing of the application in Chambers the plaintiff was put up for cross-examination. To highlight some of the salient features of her oral evidence she testified that she knew the property at 86 Main Street in Ocho Rios. She said it was a gift by an aunt to the defendant. She did not agree that that property was acquired after Champion Battery in February 1985.

She said none of the buildings were on the land at the time of the transfer. The construction of the buildings started in 1986. The plaintiff said -

" He borrowed money to erect the shop. Mortgaged house at 25 Kirkland Crescent, don't know to whom ..... I know land had been transferred to defendant's name only when the title was taken out 1985. At the time I said nothing as the sole intention was that it was for all of us - supposed to belong to defendant, myself and all the children".

She said that when she first instituted these proceedings that was the first time she initiated positive act towards the property at Main Street, the properties were bought for herself, husband and children - none of them has my name. She said she claimed  $\frac{1}{2}$  of Main Street and claimed part of Cloister Towers, registered in defendant's name only. She went on, and here I quote -

" both properties I have referred to I contributed nothing. I don't know where the money came from to buy either - I think it was from Champion Battery".

She testified that Lot 30 Windsor, St. Ann was bought in 1976. McKoy has sold this land after she filed the Originating Summons herein. She stated:

" At all times I said I had a right to have my name included in titles - 30 Windsor and all properties. Windsor was bought before Champion Battery was formed. He said not to put my name on title as we would all enjoy them as what was his would be mine.

Lot 66 Buena Vista, I am making claims in respect of all lots for myself. This lot was bought about 1974 - 1975 before Champion Battery was bought".

Plaintiff further stated that between marriage in 1954 and Martin's birth she bought most of the groceries - she had children in that period. She testified -

" Between 1960 and 1964 we both contributed - 1964 - 1969 before Reliable Battery we both contributed - 1970 - 1976 both of us contributed. From 1976 - 1986 both of us contributed..... right up to 1986 we paid  $\frac{1}{2}$  and  $\frac{1}{2}$ ".

Thereafter she gave some history of "Reliable" which she said was formed in 1969 - it was eventually sold in 1974. Champion was formed in 1976 and

200 shares were allocated to her.

She claimed she went on holidays abroad as well as on business trips - all of which were paid for by the company. She said she could "draw alone but only for company purposes not for my personal business".

Of the Champion Battery Company the plaintiff said -

" It was a joint effort, toe-to-toe. At Champion my hours were regular. I would open up. I was requested to deliver batteries, it was company policy. Started by Mr. McKoy as joint effort. I started toe-to-toe with Mr. McKoy. I was called on to perform as Personnel Officer. I Was called on to oversee".

Then the end of her cross-examination proceeded as follows:-

" Suggestion: The properties listed - you do not have a legal and beneficial interest in the properties.

Answer: He did say everything he had was mine and the children.

I travelled overseas to purchase batteries. Miami - bought machine and belts - I was asked to manage business. Business is still going on".

In re-examination by Mr. Muirhead she repeated: " I have said properties there were bought with both of us in mind. Funds from Champion as well as Reliable". She was asked whether or not she had anything to do with the establishment of Cloisters and her reply was that she went to the U.S.A., got money from Reliable Battery - got U.S. \$2,000.00 for Cloisters from Mr. McKoy - bought fridge, utensils, crockery for down there. In addition she bought pictures for the walls etc - money came out of the business.

She testified that the allotment of 200 shares to her had nothing to do with sale of Reliable Battery. Her husband gave her no part of the proceeds of sale of Reliable. She said she was involved "in mortgage process in relation to both Reliable and Champion Batteries" and ended up by asking the Court to declare that she had a half interest in the properties.

In support of her claim and to bear out her involvement in the business activities she called:

- (a) Mr. Cecil March, farmer and J.P. for St. Catherine. He knew the plaintiff long before he knew Mr. McKoy. He spoke as one who was on the ground floor and knew the parties while "they were living together as man and wife". He testified as to the rearing of pigs, planting of cane and vegetables and his accompanying the plaintiff to deliver batteries;

- (b) Their daughter Paulette Hall who stated that she knew when Reliable Battery was formed while she was at Meadowbrook High School. She also testified as to the business at Champion Battery and of her mother's activities in these Enterprises. After the closing of Reliable she had this to say: "my mother was instrumental in regaining lost business".
- (c) The second daughter Jacqueline Francis also testified. Her evidence more than any other showed the trauma and inner conflict of those embroiled in cases of this sort and the inevitable divisiveness that it creates. She was old enough to assist in the Battery business after school and during the summer holidays. She said her mother performed the same functions in Champion as in Reliable" - she would go to Bank of Jamaica for approval of licences etc - she delivered batteries and solicited business. Speaking of her father she said: "he was a good father - I am very upset about the break-up - he has been very giving to me since my adulthood".
- (d) Mrs. Hyacinth McKie an old friend of the family testified. She spoke, inter alia, of her knowledge of and activities in Reliable and Champion (she worked at the latter for nine years) - Mrs. McKoy, she said bought groceries - bought it from her money and in addition delivered batteries;
- (e) Mr. Vitolis Smith also testified before me on behalf of the plaintiff. His evidence was characterised more for its brevity than helpfulness. Broadly speaking it was on the foregoing that the plaintiff rested her claim.

In her opening Mrs. Benka-Coker stated that it was her opinion the crucial question is whether Mrs. McKoy can imply the existence of an implied, resulting or constructive trust. On the basis of the principles of law, the plaintiff must, on a balance of probabilities, based on evidence, establish material ingredients to prove her case in connection with all or any of the five pieces of real estate.

1. She must establish a common intention at the time the properties were acquired and the ownership fixed, that a common interest existed that she should share in the beneficial interest in these properties;
2. She must prove that she contributed in a manner capable of being quantified in financial terms that she contributed to ownership.

She submitted further that that the Court must look at each property and the amount, if any, contributed. The case for her client the defendant is that the plaintiff is not entitled to any of these five pieces of estate. First there was no common intention. Second - no contribution from the plaintiff and the sources of funds came solely from the defendant.

As she saw it the plaintiff's case was predicated on the following legal bases:

- (a) She seeks to follow Gissing v. Gissing to satisfy ingredients re resulting trusts - Trough v. Trough;
- (b) No evidence of direct contribution. Stratum of the plaintiff's case must therefore be that she contributed indirectly. Vague attempt by the plaintiff to invoke the principles of estoppel. There is nothing on the evidence that the plaintiff utilized equitable estoppel. Defendant always said that whatever he had belonged to her and the children of the marriage.

She submitted that the evidence as to groceries etc. was not supported by any of the daughter's called. On the affidavit evidence of the defendant every material allegation made by the plaintiff is refuted and contradicted.

The defendant says no common interest and that the plaintiff did not contribute to funds which were entirely his. In support of his case the defendant filed nine affidavits.

She conceded that the plaintiff owned 200 shares in Champion Battery Limited and would therefore be entitled to fair value of these shares. She submitted that there is no general principle of law that the parties were involved in a joint enterprise. It is not to be gathered that any property bought by one entitles the other to share in the beneficial interest of any of the properties bought - no such general principle of law - Court has to look at the intention of the parties.

She referred to cases she intended to rely on including Petitt v. Petitt; Gissing v. Gissing; Trouth v. Trouth and Azan v. Azan and intimated that she would distinguish Josephs v. Josephs; Harris v. Harris and Jones v. Maynard.

Owen McKay the defendant gave his address as 86 Main Street, Ocho Rios, St. Ann and in cross-examination by Mr. Muirhead said he did not have a Permanent Visa to reside in the U.S.A. He said he had a Businessman's Visa and stated that this type of Visa entitled him to go to U.S.A. on "Holiday and Business".

To Mr. Muirhead he said inter alia:

" I am a Jehovah Witness but not actively so today call place of worship 'Kingdom Hall'. Not attended for last three years. I was a Marriage Officer of Jehovah's Witness but resigned - I did so voluntarily. I was only an Elder - a humble servant - wife not an Elder. Elder is highest office ..... My family was looked upon the surface as a model family - I lived a lie".

Ques: For how long have you been living a lie?

Ans: From breakdown - total since 1983 - prior to 1983 wasn't so bad ..... began living a lie in 1983 .....Up to 1983 not true, I lived a happy and exemplary life - went through the motions.

Ques: Was there a time you considered yourself happily married?

Ans: Went through the motions. From night of the marriage I know it was wrong. I have been successful in business without my wife, I alone - I employed her.....I regard Company as employing me and I regarded customers as mine. I regarded Champion Battery as source of income - to take care of family and do as I choose in a limited way. As head of the business I thought myself free to do as I thought best..... I bought three properties after selling Reliable Battery - in both of our names.

Ques: In relation to one of these properties, did you forge - sign your wife's name?

Ans: Cheque for property was made payable in the name of both of us. I signed it - both names and lodged it in my account and I have paid her half. This was in 1986. Didn't consider this as dishonest - she has never had a penny. I was not authorised to do so. It was my money.

Later in his cross-examination when regard was being had to the contents of one of the plaintiff's affidavit - he was asked: "Is it true what she said in her affidavit that there was an agreement or understanding re Woodlawn Avenue - No need to put her name on the title as it was for both of us"? His answer - "Do not agree, far from the truth - Not in accordance with Jehovah's Witness teaching". He was shown a Watch Tower Book entitled "Making Your Family Life Happy". Mr. Muirhead read the following passage found at Pages 44 & 45:

" Although in most cases it is the husband who brings in the money for the family's support, it should not be forgotten that it is earned by a joint effort. If you the husband think you are doing this by yourself; then just stop and figure out what it would cost you to hire a purchasing agent, a cook, a dishwasher, a housekeeper, a decorator, a nursemaid and so forth. Normally your wife saves this expense by doing the work, which is of course her share as the marital partner. And if she keeps a lot of the records of home expenses you can add accountant to the preceding list etc"

His retort was "I don't remember giving this talk". Then follows:

Ques: The thing about joint effort between husband and wife as stated in the book - was that Jehovah Witness teaching?

Ans: That is what I was telling her and others in the Church. It looks like it deals with wife who worked in home and not outside.

Ques: Against the background of your faith; the placing of these properties in your name recognised interest of your spouse who worked with you?

Ans: Don't look at it that way - gave her own business.

When asked by Mr. Muirhead whether after the sale of the Battery business he did not intend to go back in that type of business - he responded: I was looking around for a farm - found one at Buena Vista. All proceeds of Reliable sale were invested. I agree the income from the Battery business was not satisfactory- fluctuating. I was not free to draw as I liked. There was Income Tax - we started from nothing - became very successful.

Reliable, he stated, was sold for \$227,000.00, of this amount \$100,000.00 was put on deposit. There was a condition in the sale of Reliable preventing either himself or his wife from going into Battery business for four years.

He continued:

Consequent on all these transactions my cash flow was considerably reduced from what it used to be before Reliable was sold".

The question was put:

" Do you agree that in those circumstances your wife's action on the farm were designed and did in fact improve the family's financial circumstances?

Ans: I would say so".

He denied that his wife ever travelled abroad to make purchase for the Company.

He said as far as he could remember the plaintiff never travelled for the Company at all.

On the 18th October 1989, when Mr. Muirhead was absent from the island the defendant's evidence was broken off and Martin McKoy, son of the parties was interposed. He told of different aspects of the work that his father taught him. He said:

" Financing of Champion Battery came from my father - didn't know where he got it. My father was the only person who established the money - My mother played no part in the establishment of the Company".

He testified:

" I am a shareholder in the Company. I hold 200 shares. I think equal amount with my mother. I owe all to my father - He gave me 25A next door to mother, gave me when I was about to get married in 1986..... I am paid \$460 per week - gas - travel - overseas - use of a Company car and free accommodation. My wife works. I am a member of the Jehovah Witness Faith. Father gets benefits - \$2,300.00 per month as salary as Chairman of the Board. My mother taught me some aspects of the business in Champion Battery - not as regards to administrative aspects. Write up lodgments - showed me how to get licence..... I was appointed General Manager after Mrs. McKoy left. I was there when she walked out and resigned - I was appointed right after..... My mother never drove delivering any batteries. I have never seen her doing this - never seen her take batteries to outlets. Don't know of my mother having to buy groceries for the home..... Mother has never given me money - not that I can recall. Father always gave me money..... Not true Champion Battery was established by both my father and mother. Mother did not work tirelessly in the establishment of Battery business. My father was the one who knew about servicing of machinery.

My mother would know about mixer etc. I don't think she could make a battery from scratch. I agree she would have more knowledge than average person about batteries. Not true my mother was in charge when father not there.....  
I admit my mother played part in the success of Company - played her role .....  
Know of Apartment at Tower Cloisters. Don't remember if a stove was bought in my name in Miami for Tower Cloisters Apartment (shown document) still don't remember - don't remember going to clear it from the wharf".

In response to a query put by me Martin said -

" I do not agree that my mother worked toe to toe with my father in the business".

I could not help but get the impression all through his evidence that Martin McKoy was bent on painting his mother as a frivolous and unnecessary appendage to the stern business of battery making and a lady of leisure. Note the contrast with the evidence of sister Jacqueline Francis on the subject of her father - "He was a very good father - I am very upset about the break-up".

The following also gave oral evidence: Joyce Kimble, Enval Jones and Lloyd Jones after which Mr. McKoy was recalled for further cross-examination by Mr. Muirhead. During its course Exhibit 1 (Duplicate photo-copy of Certificate of Titles at Volume 940 Folio 55) and Exhibit 2 book written by defendant already referred to were tendered in evidence.

Mrs. Benka-Coker's Submissions:

All the registered titles concerning the five properties, the subject matter of this suit, are in the name of the defendant alone. As regards the 200 shares in the Champion Battery Company - there is no contest as regards these. They belong to the plaintiff and the only issue is the value of her share.

As regards the properties, since the plaintiff's name does not appear on any of the Titles she would not be entitled to an interest in any of the pieces of real estate. The case for the plaintiff and the defendant are diametrically opposed. Where a party claiming is not named in the Title that person has to prove:

- (1) That at the time each property was acquired there was an express agreement between the parties that there would be a sharing;
- (2) Contribution directly or indirectly to facilitate the acquisition of the properties.

She cited Petitt v. Petitt 1970 A.C. P. 777; Gissing v. Gissing [1971] A.C. 386 on the subject of Resulting Constructive or implied trust. She had submitted also that alternatively the plaintiff would have to establish that there was an implied common intention that she should share in the beneficial interest in the properties.

She made submissions on the equitable principles of estoppel and stated that they could only operate in favour of the plaintiff, if inter alia:

- (1) Representations were made to her and as a consequence she acted to her detriment;
- (2) There must be acts directly related to the acquisition of these properties. She said that on the evidence in this case there was no express agreement that the plaintiff should share.

As regards the book Exhibit 2 - no reliance could be placed on it. She referred to what was allegedly said by Mr. McKoy that what belonged to him belonged to her and the children and submitted that there was no evidence that based on this representation. Mrs. McKoy acted to her detriment. She said that on the evidence in the instant case the properties belonged only to the defendant.

It was her submission that in the instant case there was no express agreement between the parties. She said that what was said and done before a transaction is more important than what is said and done after, and that there was no evidence from which the Court could draw any inferences. She cited Trouth v. Trouth S.C. Civil Appeal No. 27/31 and stated that our Court of Appeal has clearly adopted Gissing v. Gissing. She pointed out that at no time during Mr. McKoy's marriage did the parties ever share a personal joint banking account. The acquisition of the five properties in this case cannot be said to be a joint effort or that there was common intention. Continuing her submission, she said that even if all five properties had been bought from the profits of Reliable and Champion Battery Companies - bought by the defendant in his name only, the plaintiff would have no equity to displace that of Mr. McKoy.

MR. MUIRHEAD'S SUBMISSIONS

He commenced by saying that he would ask the Court to make certain findings of facts. He said the husband was an admitted liar - had not spoken the truth and so where there was a conflict between husband and wife he invited the Court to accept the evidence of the wife and find that she was a witness of truth.

He referred to several portions of the typed notes herein and one in particular where Mr. McKoy testified: "I lived a lie". He asked the Court to find that the Battery Companies were the source of the funds that were employed by the husband to purchase the properties the subject matter of this claim and to purchase the car as well, from the sales of which he made profits. He asked the Court to disbelieve the defendant's evidence that "he loaned money to the successful company".

In addition Mr. Muirhead branded the defendant as a self confessed forger. Here he was referring to that part of the notes which read:

Ques: " In relation to one of these properties, did you forge - sign your wife's name?

Ans: Cheque for property was made payable in name of both of us. I signed it - both names and lodged it in my account and I have paid her half.

This was in 1986. Didn't consider this as dishonest she has never had a penny. I was not authorised to do so. It was my money".

Mr. Muirhead said it was only on confrontation that Mr. McKoy admitted the untruthfulness of a previous unsworn testimony - he could have deceived Court and caused it to decide issue on false evidence. He underscored and buttressed his submission on this point by reference to Lynch v Lynch S.C.C.A. No. 36/89. The particular aspect was dealt with in the case cited by Wright J.A. at page 15 of the Court's judgment. In agreeing with the leading judgment of Carey J.A. he said with accustomed

brevity and clarity:

" There are among the important aspects of this case, two which stand out with undiminished clarity. Firstly, there is the established fact on the evidence, that the plaintiff is not a witness of truth and that her untrustworthiness was proved out of her own mouth. She essayed to prove indirect contribution to the acquisition of the house, 19 Graham Heights, by testifying that she relieved the appellant of certain household expenses thus enabling him the better to meet the cost of acquisition. Further she told of extensive grill work done to the house. However when the relevant documents were produced it was clearly established that the bills which she claimed she had met from her own pocket had in fact been paid out of rental which she had collected on behalf of the husband concerning which she had rendered an account showing how the money was spent. Again her salary as shown by her bank statements did not accord with her viva voce evidence in that salary which was lodged to the bank was less than she had testified. Finally the grilling was shown not to have been of the extent claimed by her, and in fact such grilling as had been done, was solely for her security. This lack of credit worthiness ought to have alerted the trial Judge to the grave risk of accepting her unsupported evidence in proof of any question which fell to be decided".

Mr. Muirhead was at pains to point out that no benefit flowed from ownership of the shares over the period under review - Reliable from 1969 and Champion from 1976. The wife was eventually forced out of the business in 1982.

Another point focussed on by Counsel for the wife was that she received an allowance of \$200 per week while the husband drew \$4,000 per month plus travelling, subsistence and other related benefits. He said: "there was no real remuneration to the wife for her services merely a token sum. Court should accept that they worked toe to toe in the business which the Court was asked to find was a Joint Venture between the parties and the shareholding structure in no way reflects the beneficial interest which it was intended to convey pursuant to the Agreement between the parties which was express or certainly implied. Another point urged on the wife's behalf was that she joined in the mortgage.

Referring again to the Booklet (Exhibit 2) Mr. Muirhead said it was predicated against the background of a non-working wife - a fortiori a

working wife like the plaintiff would be in a stronger position.

He asked Court to find on the evidence that the husband was in control. The cash funds from repairs went straight to husband and he used those monies as well as other monies for the purchase of properties. He asked the Court to find that the properties were held by Mr. McKoy for the benefit of both parties in equal shares. He submitted that when Champion was incorporated the wife set about wooing the former customers of Reliable to enhance and promote Champion.

Referring to Mrs. Benka-Coker's view that the Court should examine each transaction separately, he submitted that it is the overall Agreement that would be applicable to all the transactions. It should be judged by the conduct and circumstances of the parties. Agreement to determine the beneficial interest can be arrived at both before, at the time or after the properties are acquired. He was of the opinion that the totality of the evidence in the instant case supports his submission that there was a common intention that the beneficial interest in all the properties would held equally.

Mr. Muirhead relied on Azan v. Azan S.C.C.A. No. 53/87;  
Jones v. Maynard 1951 1 All E.R. 802 and Grant v. Edwards 1986  
2 All E.R. 426.

I refer to Azan v Azan and in particular to the Judgment of Forte J.A. at page 3. It is instructive and very much in point. It reads:

" The determination of the beneficial interest in property of one party to a marriage, where that property is registered in the name of the other party, is in most cases difficult to resolve because of the nature of the relationship of husband and wife, which in the days when the property is acquired usually enjoys a degree of trust which results in the acceptance of verbal or implied promises made without any consideration of any possible dispute arising thereafter. In spite of this, the law does not make any presumption of

beneficial interest because of the marital relationships, and therefore, the party in whom the legal estate is not vested must resort to the law of trust to establish such a beneficial interest. This was stated with clarity by Lord Diplock in the case of Gissing v. Gissing [1970] 2 All E.R. 780.

Any claim to a beneficial interest in land by a person whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the person in whom the legal estate is vested, holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts.'..... A resulting, implied or constructive trust - and it is unnecessary for present purposes to distinguish between these three classes of trust - is created by a transaction between the trustee and the cestui qui trust in connection with the acquisition by the trustee of a legal estate in land, whenever 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.

And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land".

"How then, do the Courts determine whether or not a trust has been created? This is answered in a concise and precise analysis of the judgment of Lord Diplock in Gissing v. Gissing. By Sir Nicholas Browns-Wilkinson V.C., in the case of Grant v. Edwards [1986] 2 All E.R. 426 at page 437 as follows:

If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant) in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial membership. This requires two matters to be demonstrated:

- (a) that there was a common intention that both should have a beneficial interest and
- (b) that the claimant has acted to his or her detriment on the basis of that common intention".

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

The following words of Lord Diplock in Gissing v. Gissing (supra) at page 290 confirm this view:

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".

Then on page 6 the Judgment reads:

" An inference of a common intention may also be founded on the basis of indirect contributions made by the claimant to the acquisition of the property. An example of this was demonstrated in the speech of Lord Diplock in Gissing v. Gissing (supra) at page 792:

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

" Where then, there is no direct evidence of an intention of the parties to share in the beneficial interest of the property, the claimant must establish that intention by means of the words and and conduct of the parties from which the common intention may reasonably be inferred".

Mr. Muirhead also cited the following cases:

Local cases of Josephs v Josephs S.C .C.A. 13/84 and Harris v. Harris S.C.C.A. 1/81 and submitted that the instant case falls within the principles of Jones v. Maynard, Rimmer v. Rimmer and followed in Josephs v. Josephs.

FINDINGS AND CONCLUSIONS

As invited to do by Attorney for the plaintiff I find that the Battery Companies were the source of the funds employed by the defendant to purchase the properties the subject matter of this claim and to purchase the car as well. Court did not believe the defendant that he loaned money to the successful company.

He was a self confessed forger, a man who lived a lie. His lack of credit worthiness showed the grave risk of accepting his unsupported evidence in proof of any question which fell to be decided.

In cross-examination the plaintiff testified: "At all times I said I had a right to have my name included in titles - 30 Windsor Avenue and all properties..... He said not to put my name on title as we would all enjoy them as what was his would be mine." I accepted this as credible evidence. To use an expression which cropped up time after time in the evidence - I accept that the plaintiff worked toe to toe with the defendant in the business.

Some of the defendant's utterances in cross-examination are clearly characteristic of his attitude to the business e.g. "I would draw money from Company from time to time, from time to time I would borrow and put it back. I operated it as if it were my sole business". In my view, and I so find, it certainly was not.

Mr. Muirhead's submission that the plaintiff: "relied absolutely on the promises and representations made by her husband and on this belief accepted mere pin-money expecting to share in the assets produced by their joint efforts in Reliable and Champion and who in the hiatus between the two Companies was the working breadwinner in the operation of the farm piggery etc" to my mind accurately represents a true picture of the situation.

I find that there was a representation made by the defendant to Mrs. McKoy, that reliance was placed on it by her and that she acted to her detriment.

I Declare and Determine that the plaintiff Alva McKoy is entitled to a half interest in the five properties mentioned from (a) to (e) of paragraph 1 of the Originating Summons herein.

I hold also that the plaintiff is entitled to the current value of 200 shares in Champion Battery Company situated at 59 Constant Spring Road, St. Andrew.

I further order that the defendant do give an account to the plaintiff of the profits and or rental collected from the properties or businesses abovementioned, such account to be taken by the Registrar of the Supreme Court and that the proper values of the properties be ascertained by a competent valuator to be approved by the parties herein. Failing agreement such valuator to be selected by the said Registrar.

Costs of and incident to the proceedings herein to be plaintiff's and to agreed or taxed.