NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. HCV 00864 OF 2006

BETWEEN	**JUDITH PLUMMER**	**CLAIMANT**
AND	**ANDREW PLUMMER**	**RESPONDENT**

IN THE MATTER of the Property (Rights of Spouses) Act

AND

IN THE MATTER OF ALL THAT PARCEL of land known as 7E, Lot 250, Greater Portmore, St. Catherine registered at Volume 1274 Folio 515 of The Registrar Book of Titles.

AND

IN THE MATTER of Sundry items of furniture and Appliances specified in the supporting affidavit Hereto.

Heard: November 26, 2007 and May 26, 2008 and June 15, 2009.

Ms. Tameka Jordan and Ms. Khadria Ffolkes instructed by Jacqueline Samuels-Brown for the Claimant; Mr. Gordon Steer instructed by Chambers, Bunny and Steer, for the Respondent.

Application for declaration of interest under Property (Rights of Spouses) Act 2004: Whether property is "family home" for purposes of the Act. Principles of Resulting and/or Constructive Trusts applicable in claims for beneficial interest in property; Effect of Stack v Dowden; Burden of proof on person advancing interests other than that shown on title; Application of Property (Rights of Spouses) Act to property other than the family home; extent of courts discretion in making "division of property" under sec. 14; Circumstances informing a just and reasonable division of property; "contributions:; Whether decree absolute is proper trigger for the purposes of an application under the Act.

CORAM: ANDERSON J.

In her Amended Fixed Date Claim Form dated October 31, 2007, Judith Rosemarie Plummer, ("the claimant"), seeks the following:-

1. **A DECLARATION** that the Claimant is entitled to one half of all of the legal and beneficial interest in all that parcel of land known as 7E, Lot 250 Greater Portmore, St. Catherine and registered at Volume 1274 Folio 515 of the Register Book of Titles (hereinafter called the "Matrimonial Home").

2. **A DECLARATION** that the Claimant is entitled to a half interest in the items of furniture and appliances left in the matrimonial home as of August 10, 2001 and itemized in the schedule attached to the Claimant's affidavit sworn to in (hereinafter the "furniture").

3. **ORDERS that**:
   a. The Matrimonial Home be appraised by Messrs. DC Tavares Finson & Company in order to establish the market value thereof; the cost of the said appraisal to be borne by the parties equally.
   b. The Respondent shall have first option to purchase the Claimant's interest in the said matrimonial home, in consideration for the payment to her of one half of the appraised market value of the matrimonial home. The option to purchase shall be exercised by the payment of a deposit of 10% of the Claimant's interest within 21 days of the appraisal report being delivered to the respondent or his Attorney-at-Law. The sale shall be on the usual terms and shall include:
      i. a deposit of 10% already provided for above, a further

payment of 5% on the signing of the Agreement for Sale, balance on completion.

ii. Completion within 90 days of the signing of the Agreement

iii. Stamp Duty and Registration fee to be paid by the parties equally, the Applicant to be responsible for the Transfer Tax and her own Attorney's fees, the Respondent to be responsible for his own Attorney's fees.

iv. Possession on completion.

v. Time shall be of the essence.

c. In the event that the Respondent does not exercise his option to purchase the said matrimonial home the premises shall be sold on the open at the appraised market value or at such other price as shall be agreed between the parties and the net proceeds of sale be divided between the parties equally.

d. Neither party shall do nor cause to be done anything calculated to or having the effect of delaying or preventing the sale of the matrimonial home and both parties shall take all reasonable steps to facilitate the said sale, which steps shall include but be not limited to.

i. Listing the property with reputable realtors.

ii. placing advertisements in the newspapers for the said sale.

iii. Making the premises available for viewing by potential purchasers.

iv. Giving the other party and/or his/her nominee reasonable access to the premises.

e. The Attorney-at-Law with Carriage of Sale shall be **JACQUELINE SAMUELS-BROWN**.

f. In the event of a sale on the open market stamp Duty, Transfer Tax, Registration Fee, Cost of Agreement for Sale and other necessary cash cost due from the vendor shall be payable by the parties equally and each party shall be responsible for his Attorney's fees.

g. In the event that either party shall fail or neglect to sign or to execute any document (inclusive of but not limited to the Agreement for Sale and instrument or Transfer) within two (2) weeks of such documents being presented for signature or execution, the said document shall be forwarded to the Registrar of the Court who shall execute same on the defaulting party's behalf.

4. ORDERS that:

a. An inventory of the furniture be carried out by the parties and/or their representatives jointly within twenty-one (21) days of the herein Order and either the said furnishings and furniture be divided between the parties as they shall agree; or failing such joint inventory valuation and agreement they be appraised by Messers D.C. Tavares Finson and Company and sold by the said appraisers by private treaty or by public auction after 30 days if on the first private offer they or any of them be not sold.

In support of her claim, Mrs. Plummer filed a 28 paragraph Affidavit dated the 8th March, 2006 (her "First Affidavit") in which she sets out the factual and legal bases of her claim for the reliefs sought. That Affidavit was responded to by the Respondent in an Affidavit of 49 paragraphs, in which there were some

admissions but most of the Claimants averments were contradicted. A supplemental affidavit was filed by the Claimant dated.....

For his part, the Respondent asserts that he is the sole owner of the property in question and prays that the application for the reliefs sought by the Claimant, be refused by this Honourable Court. His affidavit is at complete factual variance with that of the Claimant.

Given the extent of factual disagreement between the parties it will be necessary to try to determine the facts which are accepted by both parties as being true. It needs to be noted that pursuant to previous orders of this court, both parties were made available for cross examination and were, indeed, extensively cross-examined by the other's attorney-at-law.

The Evidence

According to the Claimant's evidence she is a secretary and the respondent an accountant. They married each other on March 11, 1987 but a Decree Nisi was pronounced in respect of their marriage on August 10, 2001. The Respondent in his affidavit in response averred that a decree absolute was granted on April 28, 2006. The main bone of contention is, of course, the house situate at 7E, Lot 250 Greater Portmore, St. Catherine and registered at Volume 1274 Folio 515 of the Register Book of Titles located in the Parish of St. Catherine.

The claimant says that when she married the Andrew Plummer ("the Respondent") she was a student West Indies College and the Respondent was a student at the Knox Community College. After the birth of their first child, she returned toher studies at the West Indies College while on July 27, 1987, the Respondent commenced a job at the offices of the National Housing Trust ("NHT") in Kingston and went to reside In the City. She says that after about three (3) years, she and her husband began living together at 9 Cranbourne Avenue, Kingston 10 in the Parish of St. Andrew. It was while the couple lived at the above address that she said, they started a joint account at the Jamaica

Citizens Bank to which they both made deposits. Subsequently, they also had joint accounts at the Bank of Nova Scotia at Cross Roads.

It is not disputed that the Claimant commenced working at St. Hugh's Preparatory School in August 1990 and continued working there until September 2001 while her husband has continued to work with the NHT up to the present. She claims that during the subsistence of the marriage, the couple shared domestic expenses. The initial arrangement was that she purchased the groceries while the Respondent took care of the rental and utilities. She also claimed to have been responsible for the educational expenses of the couple's first child, Latonia, including school fees, books, uniforms and extra curricular activities. She also said that "later on" she paid telephone and light bills and purchased groceries while the Respondent paid the rental and the payments due on the family car as well as the mortgage on the property, the subject of this claim. The Claimant was later to admit that the Respondent did undertake some of the expenses for the utilities.

The property which is the main item of the claim in this application is registered at Volume 1274 Folio 515 of the Register Book of Titles and is located at 7E Lot 250, Greater Portmore St. Catherine. According to the claimant, the down payment on the property was made up from the proceeds of a loan of five hundred United States Dollars (US$500.00) which the Respondent got from a relative, and the sum of seven thousand dollars ($7,000.00) which she contributed, being the amount of a gift from her grandfather. The rest of the cost of the property was met from a loan from the NHT. It is common ground that title to the property is in the sole name of the Respondent. The Claimant however, says that she was not aware of this fact until 1997. At that time when she was trying to purchase property along with her mother using the facilities of the national Housing Trust, she discovered that only her husband's name was on the title. She deponed that when she asked the Respondent why her name was not on the title, he explained that it was done because it would not have been wise

for them to use up their "one-time" NHT benefit. She said she accepted his explanation as she trusted him. She said that after the granting of the decree nisi, she was forced to move out of the Greater Portmore property because of the Respondent's "verbal abuse of me". She also said that the Respondent did not allow her to take any item of furniture when she left and it was only some time later that she was able, with the help of her father, to recover a bed, Latonia's computer, "our clothes, some bed linen and other personal belongings".
In her affidavit, the Claimant concedes that with respect to the motor car mentioned in her affidavit, the Respondent has already signed over the registration of Nissan Pick Up 7613 AD to her and there is therefore no issue in regard to that vehicle. The claim is essentially with respect to the home and the furniture

The Respondent filed an affidavit in response dated May 9, 2007 and he admits certain matters which are really not the subject of any contention between the parties. However, he takes issue on several points, and in so far as they are relevant to the claim at hand I shall refer to them He acknowledged the fact that the parties had a joint bank account at the Jamaica Citizens Bank but said that the Claimant would put very little money as her salary at Phil's Hardware where she worked for about six (6) months was only three hundred dollars ($300.00) per week. He also said that when the Claimant worked as a secretary at St. Hugh's Preparatory School, they enjoyed the benefit of the reduced school fees as they were only required to pay 10%. It was their agreement that she would be responsible for the school fees while he would pay for the rental of premises on Tom Redcam Avenue at premises owned by the Anglican Diocese in Jamaica and the Cayman Islands, as well as household expenses. He avers that he also paid the cost of their child's extra curricular activities out of an account which he "alone serviced" and which he maintained at the National Commercial Bank in New Kingston and he exhibited cheques drawn in favour of the school as evidence. He averred further that while he held his day job with the NHT, he was also involved in a systems consultancy enterprise. He exhibits copies of

contracts with clients for whom he provided systems consultancy services. He says that the proceeds of these jobs were lodged to an account maintained at the Bank of Nova Scotia. He had, he claimed, voluntarily placed the Claimant's name on that account and she was only able to access it on his specific instructions.

As far as the Claimant's claim for furniture was concerned, he disputes her averment and says that he was the person who purchased the furniture although she would make the payments with his cheques and would receive receipts in her own name.

At paragraph 19 of her first affidavit, the Claimant stated that "during the course of our marriage we also purchased a home at 7E, Lot 250 Greater Portmore, St. Catherine" She then gives the Volume and Folio number of the property. The Respondent for his part in paragraph 31 of his affidavit in response, states that: "At no time did we purchase a house". He avers that he borrowed the sum of twenty one thousand dollars ($21,000.00) from the NHT where he worked and that he paid the deposit of twenty one thousand two hundred dollars ($21,200.00). That loan was obtained on March 4, 1994 and all payments on the mortgage were paid by salary deductions from his salary at the NHT. He also says that all the improvements made to the property were in fact paid for by him with loans from the City of Kingston Credit Union, the National Commercial Bank and the NHT, and he lists the improvements which were effected. He states that the loans in question are still being serviced by him and that the Claimant and himself never resided in the premises. In fact, he claims, the first time the claimant visited the house was after he had moved there in 2002 and the children were living with him. He denies that there was any common intention to purchase the house for them both and exhibits a copy of the duplicate certificate of title on which is endorsed several mortgages which he claims represent the sums borrowed by him for the home improvements. These indicate that loans were taken out on the purchase in 1996, again in 1998, in 2000, 2001 and 2002. He

further exhibits a copy of letters from the City of Kingston Credit Union and the National Commercial Bank indicating that he had received loans from those institutions for the purposes of home improvements.

The Claimant counters the affidavit in response by the Respondent with a further 39 paragraph affidavit of her own dated May 17, 2007. Again, a number of averments are made by the Claimant but while they deal with many factual issues, they do not shed a lot of light on the central issue of the claim for an interest in the home. One such factual issue relates to the question of whether the Respondent paid for Latonia's extra curricular activities at St. Hugh's Prep School. She averred that the cheques exhibited by the Respondent were, in fact, cheques which he asked her to cash at the school which she was able to do because she was the secretary there. It should be noted that she exhibits a document at JP 4 of her later affidavit which, she says, proves that she had opened an account at the Bank of Nova Scotia in her own name and that the Respondent's name was subsequently added. The document, however, has a heading "Joint Deposit Agreement" and refers to "agreement by and between the Undersigned" and between them and the bank. It is not, accordingly, clear on the face of that document, that the averment that there was a subsequent addition of his name is correct. She says that the account contained the couple's "money, to be applied for our mutual benefit". She says that the funds in the said account were later "depleted" by the Respondent though she does not say how or give a time line which would assist the court in relating the time to the time of the purchase of the property. At the same time she says that she knew of the systems consulting contracts which the Respondent had, but that the moneys from those contracts were "not lodged to our joint account". She also states that the funds used to acquire the furniture which she is claiming was from her own "my own funds", except for the sum of $7,000.00 which was paid by the Respondent and she exhibits receipts in her name as proof of this averment.

With respect to the property which is at the centre of this claim, the Claimant contradicts the Respondent that the couple did not purchase a home. It was her contention that before purchasing the property at Greater Portmore they had applied to purchase a property in Woodlawn in Manchester, but were unsuccessful. It is not apparent why this application was unsuccessful but she says that they later applied to purchase one of the units in Portmore and she was advised by the Respondent that the same application which they had previously completed would be used for this purpose. She said she believed him since he was employed to the NHT and it was not until later that she realized her name was not on the title. She avers that the Respondent had advised her that they were required to pay a deposit of $27,000.00 and she had made a contribution of $7,000.00 which was a gift from her grandfather. She also alleged that after the purchase she had arranged and paid for an architect to design the addition to the house. She also conceded that the Respondent paid for some of the improvements but states that she paid for others with money she saved at the City of Kingston Credit Union. She also conceded that she never did reside in the property but alleges that it was because, at the time of its acquisition, they were in cheaper rented accommodation and could afford to rent the newly acquired house why this was so.

Submissions by the Claimant

Although, as noted elsewhere, the Claimant's Fixed Date Claim Form referred to the Property (Rights of Spouses) Act, the Claimant's counsel in one set of her closing submissions spoke of a claim under the Married Women's Property Act. The relevant sections (16 and 17) of the latter Act have, of course, now been repealed. Counsel did in the other closing submissions refer to the Property (Rights of Spouses) Act and submitted that the property fell within the terms of that Act as being the "family home". It would seem in my view, however, that since the parties never resided in the home, it does not qualify as a "family home" as defined the Property (Rights of Spouses) Act. "Family home" is defined by the Act as "the dwelling house that is wholly owned by either or both of the spouses

and used habitually or from time to time as the only or principal family residence.....and used wholly or mainly for the purposes of the household.....". There was some question as to whether the Property (Rights of Spouses) Act applied in the instant case, since the parties had separated before that Act came into being on April 1, 2006. I am of the view that section 13(2) allowing an application to be made "within twelve months of the dissolution of a marriage", a decree absolute having been granted on April 28, 2006 the court would have jurisdiction to hear such an application. (See my judgment in **Sterling v Sterling HCV 00069 of 2007 delivered December 3, 2008)**[1]

Given my view as to whether the property fell within the definition of family home, I believe counsel was correct in adopting the approach she did. In her opening salvo in her speaking notes counsel asserts that the Claimant is "the beneficial owner of the property in question. For this assertion, reliance will be placed on the trust principles of presumed resulting trust, common intention constructive trust and proprietary estoppel".

The submissions for the Claimant focused on the Claimant's alleged "contributions". In particular, counsel pointed out that the Claimant had made contributions to fees for tuition and extra curricular activities for the couple's elder child, that she had contributed $7,000.00 to the down payment on the property at issue. She also suggested that, since by virtue of the Claimant's employment with a school run by the Anglican Diocese the family was able to benefit from housing provided by the school at reduced rental, this was also a "contribution" by the Claimant for the purposes of the Property (Rights of Spouses) Act and the analysis below. She had, according to her evidence, also contributed to the design and construction of the addition to the original property and had "furnished the house, having contracted the making of mahogany furniture at a cost in excess of $50,000.00, to which the Respondent contributed only $7,000.00". It

[1] See also my judgment in O'Connor v Shearer (Unreported) HCV 00291 and HCV 02769 of 2005 where I discuss the cases of Fowler v Barron [2008] EWCA Civ 377; [2008] All ER (D) 318 (Apr) and the Privy Council case, Abbott v Abbott Privy Council Appeal 142 of 2005, which re-visit Stack v Dowden.

was accordingly submitted that "by her contribution a resulting trust has arisen in her favour". (See **Lloyd's Bank v Rosset [1991] AC 107; 1990 1 All ER 1111**) It was further submitted that "the effect of the Applicant's indirect financial contributions is to give rise to a constructive trust in her favour". In support of this proposition, counsel cites the purported "arrangements between the parties" as to how they would deal with family obligations. And it was submitted in summary, that the fact that there was "direct financial contribution to the closing costs is indicative of an understanding .....that the property is to be shared beneficially". Finally, she says that this "understanding" is bolstered by the Claimant having acted to her detriment by contributing to the costs of the additions to the house. It was a further submission that the allegation by the Claimant that the Respondent had told her that the reason why her name was not on the title was because he did not wish her to use up her "one time" benefit, was explainable only on the basis that there had been an intention that the Claimant should have a beneficial interest in the property. She cited **Grant v Edwards [1986] 2 All ER 426; [1986] Ch 638** and **Pinnock v Pinnock (Jamaican SCCA 52 of 1996)** where the principle in Grant was upheld.

Submissions for the Respondent

Mr. Steer for the Respondent submitted that the only questions which the court had to answer were:

Did the Claimant make any contribution to the purchase of the property so as to derive an interest by way of a resulting trust? If the answer to this first question was in the negative, then secondly, did the parties have any understanding or joint intention to share the beneficial interest in the said property or could such an intention be inferred from their course of conduct, and if so, did the Claimant act to her detriment in reliance upon such an understanding? He submitted that the evidence clearly showed that there was no agreement or intention to share the beneficial interests in the property. Indeed, he urged the court to the view that there was certainly no evidence of any discussion concerning any intention to

share the beneficial ownership in the property, nor of any understanding in that regard, "however imperfectly remembered" (per Lord Bridge in **Lloyd's Bank v Rosset**). He also asked the court to find that the Claimant's assertion that she had contributed the sum of $7,000.00 or any other sum toward the purchase of the property as she alleged, ought not to be believed.

It was also the Respondent's counsel's submission that the expenses which the Claimant averred she had borne were not supported by the evidence whether as they related to the purchase of furniture or the contribution to the domestic expenses of the family. He also submitted that the Claimant was not a witness of truth. In this regard, he pointed to the fact that in her application for a decree nisi, she had averred in the statement of arrangements signed by her, (and tendered as exhibit 1) that "the Respondent is totally responsible for all of Latonia's educational and medical expenses. He is also mainly responsible for her day to day and general expenses. Deondre's living and medical expenses are also mainly met by the Respondent". This document, with which she was confronted in the hearing, was at variance with her own affidavit in these proceedings in which she had sworn that she covered all Latonia's expenses, tuition and extra-curricular activities. He also pointed to the conflict in the evidence of the parties in relation to the pooling of resources. I find it instructive however, that the Claimant in her affidavit points out that she was aware of the fact that the Respondent was engaged in doing systems consulting from which he derived additional income, but noted that the proceeds of this activity were not placed in the joint account that they maintained. It is clear, therefore, that not all resources were pooled in jointly held accounts. It is accepted on both sides that the couple did maintain at least one joint bank account. Whatever the position in relation to the joint bank account, there is no averment by the Claimant that the resources of that joint bank account were used either as a down payment or otherwise for any other purpose connected with the acquisition of the home in Portmore.

It had been a submission on behalf of the Claimant that facts asserted by her had not been denied by the Respondent and should be accepted as admissions. However, counsel for the Respondent said this was an incorrect statement of the law with respect to affidavit evidence. He cited the case of **Gordon v Gordon [1989] 26 J.L.R. 358.** This case was authority for the proposition that notwithstanding the fact that the Respondent had not specifically denied particular averments in the Claimant's affidavit, and had thus apparently failed to join issue thereon, this is not to be taken as an admission since affidavits supporting a summons are not pleadings. In any event, here, as in the Gordon case, the totality of the Respondent's case and his viva voce evidence unambiguously demonstrated that he was denying the allegations which grounded the Claimant's case.

Assessing the credibility of the Parties

In the instant case, both the Claimant and the Respondent were made available for cross examination and so the court had an opportunity to not only hear the evidence, but to view the demeanour of each party. The Claimant's basic assertion is that the property was purchased as the matrimonial home for both of them. The Respondent says it was purchased by him as an investment and indeed, the Claimant never lived there as it was bought at a time when they lived in accommodation which was subsidized. Based upon the evidence led as the parties were cross examined and my view as to the credibility of the parties, for reasons set out elsewhere, I am more inclined to hold that where there is a conflict between the evidence of the Claimant and that of the Respondent, I believe the evidence of the Respondent who appeared more forthright. I am reinforced in this view by the fact of the statement of arrangements sworn by the Claimant in the divorce proceedings between the parties which was tendered as exhibit 1, and which conflicted with other evidence of the Claimant. But I also accept the Respondent's evidence that the couple had separated from around March 1999. Indeed, the statement of arrangements was filed in April 2001,

which would indicate that the couple had lived separate and apart from at least early in 2000.

I have also already adverted to the averment in the Claimant's affidavit in response to that of the Respondent that the proceeds of systems consulting contracts which the Respondent undertook were not lodged to their joint accounts. In addition, she also stated in her affidavit in response that on the sale of the Corolla motor car which they owned, "$83,000.00 was lodged to my NCB account at the Cross Roads branch". Although I remind myself of the danger that in these situations persons are apt to remember events through the prism of the present circumstances, I have to note that these statements appear to be at variance with the Claimants averment that there had been "our practice of pooling our pool resources".

The Law

The law which is applicable, as noted by my learned brother Sykes J. in the unreported case of **Abrahams v Williams HCV 1779 of 2005**, is the law of Trusts, but that is perhaps the only definitive statement one can make in this vexed area of the law. Although the Amended Fixed Date Claim Form referred to the recently enacted Property (Rights of Spouses) Act, in light of the view expressed above as to whether the property was the family home, counsel rightly concentrated her efforts on establishing the existence of a resulting or constructive trust. The Claimant's counsel says that she is entitled to a beneficial interest in the property by virtue of a resulting trust in that she contributed some $7,000.00 to the down payment. Alternatively, she is entitled by virtue of a constructive trust in that there was an agreement, actual or to be inferred, that she was to share as a beneficial owner and she has, in reliance upon this understanding, acted to her detriment. The detriment she alleges is direct contribution to the addition to the home from her "meager resources". At this time, it might be useful to recall the dicta of Gibson L.J. in **Drake v Whipp [1996] 1 FLR 826, 827** (a cohabitation case in which the property was in the man's sole

name, though both had made direct contributions both to the purchase of a barn and to its expensive conversion into a home) that:

> "A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention."

It was also submitted that the Claimant relied upon the principle of proprietary estoppel. However, based upon the evidence led before me, I am unable to see where the basic elements of that principle are fulfilled in the instant case. (See **Keelwalk Properties Ltd. v Walker [2002] EWCA Civ. 1076** cited by the Claimant's attorney). I will, accordingly, not discuss that issue further.

Just as the starting point where there is joint legal ownership is joint beneficial ownership, so the starting point where there is sole legal ownership is sole beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. Where the party whose name does not appear on the title is able to show that he or she made a contribution from his own resources or that the contribution was made from jointly held resources, it will be compelling evidence of the existence of a resulting trust. In the instant case, the contribution allegedly made by the Claimant was the sum of $7,000.00. This the Respondent denies. There is here a conflict in the evidence between the parties.

In seeking to assess the credibility of the conflicting evidence of the parties, I have noted that the Claimant does not in her affidavit say when the property was purchased. She says that the couple operated two joint accounts at the Bank of Nova Scotia but the money for the deposit on the property in question was not taken from either of these. It will be recalled that she had also said that she had opened one of these accounts and then added the Respondent's name She also

says at paragraph 25 that after the grant of the decree nisi she was "forced to move out of the matrimonial home because of the Respondent's verbal abuse". However, at the time of the decree nisi in August, the parties resided at Tom Redcam and not at what the Claimant refers to as "the matrimonial". Further, she also speaks, in relation to the furniture, of the furniture she left in the "matrimonial home". The Respondent's affidavit points out that the Claimant left Jamaica in August 2001 and returned in December 2001 but not to their then residence at Tom Redcam Avenue. In her response affidavit, the Claimant avers that she went to the United States at the Respondent's suggestion and expense to provide a cooling off period for the couple. Since the decree nisi had already been granted in August, I have some doubt about the Claimant's recall of these events. In addition it should be noted that apart from the mortgage to acquire the property in 1996, there were subsequent mortgage loans secured against the property in 1998, 2000, 2001 and 2002. The Respondent says that these were the sums used for the upgrading of the property. The Claimant does agree with the Respondent that he paid the mortgages which, he said, he paid by salary deductions. In terms of whether the Claimant has established that she made a contribution which would give rise to a resulting trust in her favour, I find that the Claimant has failed to establish this fact and I hold that there is no resulting trust giving rise to a beneficial interest in the disputed property.

Notwithstanding this finding, the court must still determine whether the Claimant has an interest under a constructive trust, and if so, the extent thereof. In doing so, the court will seek to determine the *intention of the parties*. If there is an actual agreement as to whether, and if so how, the property is to be shared, the court will give effect to that agreement or arrangement. If there is no actual agreement as to the intention of the parties, the court will seek to determine from the conduct of the parties whether such an agreement exists. In order to establish a constructive trust, the party seeking to assert the existence of such a trust must establish the common intention between herself and the other party, (acted upon by her to her detriment), that she should have a beneficial interest in

the property. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property.

While it is the intention that prevailed at the time of the acquisition of the property that is critical the court will, in making a determination, seek to do so in the light of their whole course of conduct of the parties in relation to it. (See **Oxley v Hiscock [2004] 3 W.L.R. 715** per Chadwick L.J.) But, as Baroness Hale said in **Stack v Dowden [2007] UKHL 17, [2007 All ER D 208 (Apr)**, the court may not abdicate its duty to seek to ascertain the existence of such an intention.

In the instant case, the property is in the sole name of the Respondent. The Claimant asserts but the Respondent denies any common intention that the property was to be their joint property and matrimonial home. The Claimant advances as the reason she did not participate in the application for the purchase of the property, that she was assured by the Respondent that their previous application for a house in Manchester could be used. This is, of course, denied by the Respondent. I have already noted the view I have taken of the Claimant's assertion of having contributed $7,000.00 to the deposit or closing costs. I note with interest the perceptive comment by her ladyship, Baroness Hale in **Stack** at paragraph 68 that

> In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to re-interpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on the legal battle than is warranted by the sums actually at stake.

It is a warning that this court takes very seriously, on board.

In **Oxley v Hiscock,** an unmarried couple purchased a house. It was purchased in the name of the man with contributions from the woman. Mrs. Oxley obtained a reduction in the purchase price of £20,000 under the 'right to buy' legislation. The balance of the purchase price, £25,000 - was provided by Mr. Hiscock. The question was whether assessing the woman's share she should receive just the

actual amount of her contribution or whether other factors arising from the relationship should be considered. It was held:

> Once a contribution had been made then the court could imply a common intention or bargain and then go on to consider this as a constructive trust rather than merely a resulting trust. As a result the court is entitled to look at other factors. In this case the woman was awarded a share of 40% whereas the actual size of her initial contribution was 20%. The case demonstrates a greater willingness to look at the realities of the dealings between the parties, rather than to look only at 'hard' evidence of agreements between them.

Baroness Hale in the course of her judgment in **Stack,** with reference to **Oxley v Hiscock**, stated:

> The claimant had first to surmount the hurdle of showing that she had any beneficial interest at all, before showing exactly what that interest was. The first could readily be inferred from the fact that each party had made some kind of financial contribution towards the purchase. As to the second, Chadwick L.J. said this, at [69]:
>
> "... [I]n many such cases, the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which each was to have--and even in a case where the evidence is that there was no discussion on that point--the question still requires an answer. It must now be accepted that (at least in this court and below) the answer is that *each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property.* ....And in that context, the whole course of dealing between them in relation to the property includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home." (emphasis supplied)

It should be noted in passing, that the idea of a division based upon the court's notion of "fairness between the parties" which is suggested in this citation from Chadwick L.J., while it was fulsomely supported by Lord Walker of Gestingthorpe (in the later case of **Stack**) as a correct statement of the law, its import was more

carefully circumscribed by Baroness Hale as relating to the need to determine the *quantification of the interests, but not to the determination of whether an intention to share had been proven*. Thus she said in her judgment:

> **Oxley v Hiscock** has been hailed by Gray and Gray as "an important breakthrough" (*op cit* p.931, para.10.138). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes* (2002, *op cit*, para.4.27) on the quantification of beneficial entitlement:
>
> > "If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended."
>
> That may be the preferable way of expressing what is essentially the same thought for two reasons. First, *it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair*. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before **Pettitt v Pettitt [1970] A.C. 777** without even the fig leaf of s.17 of the 1882 Act. (Emphasis mine)

In this case, as was the case in **Oxley v Hiscock** the property has been conveyed into the sole name of one of the parties to the relationship. The claimant has first to surmount the hurdle of showing that there was an intention that she should have any beneficial interest at all, before showing exactly what that interest was. Where, as here, the Claimant alleges that she made a financial contribution to the purchase of the property, if the court finds that evidence credible, as noted above, this would give rise to a resulting trust. Where a common intention is established, and the *cestui que trust* has acted to her detriment in reliance upon what she perceives as an understanding of that common intention, the court will find a constructive trust.. In **Lloyd's Bank Ltd. v Rosset**, Lord Bridge of Harwich had restated the message of cases such as

Gissing v Gissing* [1971] AC 886** that where a common intention to share ownership of a home could be found on the part of the parties in a relationship, then a non-legal owner of property would be able to establish an interest in the home in equity. *In the absence of this, strict principles of property would apply:* and upon looking at the contributions which had been made to the home by the party claiming an interest, it was thus possible for a non-legal owner of property to have no interest in the property at all (such as was the case in **Burns v Burns [1984] Ch 317**, and indeed in ***Gissing itself).

This pronouncement of Lord Bridge's, provided the basis for his classification of two types of case (thereafter known as '*Rosset* category 1' and '*Rosset* category 2' cases) and may be summarized as follows:.

> (a) A 'first category' constructive trust arises where: the court finds an agreement, arrangement or understanding between the parties that the beneficial interests will be shared, based on evidence of express discussions, no matter how imperfectly remembered and however imprecise their terms; and the claimant acted to his / her detriment or significantly altered his / her position in reliance on the agreement.
>
> (b) A 'second category' constructive trust is based entirely on the parties' conduct. Direct contributions to the purchase price by the claimant, whether initially or by the payment of mortgage instalments will readily justify the inference of a common intention to share beneficially, and thereby give rise to the creation of a constructive trust. *But it is at least extremely doubtful whether anything less will do*.

The onus therefore remains upon the non-owner to show she has any interest at all. In this case, this is to assert no more than the normal civil burden of proof that he who asserts must prove. *Once the claimant has established some beneficial interest,* the court will survey the whole course of dealing between the parties, taking account of all conduct which throws light on the question what shares were intended. Once it is understood that the court must seek for the parties' intention, the list suggested by Chadwick L.J. in **Oxley** may be of assistance.

> ".....each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And in that context, the whole course of dealing between them in relation to the property includes the arrangement which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, insurance and housekeeping). "

For the Claimant to succeed here, It is necessary to show, on a balance of probabilities, that her case falls within those of a resulting trust or one of the categories of constructive trusts as defined above.

The Question of Intention

As noted above, the Claimant's attorney, in her closing submissions, had pointed to the averment by the Claimant as to the reason purportedly given by the Respondent for not putting her name on the title; that is the unwillingness to use up their "one-time" NHT benefit. She submitted that this indicated that there was a joint intention to own the property beneficially. She cited **Grant v Edwards [1986] 2 All ER 426; [1986] Ch 638.** In that case, a house was purchased in1969 for the plaintiff, Mrs. Grant, and the defendant, Mr. Edwards, to live in as a cohabiting couple. Mrs. Grant was actually then married to someone else. The house was purchased in the name of Edwards and his brother. Edwards told Grant that her name would not go on the title "for the time being" because it could harm the matrimonial proceedings pending between Mrs. Grant and her husband. In reality however, it appears that he had no intention of conveying any legal title to the plaintiff.

The first defendant Mr. Edwards paid the deposit on the house and most, but not all, of the repayments on the two mortgages. The plaintiff also contributed towards general household expenses, provided housekeeping and brought up the children. In 1980 the couple separated, and the plaintiff claimed a beneficial interest in the property.

On a claim by the plaintiff for a declaration that she was entitled to a beneficial interest in the property it was held that:

1) Where a couple chose to set up home together and a house was purchased in the name of one of the parties, equity would infer a trust if there was a common intention that both would have a beneficial interest in the property and the non-proprietary owner had acted to his or her detriment upon that intention; that there had been conduct from which the common intention could be inferred and conduct on the part of the non-proprietary owner, whether directly or indirectly referable to the purchase of the property, that could only be explained by reference to a person acting on the basis of having a beneficial interest in that property;
2) That the excuse given by the first defendant to the plaintiff for not putting her name on the title raised the clear inference of a common intention that the plaintiff should have an interest in the house; that her contribution to the general household expenses had been in excess of what would be expected as a normal contribution and without that substantial contribution the first defendant's means would not have been sufficient to keep up the mortgage payments; that in making these indirect payments towards the purchase of the house the plaintiff had acted to her detriment and it could not have been expected that she would so conduct herself unless she had an interest in the property, and that, accordingly equity would infer that the house was held on trust for them both .....and the plaintiff was entitled to a half interest therein.

While in **Grant** there was clear and accepted evidence as to what the first defendant had told the plaintiff, here the Respondent has denied that he did make any representation to the Claimant in the terms she alleged. I am wary of accepting the averment of the Claimant since on her account, the application which they had made previously for a house in Manchester had been done in both their names. She stated that the Respondent had told her that the NHT could use the same application forms in their application for the Portmore property. No explanation is proffered as to why the second consideration of the application would have resulted in one name being dropped, nor why the Respondent's same explanation had not been suggested when they both made the first application.

I am mindful of the fact that in **Lloyd's Bank v Rosset**, Lord Bridge drew attention to the fact that if there is to be a finding of an actual "agreement, arrangement, or understanding" between the parties it must

> "be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been."

It should be noted that even if the Claimant were able to establish a common intention to do the addition and renovation of the property, this would not give rise to a right to have a beneficial interest. In **Lloyd's Bank v Rosset** the court did find on the part of the parties *a common intention to renovate the property as a 'joint venture'*, but concluded that this *did not cast light on what their intentions were in relation to beneficial ownership of the home*. Thus even if the Claimant had been able to establish that there had been an agreement in relation to the addition, this would not have been sufficient to establish a prior agreement or joint intention to share beneficial ownership.

Based upon the totality of the evidence which has been presented, I find that the Claimant has not satisfied me on a balance of probabilities that there was an agreement, actual or inferred, between the Claimant and the Respondent that they should share the beneficial ownership of the disputed property. In the absence of such an agreement, the court does not have to go on to consider the shares to which the parties may have been entitled based upon a survey of the whole course of dealings between them, as would have been necessary had the relevant intention been established.

The Furniture

There still remains the question of the furniture, the subject of a part of the claim made by the Claimant, and whether the each party has a beneficial share in the items of furniture. The Property (Rights of Spouses) Act (the "Act") does provide, not only for the determination of the interest in the "family home" but indeed, provides for "the division of property belonging to the spouses". According to

section 2 of the Act, "property" includes "any real or personal property, any estate or interest in real or personal property".

Section 13 of the Act provides the jurisdictional basis for the court to hear an application for the division of property. "Property", as noted above, includes not only real property, but personalty as well. The Fixed Date Claim Form seeking division of property having been filed within the twelve (12) month period after April 28, 2006, the date of the absolute, the court has jurisdiction to hear the application. Section 14(1) of the Act provides that:

> (1) Where under section 13 a spouse applies to the court for a division of property, the Court may -
>
> (a) .....;
>
> (b) subject to section 17(2) divide such property, other than the family home, as it thinks fit, taking into account *the factors specified in subsection* (2)

Section 17(2) provides for deducting the value of any debts on property to be divided, to be deducted from the value of the property, and is not relevant here. Section 14(2) of the Act sets out a list of factors which the Court may consider in determining how to divide any property, including the family home. Those factors include "contribution, financial or otherwise, directly or indirectly made, by or on behalf of a spouse to the acquisition, conservation or improvement of any property....." Section 14(3) sets out a definition of the word "contribution" in subsection (2), which allows the Court to consider factors such as the management of the household, the performance of household duties and the care of relevant children. There is no doubt, given the evidence in the affidavits of both parties, that the Claimant made contributions to the family within the meaning of section 14(3). There was evidence of contributions in terms of care of relevant children, contribution to utilities and other household expenses.

Given that finding, I am satisfied that there are sufficient instances of "contribution" as defined in the statute to justify a division of the furniture in a way

that recognizes the value of the factors set out in Section 14 (2 and 3). It is to be noted that in application for division of property under Section 13, one of the factors referred to in Section 14(2) is that there is no family here. It is, of course, my finding that there was no relevant family home for the purpose of this application.

Having considered the evidence of both parties I believe that it would be appropriate to exercise the power given by Section 14(1)(b) of the Act to make such order "as it thinks fit" altering the interest of either spouse in the property. The only comprehensive listing of furniture is given in the first affidavit of the Claimant. The list is not easy to understand as it makes clear that some of the articles of furniture were paid by the Respondent. In some cases, a part payment was made by the Claimant but the balance was paid by the Respondent. Nevertheless, I am satisfied that the Court has a very wide discretion in determining how the property is to be divided. Regrettably, there is no evidence as to what of the furniture is still available. However, the Court must do the best it can.

Based upon an analysis of the figures presented in Claimant's affidavit, if it is accepted, she paid about two-thirds of the cost of about three hundred thousand dollars in furniture. Accordingly, I order the Respondent to surrender those items of furniture set out in the schedule to the Claimant's affidavit to the claim within thirty (30) days. In the event that the furniture in question has been disposed of by the Respondent, or he wishes to retain possession of the said furniture he shall pay within a further period of thirty (30) days to the Claimant, the sum of Two Hundred Thousand Dollars, ($200,000.00) as her share of the furniture.

In summary, while I find that the Claimant has failed to satisfy me with respect to the claim for an interest in the real property at issue, I believe that the Act and the breadth of section 14, allow me to make the order which I have with respect to

furniture. The relief otherwise sought in the Fixed Date Claim Form in respect of the home is accordingly denied.

I also order that each party is to bear his or her own costs.

ROY K. ANDERSON
PUISNE JUDGE
JUNE 13, 2009