NMLS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 52/96

COR: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE LANGRIN, J.A. (AG.)

BETWEEN	LORRAINE PINNOCK	PLAINTIFF/APPELLANT
AND	FITZROY PINNOCK	DEFENDANT/RESPONDENT

Verleta Green for Appellant

Gordon Steer instructed by **Vernon Ricketts** for Respondent

16th, 17, November, 1998 & 26th March, 1999

RATTRAY, P.

I have read the draft judgments of Harrison, J.A. and Langrin, J.A. (Ag.) and agree with their application of the relevant law and their conclusions that the appeal should be allowed, the Order of G. James, J set aside and substituted therefor a declaration of the appellant's entitlement to one third of the land and buildings at Rosetta Cottage in the parish of Westmoreland registered at Volume 1030, Folio 180 of the Register Book of Titles in the name of the defendant/respondent.

In relation to this property the wife/appellant, contended that the excuse given by the husband as to why her name was not placed on the title was that two lots were sold off before they had acquired the property. These lots had not yet been transferred and the husband therefore took title in his name alone and said that he would transfer the property later into the names of both himself and his wife.

In his affidavit the husband denied having said this and further denied being aware of two acres being sold off the said land. However, a perusal of the agreement

for sale between the husband Fitzroy Pinnock and the vendor Arthur Fairclough shows that the sale was subject to the following endorsement:

> "The Westmoreland Coop Credit Union is to agree by way of letter to deliver back the title to us for the transfer of lot 1 and 2 to be effected which are not part of this sale and were already sold to Wesley Haring et ux and Mr. Savariau as well as 10 perches which belong to Neiland Ritchie."

Furthermore, the transfer under the Registration of Titles Law recites the consent of the purchaser Mr. Pinnock "... that he will upon the said subdivision of the said land into three lots two being the land described in the Second Schedule hereto and the other one the remainder of the land, being approved by the Westmoreland Parish Council, whose approval may be necessary according to the law, and upon demand of the vendor, he the purchaser will re-transfer to the Vendor or the Vendor's nominees the land more particularly described in the Second Schedule hereto." That Schedule states as follows:

> "All those two parcels of land being the lots Numbered 1 and 2 respectively on the subdivision plan annexed hereto and marked with the letter 'A' and being a portion of the land comprised and described in Certificate of Title registered at Volume 1030 Folio 180 of the Register Book of the Office of Titles."

Mrs. Pinnock's evidence therefore in regard to the two lots was supported by the documentary evidence and Mr. Pinnock's evidence discredited. In determining where the truth lies with respect to this, the learned trial judge obviously failed to consider the effect of this evidence. It is significant too that the rental agreements for the shops constructed on the Rosetta property are in the names of both husband and wife as 'Landlords'.

Furthermore, the Commercial Comprehensive Proposal Form for Insurance on the supermarket records the name of proposers as "Fitzroy and Lorraine Pinnock t/a Fitzlor" and under the heading "Description of Property" as -

> "1. On the Building including landlord's fixtures and fittings attached and belonging thereto $800,000

> which in fact is the full sum for which the application was made for insurance coverage."

The oral judgment of the learned trial judge in respect to the land and building part of Rosetta Cottage, was indeed terse. It stated as follows:

> "(2) The land and buildings thereof, part of Rosetta Cottage situate at Savanna-la-mar in the parish of Westmoreland registered at Volume 1030 Folio 180 of the Register Book of Titles belongs exclusively to the defendant."

In my judgment the trial judge not having made any assessment of the evidence it is left to this Court to fill the lacuna and make its own assessment upon the material appearing on the record.

Viscount Dilhorne in his judgment in ***Gissing v. Gissing*** [1970] 2 All E.R. 780 at page 785 states as follows:

> "I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a cestui que trust. Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared, it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held entitled to a share in the beneficial interest."

I am satisfied that the evidence establishes a common intention that ownership should vest in both husband and wife.

The only question outstanding therefore is the proportion to which each was entitled in terms of ownership. This always poses a problem. The property is not the matrimonial home in which event I would have had no hesitation in determining the shares on a fifty percent basis. The evidence of monetary contribution was to the extent of $20,000 but there was other evidence of the wife's involvement in the development of the land at Rosetta Cottage in sugar cane cultivation and in

monitoring and overseeing the supply of materials for the construction of the buildings on the property.

All the cases disclose that taking all factors into account the evaluation is at best a rough and ready one.

It was so stated by Lord Reid in ***Gissing v. Gissing*** (supra), by Brightman, J in ***Eves v. Eves*** [1975] 3 All E.R. 768 at page 775, and guidance is found in the very helpful dicta of Lord Denning M.R. in ***Cooke v. Head*** [1972] 2 All E.R. 38 at page 42 where he stated:

> "Counsel for Mr. Head set out very helpfully the various matters we should take into account in assessing shares. These were the background of the parties with their earnings and their contributions; the statements made to third parties, ... the method in which they saved, such as the money put in the money box; the method of repaying the mortgage instalments; the amount of the direct cash contributions of each; the amount of the work each had done on the property; the part each had taken in the planning and the design of the house; and the steps by which the transactions were carried out. I quite agree with counsel that all those matters should be taken into account. On them we should decide what the shares should be."

Having formed the view on the evidence which I have indicated that there is established a common intention that the appellant would be entitled to a share in the beneficial interest in the property known as Rosetta Cottage, on the application of the principles aforementioned I conclude that Mrs. Pinnock is entitled to a one-third share of the Rosetta Cottage property and I would so declare.

I agree with the Order as proposed in the judgment of Harrison, J.A.

HARRISON, J.A.

This is an appeal from the judgment of G. James J., delivered on 25th April, 1996 in the above matter in respect of a declaration of the respective rights of the parties under the Married Women's Property Act in certain matrimonial property. It was ordered, inter alia, that:

> (1) the plaintiff/appellant was entitled to and to be paid 50% of the net value of the assets of the supermarket
>
> (2) that the land and buildings at Rosetta Cottage, Savanna-la-mar in the parish of Westmoreland registered at Volume 1030 Folio 180 is owned by the defendant/respondent, and that
>
> **(3)** the land part of Waterworks registered at Volume 1139 Folio 290 is jointly owned by the parties in equal shares.

The hearing in this matter ended on the 1st day of April, 1993. However, judgment was not delivered until the 25th of April, 1996.

The appellant complains (ground 1) that because of the delay in delivering his judgment the learned trial judge failed to take advantage of having seen and heard the witnesses and therefore he could not properly evaluate their evidence, make the proper assessment and findings, and arrive at a proper conclusion, especially where there are conflicts.

It is undoubtedly the case that delays as that which occurred in this case place the learned trial judge at a disadvantage in arriving at a proper and just assessment of the witnesses, due to the passage of time. This Court, as a court of review, is, in the circumstances, in as good a position as the learned trial judge, to use the printed record, to examine the findings he made and come to its conclusions, both in respect

to the findings of the learned trial judge and also where he failed to make such findings (**Ellis vs Jamaica Railway Corp.,** (1986) 23 J.L.R. 35.) See also **Watt vs Thomas** [1947] 1 All ER 582. In **Benmax vs Austin Motor Co. Ltd.** [1955] 1 All ER 326 relied on in the **Ellis case (supra)** it was said that it was:

> " ... only in rare cases that an appeal court could be satisfied that the trial judge has reached a wrong decision about the credibility of a witness." (Lord Reid at p. 328).

The parties were married on the 2nd of August, 1975, and had three children thereafter.

In 1975, prior to their marriage the appellant applied for and was allotted, in her maiden name Lorraine Pulchan, by the Ministry of Housing a house in the Water Works Housing Scheme, Deans Valley in the parish of Westmoreland. She deponed in paragraph 7 of her affidavit dated 28th December, 1990.

> "7. That prior to our marriage I had applied for a house in the Water Works Housing Scheme from the Ministry of Housing. The house was completed in 1976 and I started living there. I paid all the mortgage installments by myself. The payments were completed in 1987 and I arranged for the transfer into the joint names of the Defendant and myself. The land is registered at Volume 1139 Folio 290 of the Register Book of Titles."

In denying the bona fides of her evidence, the respondent said in reply in paragraph 6 of his affidavit dated 11th June, 1991:

> "6. That I deny paragraph 7 and state that prior to my departure from Jamaica in January, 1976, I completed an application form for the house at Water Works in the parish of Westmoreland and handed same to the Plaintiff to hand in to the Ministry of Housing along with the deposit to be paid from my salary which she was authorised to collect. That all mortgage payment were paid out of my salary by monthly salary. That during the period that we reside in Kingston the premises was

> rented and the rental income received used to pay the mortgage. That between 1984 and 1987 I completed the payment for the said premises to the Caribbean Housing Finance Corporation. That I admit that the title was issued in our joint names but say that it was because the application that was handed in by her included her name in my absence."

These denials of the respondent are firmly refuted by the evidence and documentary proof by one Judith Ramlogan, attorney-at-law with the Ministry of Construction (Housing) in her affidavit dated 23rd November, 1992. She exhibited:

> (1) An application form of particulars signed by "Lorraine Pulchan" to the Ministry of Housing dated 3rd January, 1995, in respect of land at Deans Valley, Westmoreland. The form was witnessed by "E.E. Thompson, J.P. Westmoreland and approved by the "Minister."
>
> (2) The report and recommendation of the investigating officer of the said Ministry; this report was also signed by the appellant.
>
> (3) Agreement for sale dated 14th September, 1976, between Lorraine Pulchan and the said Ministry, and
>
> (4) Letter dated 3rd November, 1978, to the said Ministry, from the appellant, but also bearing the signature of the respondent. It reads, inter alia:
>
> > "I am an occupant of a house situated in the above mentioned address. I had applied for this house before I got married, therefore, it is still in my maiden name (Loraine Pulchan).
> >
> > I am now Loraine Pinnock and would be very grateful to have this corrected, also an addition with my husband's name Fitzroy Pinnock.
> >
> > Enclosed you will find a copy of my marriage certificate to clarify this."

The mode of acquisition of this property was clearly in accordance with the evidence of the appellant and the learned trial judge on a careful examination could not have failed to reject the contentions of the respondent in regard to the acquisition of that property. The respondent's credibility was obviously in question. The respondent's assertions that the appellant incorrectly placed her name on documents on occasions when she was not entitled to and without his permission was later again resorted to, in relation to the lease agreements and an insurance proposal form in respect of certain shops in question.

After their marriage, the respondent left his job as a teacher with the Ministry of Youth and went to Germany in January 1976, to study. In his absence, the appellant continued her employment as a typist at the said Ministry, looking after their first child. She paid the household bills, she stated, from her salary; he said they were paid from his. The respondent returned qualified as a mechanical engineer in 1977, resumed his employment with the said Ministry until 1978 when he left to take up an employment at the Frome Sugar Factory. Their second child was born in 1979. The appellant left her employment with the Ministry and worked at the said factory.

In 1983, the respondent bought 8½ acres of land at Rosetta Cottage, Westmoreland for forty eight thousand dollars ($48,000.00) with a loan of forty eight thousand four hundred and fifty seven dollars($48,457.00) from the Westmoreland Credit Union on the security of the said land. The land was transferred into the name of the respondent only - registered at Volume 1030 Folio 180.

In August 1983 the respondent obtained employment at the Clarendon Sugar Estate; the family moved to Clarendon.

In 1987, the respondent obtained a loan of one hundred and thirteen thousand dollars ($113,000) from the Credit Union to erect a building on the said land. The construction commenced. A further loan of three hundred and twenty eight thousand five hundred dollars ($328,500.00) was obtained from the Credit Union and the construction of four shops and a supermarket was completed in August, 1988.

The appellant contended that the offer to purchase the said land at Rosetta was made to them both and the respondent stated that his salary would just be able to make the repayments for a loan that they agreed to obtain; she agreed to meet the household expenses. This the respondent denied. The appellant stated that having discovered that the respondent's name only was on the title, enquired of this and the respondent explained that two acres had been sold off the land and not yet been transferred and therefore he had to take the transfer in his name only and would later re-transfer it in both their names. The respondent denied that he told the appellant this and denied further there was any two acres to be transferred from the said land.

The appellant stated further that the respondent stated that she could not sign for the loan because she did not have an account with the Credit Union. However she got workers including her brothers to prepare the land and they planted cane thereon, with the assistance of her two small children. She also travelled to Miami bought hair products and sold in Jamaica providing money which paid bills. She also bought clothing for the family. The respondent denied this. She claimed further that she contributed twenty thousand dollars ($20,000.00) towards the construction on the said land, after the first loan was taken and before the second loan was obtained; the respondent denied this.

In August 1988, both parties applied for and received a loan of three hundred thousand dollars ($300,000.00) to stock the supermarket, which opened in December 1988.

The appellant was in charge of the supermarket; the respondent was still then working in Clarendon. In March 1989, the parties had an altercation as a result of which the appellant sustained fractures to her left leg and right foot. Later that year in June 1989, the respondent operated the supermarket. In August 1989, after discussions the appellant returned to assist in the operation of the supermarket but left in March 1990 when they again had a violent disagreement. The appellant obtained a decree nisi in November 1990.

The completed shops built on the said land were rented out in August 1988.

The respondent maintained that the appellant had no interest in the land at Rosetta which was in his sole name or in the supermarket business and he had not expressed an intention that she should acquire any. She made no contribution thereto and was an employee in the business receiving a salary

The claim in the instant case is made by originating summons filed under the provisions of Section 16 of the Married Women's Property Act. This is a procedural section giving to the court the power merely to declare the rights of the parties. In that respect the court has no power to re-distribute or adjust the shares in the property, as it thinks justice demands, but only to declare the existing rights. Property is acquired by spouses under the general law of contract or real property. There is no special law applicable to matrimonial property. There is no principle of community of property as between spouses **(Petitt vs Petitt** [1969] 2 All ER 385)

A spouse in whom the legal estate to matrimonial property is not vested and who wishes to establish a claim thereto has to rely on the law of trust.

Lord Diplock said in **Gissing v Gissing** [1970] 2 All ER 780, at page 789:

> " 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."

In the absence of an agreement or arrangement that a spouse, in whom the legal estate is not vested, should have an interest, any such spouse who wishes to establish such a claim, may do so by showing that there was a common intention between them and relying on such common intention he or she acted to their detriment by making some contribution, whether direct or indirect.

This common intention may be expressed and if not the court may have to be asked to draw inferences from the conduct of the parties.

In **Grant v Edwards** [1986] 3 WLR 114, Sir Nicholas Browne-Wilkinson V.-C., in explaining the principle laid down in **Gissing vs Gissing** (supra), said, at p. 127:

> "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 ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention."

That common intention may be inferred from the deception of the party in whom the legal estate is vested, on the rationale that he would not have effected the deception except that it was necessary to conceal the common intention.

In **Grant v Edwards,** (supra) the defendant, in whose name the legal estate was vested, told the plaintiff that her name was not going on the title because it would cause some prejudice in the matrimonial proceedings between herself and her husband; he had no intention of placing her name on the title. In **Eves v Eves** [1975] 1 W.L.R. 1338, the defendant told the plaintiff that the house would have been in their joint names but for the fact that she was under 21 years old, therefore his name only was placed on the title; the plaintiff accepted it. The defendant admitted that this was an excuse and he intended his name alone to be on the title. In both cases the court inferred that there was a common intention, otherwise no excuse for not putting the respective plaintiff's name on the title would have been necessary.

In the instant case, the credibility of the respondent being in doubt, the evidence of the appellant is preferred. It is likely that the respondent gave to the appellant the excuse that her name could not go on the title because of the two acres to be sold off. On the evidence of the appellant the clear inference is that this excuse was used by him because there was a common intention that both names should have been placed on the title, but he had no intention of doing so. That seems to have been his reason for utilizing that excuse, although he denied this.

There is, in addition, further proof of such a common intention. The rental agreement dated the 27th day of July, 1988, and tendered as Exhibit 4 for "... shop(s) numbered one and two of the ground floor..." built on the land at Rosetta, in the parish

of Westmoreland was signed on behalf of Aluminum Structures Ltd. as tenant and recites:

> "Between Fitzroy and Lorraine Pinnock ... hereinafter called 'The Landlords'...."

Further, shop number three was rented to "Hartley Nesbeth and Alexander Bartlett" on the 15th day of August 1988 and the rental agreement describes, Fitzroy and Lorraine Pinnock as "The Landlords".

The respondent said in evidence that he had signed exhibit 4 in blank and given it to the attorney's secretary, who should have inserted his name and the tenant's name, and that the appellant "... put her name on against my instructions." Both rental agreements were signed by the appellant and the respondent.

The insurance proposal form for insurance on the said premises at Rosetta by The Insurance Co. of the West Indies, as from 13th March, 1989 with both parties as proposers describes them as "freeholders".

These three documents each provide clear evidence of the common intention that the appellant was initially intended to be and was regarded as joint owner of premises at Rosetta, registered at Volume 1030 Folio 180, together with the respondent. The respondent's evidence that the appellant wrongfully placed her name on these documents is simplistic and unacceptable and cannot rebut the documentary proof.

The conduct of the appellant subsequent to the acquisition of the property is relevant to determine whether or not in reliance on a common intention at the time of its acquisition she acted to her detriment.

In **Lloyds Bank vs Rosset** [1990] 1 All ER 1111, without an agreement between the parties at the time the property was transferred into the name of the

husband or any common intention inferred, the reliance by the female spouse on her assistance and encouragement of the renovators, the fetching of material and general help in making the house fit for habitation, was insufficient to establish a claim to the beneficial interest. In **Gissing v Gissing** (supra), relying only on (a) purchasing some furniture (b) spending money on her sons and her clothes and (c) laying a lawn, were acts found to be insufficient to base the female spouse's claim to a beneficial claim to the matrimonial property in the male spouse's name only.

In the instant case, the appellant admitted that the respondent alone paid from his own monies the purchase price of the land and borrowed the monies to erect the buildings, repaying the loan by the Credit Union by deductions from his salary.

There was evidence from which the learned trial judge could have found that the appellant physically assisted in the planting of the cane on the land, which facilitated its purchase, contributed to household expenses and did the business of buying and selling of hair products making several trips to Miami in doing so. The respondent admitted that the appellant:

> "...had a business enterprise number, she used to sell things."

The sum of twenty thousand dollars ($20,000.00) was probably contributed by the appellant towards the construction of the buildings on the property, making this a further act to her detriment.

The concession by the respondent that, as a result of the "co-borrowing Plaintiff has some interest in the supermarket..." should have been viewed by the learned trial judge as significant, in that his initial stance was that she was employed to the said business and;

> "She used to draw two hundred and fifty dollars ($250.00) per week. I did not consider her a part owner of the business".

However, the said insurance proposal form, recited that on 13th March, 1989 there were three (3) employees in the said business, earning together fifteen thousand dollars ($15,000.00) per annum. The appellant would thereby be paid twelve thousand dollars ($12,000.00) on a salary of "$250.00 per week," leaving a total of four thousand dollars ($4,000.00) to be paid to two (2) employees as their earnings for an entire year. This would have been quite unlikely.

In my view there was ample evidence from which the learned trial judge could have found that there was a common intention between the parties, that the property should have been jointly owned and that acting on her belief in the existence of the common intention the appellant acted to her detriment making these indirect contributions. The respondent is accordingly a trustee as to the appellant's share in the beneficial interest in the said property at Rosetta.

The extent of the appellant's beneficial interest will be, prima facie, that which the parties intended **(Gissing v Gissing, supra)**. Having inferred the common intention, the court would have to look at the contributions in order to determine the percentage of the appellant's interest. In **Grant v. Edwards,** (supra), the placing of the balance of the insurance monies in the parties joint account was found to be conclusive evidence of equal interests. However, joint ownership does not necessarily mean equal rights in the beneficial interest.

In dealing with the quantification of the wife's share where her name was not on the title, but a common intention exists, Lord Reid, in **Gissing vs Gissing** (supra) said at page 782:

> "It is perfectly true that where she does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that she would as a rule get a half share. I think that the high sounding brochard 'Equality is equity' has been misused. There will of course be cases where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than a half." (Emphasis added)

and Lord Pearson said, at page 788:

> "I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim 'Equality is equity'. No doubt it is reasonable to apply the maximum in a case that there have been very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or costs is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing. Contributions are not limited to those made directly in part payment of the price of the property or to those made at the time when the property is conveyed into the name of one of the spouses. For instance there can be a contribution if by arrangement between the spouses one of them by payment of the household expenses enables the other to pay the mortgage instalments." (emphasis added)

Lord Diplock pointed out that where a clear inference can be drawn as to the respective shares of the parties in such circumstances, the Court will give effect to it, and he continued, at page 792:

> "It is only if no such inference can be drawn that the court is driven to apply as a rule of law, and not as an inference of fact, the maxim 'equality is equity',

> and to hold that the beneficial interest belongs to the spouses in equal shares."

Although in **Midland Bank vs Cooke et al** [1995] 4 All ER 562, the view was that the court could consider the whole course of dealings between the parties and "... was not bound to deal with the matter on the strict basis of the trust resulting from the cash contribution to the purchase price...," in order to determine the proportion of the interest of the party whose name was not on the legal estate, the preferred view, is for a more precise approach by a court.

In the instant case the fact that the respondent made the initial payments and acquired the loan has to be balanced against the indirect contributions of the appellant in reliance as the common intention, namely, her assistance in the planting of the cane, albeit one crop only, the sale of hair products and monetary contribution.

The appellant's and the respondent's interests could not have been intended to be equal shares. During the construction of the said buildings, even when the respondent was obtaining loans of one hundred and thirteen thousand dollars ($113,000.00) and three hundred and twenty eight thousand ($328,000.00), the appellant's contribution was twenty thousand dollars ($20,000.00). This amount was less than 10%. In the circumstances of this case, such contributions as made by the appellant, including the monetary contribution towards the acquisition of the property at Rosetta, Westmoreland, cumulatively, points towards a share in the beneficial interest of a percentage not exceeding 33 1/3%. I would accordingly declare the appellant's interest to be 33 1/3%.

I would therefore allow the appeal, set aside the order of G. James J., and declare:

(1) that the appellant and respondent are joint owners of the supermarket business, and the respondent must account to the appellant for her one half of the net profits of the business as from 1st March, 1990; to date; such amounts to be determined by an audit to be done by a reputable firm of auditors to be agreed on by the parties;

(2) that the appellant is entitled to 33 1/3% of the land and buildings at Rosetta in the parish of Westmoreland registered at Volume 1030 Folio 180, except the lots previously sold;

(3) that either party to be at liberty to purchase the share of the other, in the said business and property, failing which it shall be sold and divided in the proportions declared in respect of each.

Costs of this appeal and in the Court below to be the appellant's to be agreed or taxed.

LANGRIN, J.A. (Ag.)

This is an appeal from a judgment in the Supreme Court in which the learned judge ordered inter alia that:-

1. The Plaintiff be paid 50% of the net value of the assets of the Supermarket as at August, 1989 with interest thereon at 18% from 1st August, 1989.

2. The land and buildings thereon part of Rosetta Cottage situated at Savanna-la-mar in the Parish of Westmoreland registered at Volume 1030 Folio 180 of the Register Book of Titles belongs exclusively to the Defendant.

The Pinnocks were married on the 2nd August, 1975. The marriage produced three (3) children born in the years 1975, 1979 and 1984 respectively. At the time of marriage both parties were employed to the Ministry of Youth and Community Development, the husband as a teacher and the wife a stenotypist.

During the marriage, the husband went to Germany to study in January, 1976. Having qualified as a mechanical engineer he returned to Jamaica in December, 1977 and worked with the Ministry of Youth until December, 1978 when he left to assume a post with the Frome Sugar Factory. In 1979 when the second child was born, the wife resigned her job with the Ministry and started working at the Frome Factory.

Prior to the marriage the wife applied in 1975 to the Ministry of Housing for a house in Deans Valley Housing Scheme, Westmoreland. The application was made in her maiden name and the original agreement dated 14th September, 1976 was also in her maiden name. In 1978 she requested that an amendment be made to the record to reflect her married name and also that her husband's name be added. A new agreement was prepared in the names of both parties and a title was issued in both names as joint tenants on completion of the payments.

It is common ground that in 1983 a property containing 8 1/2 acres of land at Rosetta Cottage was bought and transferred in the name of the husband alone and in 1987 a building was erected on the said land.

A decree nisi of divorce was granted on 15th November, 1990.

It is now convenient to consider the claim of each party, first in respect to the acquisition of the land and secondly the erection of the building.

The purchase of the land and construction of the buildings thereon with which this appeal is concerned must be viewed aganinst this stated background. The wife asserted that in 1983, an offer to purchase 8 1/2 acres of land at Rosetta Cottage, was received by both of them for a consideration of $48,000. They both agreed to seek a loan from the Westmoreland Credit Union to purchase the land. Her husband told her that his salary would be just enough to cover the payments and she responded that she would 'turn her hand' and meet the household payments. He obtained a mortgage in the sum of $48,457.00

from the Credit Union on the security of the property. The land registered at Volume 1030 Folio 180 of the Register Book of Titles was transferred in the name of the husband alone. She stated that when she enquired if her name was not going to be on the title her husband responded that two acres had been sold off the land which was yet not transferred so he would take it in his name alone and then later re-transfer it to both of them. When she enquired about her signing for the loan he stated that it could not be done since she did not have an account at the Credit Union. She got workers, including her brothers to prepare the land and with the assistance of their two children they planted cane on the land to help meet the expenses. In August 1983 the husband went to work with Clarendon Sugar Estate and the family moved to Clarendon.

In 1984, six months after the birth of their third child, she started going to Miami where she purchased hair products for resale in Jamaica. She used the income to pay bills and provide for clothing for the family.

In 1987 they both decided to erect a building on the land at Rosetta Cottage. Her husband held discussions with the Credit Union about financing for the buildings. By then she had become a member of the Credit Union but when she suggested that she would join in the loan he told her that she would have to be employed to a company where she could obtain the required job letter.

A loan of $113,000.00 was obtained from the Credit Union and both parties held discussions with the architect and contractor. She attended at the

Credit Union to obtain drawdowns on the loan and travelled three to four times per week from Clarendon to Westmoreland to supervise the construction.

The first loan ran out when the building was half-completed and she contributed $20,000 towards the construction from her buying and selling enterprise. The judge found that there was no documentary proof of her contribution. A further loan of $328,500 was obtained from the Credit Union which was used to complete the building consisting of four shops and a supermarket by August, 1988.

The shops were rented and it was decided that she would move down to Savanna-la-mar to start the supermarket business. She moved down with the children in July, 1988. The Rental Agreements as well as Insurance Proposal Forms concerning the buildings in which they both signed have the wife and husband as landlords of the property.

In August 1988 they received approval for a loan of $300,000.00 from the National Development Foundation of Jamaica to furnish and stock the supermarket. The application was made by both parties and she obtained the periodic drawdowns to furnish the supermarket and stock it.

The supermarket opened in December, 1988 and she operated it by herself with periodic visits from her husband who continued in his job at Clarendon.

There was a breakdown in the family relationship which began in March, 1989 and in June, 1989 he resigned his job and took over the running of the

supermarket. In August, 1989 she returned to the supermarket. Her return was short lived since she was forced to leave the business in March, 1990.

In an affidavit sworn to by her husband he categorically denied that there was ever any intention that his wife would have any interest in the land at Rosetta Cottage since during this time there were constant fights and periods of separation due to his wife's many extra-marital affairs. He traversed every aspect of the wife's claim and stated that between 1984 and 1989 all the household expenses were covered by him solely from his salary.

Under cross-examination he admitted that his wife had signed the loan application from the National Development Foundation only because the Deans Valley property of which his wife was a joint owner had been used as security for the loan. Also that the loan was used to furnish and stock the supermarket. He also admitted that his wife worked at the Supermarket until he resigned his job in November, 1988 but said that she received a benefit as well as a monthly salary.

Again, under cross-examination it was disclosed that the transfer in respect of the land to himself recites a covenant that upon sub-division of the land, being approved by the Westmoreland Parish Council and upon demand of the vendor , he would re-transfer to the vendor or his nominee the portions of land set out in the second schedule.

This significant disclosure and moreso after the husband's denial clearly demonstrates that there had been discussions between her husband and herself about the matter.

The first question raised by this appeal is whether the learned trial judge failed to take timely and proper advantage of having seen and heard the parties themselves and where there was conflict between their evidence he did not indicate which of the opposing sides he believed.

This court is mindful of the decision in ***Justin Ellis vs Jamaica Railway Corporation*** Court of Appeal No: 92/89 delivered 6th July, 1992 in which the decision in ***Benmax v Austin Motor Co. Ltd.*** [1955] 1 All E.R. 326 was approved. The case makes it absolutely clear that an Appellate Court does not lightly interfere with a trial judge's finding of facts because the judge has seen and heard the witnesses, whereas the Appeal Court is denied that advantage and only has before it a written transcript of their evidence.

However, whereas as in the instant case the learned trial judge has failed to make a proper use of that advantage this court will have to evaluate the evidence. A lapse of three years from the date of trial to the delivery of judgment must of necessity render it difficult for the trial judge to have made the proper evaluation of the evidence.

Although the trial judge stated in his judgment that he had 'carefully considered the evidence in this matter as contained in the affidavits and the oral

evidence', the judgment is a mere summary of the contention of the parties. The only specific finding is as follows:

> "It seems abundantly clear to me that it was intended from its inception that the plaintiff would be a joint owner of the Supermarket business. The very name 'Fitzlor' incorporated parts of the Christian names of the parties. I find that until there was disagreement between the parties resulting in a separation, the plaintiff operated the business as a joint owner".

The central issue in this appeal is whether a constructive trust has been established in favour of the appellant in relation to the land and building commonly known as Rosetta Cottage. In determining this issue, regard must be given to the principle as stated by Sir Nicholas Browne-Wilkinson in ***Grant v Edwards and Another*** [1966] 2 All E.R. 426 at pg. 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 ownership. This requires two matters to be demonstrated:
>
> > (a) that there was a common intention that both should have beneficial interest; and
> >
> > (b) that the claimant has acted to his or her detriment on the basis of that common intention".

An express agreement of the common intention would be sufficient to determine the beneficial interest. However, where this is absent the common intention of the parties may be inferred from their words or conduct. An

inference of a common intention may also arise on the basis of indirect contributions made by the claimant to the acquisition of the property. A statement in the speech of Lord Diplock in *Gissing v Gissing* [1980] 2 All E.R. 780 at pg. 792 is instructive.

> "It may be more than a matter of convenience which spouse pays particular household accounts, particularly when both are earning, and if the wife goes out to work and devotes part of her earnings and uses private income to meet joint expenses of the household which would otherwise be met by the husband, so as to enable her to pay the mortgage installments 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".

In the case of *Grant v Edwards* (supra) the gentleman whose name was on the title had told his partner that her name was not going on the title because it would cause some prejudice in the matrimonial proceedings then pending between herself and her husband. The Court found that Mr. Grant never had any real intention of putting her name on the title.

Again in the case of *Eves v Eves* [1975] 3 All E.R 768 which was referred to in the case of *Grant v Edwards* the defendant had told the plaintiff that the house which was to be their joint home would have been conveyed into their joint names but for age because she was under 21 years of age she accepted his explanation and the house was conveyed into the sole name of the

defendant. He admitted that his explanation was simply an excuse to avoid putting the house into their joint names. The Court inferred that there was an understanding between them or a common intention that the woman was to have some sort of proprietary interest in it, otherwise no excuse would have been needed.

Undoubtedly, the parties agreed to purchase the land in their joint names and the only reasonable inference to be drawn from the fact is that it was the common intention that both should be beneficially entitled.

In relation to the question of construction of the building the wife asserted that she made a direct contribution of $20,000 which was denied by her husband. The judge found that there was no documentary proof of it.

Although the learned trial judge made no finding of indirect contribution by the wife there was ample evidence of such which consisted of helping to plant cane on the property; travelling to Miami to buy beauty products; helping out with household expenses; travelling 85 miles to Savanna-la-mar 3 to 4 times per week, supervising the construction work and obtaining draw downs from the Credit Union. Most importantly her efforts served to 'free her husband' to make mortgage payments.

Additionally, the evidence disclosed that the wife contributed to the household expenses; the loan was repaid with the help of sale of sugar cane that they both cultivated on the land; some of the loan was repaid from the business

and that she had started paying the mortgage to the Credit Union from the business.

In ***Midland Bank v Cooke & Another*** [1995] 4 All E.R. 562 at 574 Waite L.J. had this to say:

> "Identifiable contributions to the purchase of the house will of course be an important factor in many cases. But in other cases contributions by way of the labour or other unjustifiable actions of the claimant will also be relevant. Taking into account the fact that the house was intended to be the joint property, the contributions to the common expenditure and the payment of the fire insurance moneys into the joint account, I agree that the plaintiff is entitled to a half-interest in the house".

The failure of the judge to evaluate the documentary evidence in relation to the Rental Agreement and Insurance Proposal Forms which show clearly that the parties are joint owners of the property coupled with the absence of any evidence of contrary intention demonstrates that the wife has a beneficial interest in the property.

Mr. Steer on behalf of the respondent submitted in the main that the wife's contribution was trifling and prayed in aid ***Lloyds Bank plc v Rosset and Another*** [1990] 1 All E.R. 1111. I cannot accept this submission. The wife made substative indirect contribution and has shown detrimental reliance based on the excuses given by the husband.

The history of the transaction in relation to the first asset purchased by the Pinnocks tells an interesting story. The wife had bought the property from

the Ministry of Housing in her name prior to marriage and later transferred the house to the names of both her husband and herself. This give the backdrop to an emerging cmmon intention with respect to property subsequently acquired.

I find it difficult to accept that the wife would be doing all that she did except in pursuance of some expressed or implied undertaking or arrangement that she had a beneficial interest. Such conduct amounted to an acting upon the common intention by the husband. In adopting this conduct she is seen to act to her detriment on the faith of the common intention. There is therefore a sufficient detrimental reliance to support the imposition of a constructive trust.

In my judgment it can properly be imputed from the evidence that there was a common intention at the time of the acquisition of the land and building that the beneficial interest therein should be shared, in which case the claim of the wife will lie in the law of trusts.

Finally, it is necessary to determine the extent of the wife's beneficial interest in the land and buildings, part of Rosetta Cottage. This is always a very difficult question. In light of the disparity of the incomes between the parties, one being an engineer and the other a stenotypist, coupled with the asset being other than the matrimonial home, I would hold that the parties intended that the wife should hold one third interest in that property.

The only other question which remains to be considered is the proper date at which to put a value on the beneficiary's interest in the land and buildings as well as the business. This is the date when the interest is realised

i.e the date when the asset is sold or alternatively when the beneficiary is bought out.

In this way the beneficiary can share in any increase or decrease in value until sale or realisation.

For the above reasons, I would allow the appeal and make a declaration accordingly with costs to the appellant to be agreed or taxed.