JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 55/00

COR: THE HON. MR. JUSTICE FORTE, P.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN	**ROBERT STEPHENSON**	**DEFENDANT/ APPELLANT**
AND	**CARMELITA ANDERSON**	**PLAINTIFF/ RESPONDENT**

Gillian Mullings instructed by Patrick Bailey & Co., for Appellant

Sharon Usim instructed by Usim Williams & Co., for Respondent

10th, 11th December 2002 & 12th June, 2003

FORTE, P.:

The issue in this appeal concerns the ascertainment of the beneficial interest of the parties of property situated at 4 Winsome Avenue, Meadowbrook Estate, Kingston 19 and registered at Volume 1097 Folio 737 of the Register Book of Titles. Both parties were enjoying a common law relationship at the time of the acquisition of the property. Their union produced three children, but there was an issue at trial, as to whether they shared a "visiting relationship" or lived together. The respondent insisted that they never lived together. The

learned judge, although concluding that the respondent was a credible witness, made no definitive finding in this regard. This issue, however is of no relevance to the question which arose on appeal.

The respondent's case which was accepted by the learned judge disclosed that the property was purchased solely by her. The only assistance given by the appellant was to consent in joining her as Co-Mortgagee with the mortgage company Victoria Mutual Building Society, so that she could qualify for the mortgage. As a result, the loan was secured from the mortgage company, and the property registered in both their names. The respondent expressed her lack of knowledge in relation to the meaning and effect of registering property as joint tenants or as tenants in common.

It was agreed however at the hearing of this appeal, that the property is registered in the names of both parties as tenants in common. This fact has formed the basis of the main contention in this appeal and consequently I will return to it.

In a short judgment, the learned judge rejected the evidence of the appellant and his witnesses. In respect of the respondent's case he found as follows:

> "In favour of the Plaintiff, I accept her that her salary was sufficient (sic) to obtain a mortgage that she asked the Defendant if he could assist. The Defendant agreed, but there was never any agreement or understanding between them that the property was to be jointly acquired and he should get any portion of this property. A tenancy whether joint or in common when endorsed on the certificate of

> Title creates a presumption that the intention of the parties at the time of acquisition is that there is to be some sharing in the absence of receipts and documentary proof by the Defendant. There is an abundance of receipts put forward by the Plaintiff that she made contribution towards the payment of the mortgage and acquisition of the property."

As a result of this finding the learned judge found for the respondent and made the following orders:

> "(a) Declaration that she alone is entitled as beneficial owner of all the property located at 4 Winsome Avenue, Kingston in the Parish of Saint Andrew;
>
> (b) Make order that the Defendant himself or any person claiming Title from him yield up occupation of the said premises;
>
> (c) That Title be transferred to the Plaintiff as the sole proprietor;
>
> (d) In the event that the Defendant is unable or unwilling to transfer his portion, that the Registrar of the Supreme Court be empowered to execute the necessary documentation;
>
> (e) That an award of costs is made in favour of the Plaintiff to be paid by the Defendant to be taxed or agreed."

The appellant filed seven grounds of appeal, but the arguments were developed solely on the question of whether a title held by both parties as tenants in common was conclusive of the fact that both should share the property or the proceeds therefrom in equal shares.

In relying on the case of ***Goodman v. Gallant*** [1986] 1 All E.R. 311 the appellant filed the following ground which is misconceived given the circumstances of this case:

> "That the Learned Judge erred in law, in that he did not consider the principles in ***Goodman v. Gallant*** (supra) that '... where there was an express declaration which comprehensively declared what were the beneficial interests in the property' ... such declaration was exhaustive and conclusive of the position unless and until the conveyance was set aside or rectified."

To begin with the case of ***Goodman*** (supra) was decided on the basis of an English Statute, and concerns circumstances in which the beneficial interest in the land had been expressly declared in the conveyance. See page 312 of the judgment where it is indicated that Clause 2 of the conveyance states: "The Purchasers hereby declare as follows:

> "(a) The Purchasers shall hold the property upon trust to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and net rents and profits thereof until sale upon trust for themselves as joint tenant ...".

The judgment on page 313 also records that the plaintiff served a written notice on the defendant stating:

> "I hereby give you Notice of my desire to sever as from this day the joint tenancy and equity of and in the property described in the Schedule hereto now held by you and me as joint tenants both at <u>law and in equity</u> so that the said property shall henceforth belong to you and me in equal shares." [Emphasis mine]

The underlined words underscore the fact that there was a declared intention to share in the equitable as well as the legal interest in the property.

Of significance and relevance to the issues in this appeal are the following words of Slade, L.J. at page 314:

> "In a case where the legal estate in property is conveyed to two or more persons as joint tenants, but neither the conveyance nor any other written document contains any express declaration of trust concerning the beneficial interests in the property (as would be required for an express declaration of this nature by virtue of s 53(1)(b) of the Law of Property Act 1925), the way is open for persons claiming a beneficial interest in it or its proceeds of sale to rely on the doctrine of resulting, implied or constructive trusts (see s 53(2) of the Law of Property Act 1925). In particular, in a case such as that, a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well-known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust (see, for example, ***Pettitt v. Pettitt*** [1969] 2 All E.R. 385 at 406, [1970] AC 777 at 813-814 per Lord Upjohn). If, however, the relevant conveyance contains an express declaration of trust which comprehensively declares the beneficial interests in the property or its proceeds of sale, there is no room for the application of the doctrine of resulting, implied or constructive trusts unless and until the conveyance is set aside or rectified; until that event the declaration contained in the document speaks for itself."

Slade L.J. recognizes that where unlike the ***Goodman*** case there is no express declaration as to the beneficial interest, a claim as to beneficial interest can be made by a person who contributed to the purchase of the property. In

that respect Slade, L.J. cited with approval at page 319, the following dicta of Lord Upjohn in ***Pettitt v. Pettitt*** [1969] 2 All E. R. 385 at 405, which reiterates that where there is a written declaration as to the beneficial interest, that will conclude the matter:

> "In the first place, the beneficial ownership of the property in question must depend on the agreement of the parties determined at the time of its acquisition. If the property in question is land there must be some lease or conveyance which shows how it was acquired. If that document declares not merely in whom the legal title is to vest but in whom the beneficial title is to vest that necessarily concludes the question of title as between the spouses for all time, and in the absence of fraud or mistake at the time of the transaction the parties cannot go behind it at any time thereafter even on death or the break-up of the marriage."

The contrary as I have shown is also correct that is to say where there is no expressed declaration of the beneficial interest, enquiries can be made to determine that issue.

In the case of ***Bernard v. Josephs*** [1982] 3 All E.R. 162, Lord Denning addresses this question as follows:

> "When the house is conveyed into joint names, the question often arises: what are the shares of the two parties in the house? And at what date are those shares to be ascertained? If the conveyance contains an express declaration of the shares, that is decisive, as we held recently in ***Goodwin v. Bedwel*** [1912] CA Bound Transcript 185. But often there is, as here, no such declaration. In such a case it used to be thought that the shares would always be equal shares. That was the view of Russell, L.J. in ***Bedson v. Bedson*** [1965] 3 All E.R. 307 at 318, when he said:

'If there be two beneficial joint tenants, severance produces a beneficial joint tenancy in common in two equal shares ... by declaration of the beneficial joint tenancy between A and B, their respective rights and titles are no less clearly laid down and established than if there had been a declaration of a beneficial tenancy in common in equal undivided shares.'

Russell, L.J. had previously said much the same in ***Wilson v. Wilson*** [1963] 2 All E.R. 447 at 453, [1963] 1 WLR 601 at 609:

'But that view has not prevailed. It is because a conveyance into joint names does not necessarily mean equal shares. It is often required by the local council or by the building society when they grant a mortgage, so that they are both responsible for re-payment. It is sometimes done on the suggestion of lawyers, without taking into account all the factors, such as their contributions to the purchase money and so forth.
As between husband and wife, when the house is in joint names and there is no declaration of trust, the shares are usually to be ascertained by reference to their respective contributions, just as when it is in the name of one or other only. The share of each depends on all the circumstances of the case, taking into account their contributions at the time of acquisition of the house, and, in addition, their contributions in cash, or in kind or in services, up to the time of separation. In most cases the shares should be ascertained as at that time. But there may be some cases where later events can be considered. The departing party may only be entitled to one-half, one quarter or even one-fifth, depending on the contributions by each and, I would add, all the circumstances of the case. That was the view of this court in ***Hine v. Hine*** [1962] 3 All E.R. 345. The facts of that case show clearly that justice requires that the courts should have a discretion to apportion the shares, and that there should not be a rigid rule of equal shares'."

Slade, L.J. in the ***Goodman*** case (supra), approved of the above dicta of Lord Denning in ***Bernard v. Josephs*** (supra) with the following qualification (stated at page 320) after citing a great portion of the above cited passage:

> "We respectfully agree with Lord Denning MR's observation that 'a conveyance into joint names does not necessarily mean equal shares' (see [1982] 3 All ER 162 at 166, [1982] Ch 391 at 398), for it does not necessarily have this meaning when the conveyance contains no declaration of the beneficial interests (see, for example, ***Crisp v. Mullings*** (1975) 239 EG 119). But we must respectfully dissent from his observation that the relevant views expressed by Russell LJ in ***Bedson v. Bedson*** [1965] 3 All ER 307 at 318, [1965] 2 QB 666 at 689 and ***Wilson v Wilson*** [1963] 2 All ER 447 at 453, [1963] 1 WLR 601 at 609 'have not prevailed'. In our opinion, those views (relating as they did, solely to the case where the conveyance does contain a declaration of this nature) have prevailed, as is indicated by the decisions of this court in ***Leake (formerly Bruzzi) v Bruzzi and Pink v Lawrence*** (1977) 36 P & CR 98; and we are bound to follow them."

The learned Lord Justice there makes a distinction between circumstances where the conveyance contains a declaration of the beneficial interests and circumstances where it does not. In the former, the declared beneficial interest cannot be challenged but in the latter, the presumption of a shared interest can be rebutted. This is also the case, where the title for example is registered in one name only.

In the instant case, the property is registered in the names of both parties as tenants in common. The legal interest therefore rests in both of them. In addition, that fact also raises the presumption that at the time of the acquisition

they intended that the beneficial interest would also be shared. The evidence, however, which was accepted by the learned judge disclosed that the appellant made no contribution to the purchase of the property, and became registered on the title as a matter of convenience, necessitated by the respondent's inability to secure the mortgage on her own. In this regard it should be noted that the Courts are aware of the economic needs and constraints of some parties and will recognize and accept that in certain circumstances one party's name may be placed on the title, as a consequence of his/her assistance to the other party in obtaining a mortgage to facilitate the purchase of the property. As earlier pointed out, Lord Denning accepted this in the case of ***Bernard v. Josephs*** (supra) and so did Lord Diplock in the case of ***Pettitt v. Pettitt*** (supra) in dicta which was accepted and followed by this Court in the case of ***Neville Lynch v. Maureen Lynch*** [1991] 28 JLR 8 in which at page 13 Carey, J.A. expressed the following opinion:

> "It is now a fact of modern economic reality that many building societies require as a matter of policy the names of husband and wife to be joined as parties to a mortgage loan. This fact was appreciated by Lord Diplock in ***Pettitt v. Pettitt*** (1969) 2 All E.R. 385 at p. 415 when he observed –
>
> '... The old presumptions of advancement and resulting trust are inappropriate to these kinds of transactions and the fact that the legal estate if conveyed to the wife or to the husband or to both jointly though it may be significant in indicating their actual common intention is not necessarily decisive since it is often influenced by the requirements of the building society which provides the mortgage.'

> The fact that a wife agrees to be a party to a mortgage loan granted to her spouse and herself does not inevitably mean that she expects 'a piece of the action' if I may be pardoned the use of an Americanism. A great many relatives assist their relations in this way, and I have not the least doubt that no one would say that they expect thereby to have a share in the equity. What is required is evidence of the parties' intentions and therefore all the circumstances must be taken into account."

The facts found by the learned judge establish that the property was bought solely by the respondent and that there was no intention at the time of the acquisition to share the beneficial interest in the property.

For these reasons, I would conclude that the contention made by the appellant that the registration of the title in the parties' names as tenants in common is conclusive of the entitlement of the parties to the beneficial interest in the property, must fail. I would dismiss the appeal.

HARRISON, J.A:

I have read the judgment of Forte, P. and I agree with his reasoning and conclusion. However, I wish to add a few comments.

The registered Title to the property at Volume 1097 Folio 737 of the Register Book of Titles was issued in the names of both the appellant and the respondent as tenants in common. This joinder of both parties in the legal estate was brought about because of the insistence of the mortgage company

that the appellant's name be placed on the Title, he having agreed to join in the application for a mortgage because the salary of the respondent was insufficient for her to qualify by herself.

The learned trial judge found, inter alia, at page 14 of the Record:

> "... there was never any agreement or understanding between them that the property was to be jointly acquired and he should get any portion of this property. A tenancy whether joint or in common when endorsed on the Certificate of Title creates a presumption that the intention of the parties at the time of acquisition is that there is to be some sharing in the absence of receipts and documentary proof by the Defendant. There is an abundance of receipts put forward by the Plaintiff that she made contribution towards the payment of the mortgage and acquisition of the property."

Where a registered title is in the names of parties as tenants in common, it is referable to the manner in which the legal estate is held. It is not thereby necessarily referable to the proportionate holding in the beneficial interest. However, the reference to property being held as tenants in common, prima facie, means that the beneficial interest is shared equally but the specific respective proportions in the absence of an express declaration, may be unknown. In addition, it also means that there is no right of survivorship on death. Therefore, where property is bought by parties the proportionate holding of each party in the beneficial interest where the legal estate is held as tenants-in-common is dependent on the agreement of the parties at the time of acquisition or evidenced by their respective contribution.

The ascertainment of the shares in the beneficial interest in property held in their joint names by an unmarried couple who contributed to its acquisition, is based on the same principles applicable to married couples (***Bernard v Josephs*** (1982) 3 All E.R. 162). In the latter case, the factors to be taken into consideration in determining the respective shares were noted. Lord Denning, M.R., at page 166, said:

> "As between husband and wife, when the house is in joint names and there is no declaration of trust, the shares are usually to be ascertained by reference to their respective contributions, just as when it is in the name of one or other only. The share of each depends on all the circumstances of the case, taking into account their contributions at the time of acquisition of the house, and, in addition, their contributions in cash, or in kind, or in services, up to the time of separation. In most cases the shares should be ascertained as at that time. But there may be some cases where later events can be considered. The departing party may only be entitled to one-half, one-quarter or even one-fifth, depending on the contributions made by each and, I would add, all the circumstances of the case."

A mere recital that the legal estate is held by the parties as tenants in common is not determinate of the proportionate share of each party in the beneficial interest. A presumption arises that it is held in equal shares but the particular circumstances of the case must be considered.

I agree with Forte, P. that the appellant's reliance on the case of ***Goodman v Gallant*** [1986] 1 All E.R. 311, is unhelpful to the appellant. In that case, both parties as "purchasers" provided the purchase monies, and in

addition, the conveyance contained an express clause, as to their beneficial interest namely:

> "The Purchasers hereby declare as follows:
>
> (a) the Purchasers shall hold the property UPON TRUST to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and net rents and profits thereof until sale UPON TRUST for themselves as joint tenants;"

although the legal estate was held by them as joint tenants. The interests were here clearly spelt out.

The Law of Property Act 1925 in England converted all legal estates held as tenants in common, into joint tenancies on trust for sale as to the beneficial interest (sections 34 and 36) Despite that, the trust for sale thereby created does not determine in what proportion the beneficial interest is held on severance. Slade, L.J. at page 314 said:

> "However, sections 34 to 36, while importing a trust for sale in certain cases where it would not otherwise have arisen, are designed merely to simplify the mechanics of conveyancing. They have no effect whatever on the nature and extent of the respective beneficial interests in the proceeds of sale of the several persons interested."

In Jamaica, there is no such corresponding statutory provision, as those sections of the *Law of Property Act 1925 (England)*. *Parties* may still hold the legal estate as tenants in common and there is no automatic holding as joint tenants of the legal estate thereby. Neither is there any

"trust for sale" created as to the corresponding beneficial interest. Accordingly, in the absence of an express agreement orally or documentary, the proportionate share of parties in the beneficial interest in property held by them as tenants in common in the legal estate must be determined on the particular facts of the case.

The contribution of a party to the acquisition of the property is a significant factor in determining that party's share in the beneficial interest: (See ***Pettitt v Pettitt*** [1969] 2 All E.R. 385 and ***Gissing v Gissing*** [1970] 2 All E.R. 780). In ***Goodman v Gallant*** (supra) Slade, L.J. relying on the dictum of Lord Upjohn at page 406 in ***Pettitt v Pettitt***, (supra) elaborated on this theme. On page 314, he said:

> "... a person who claims to have contributed to the purchase price of property which stands in the name of himself and another can rely on the well-known presumption of equity that a person who has contributed a share of the purchase price of property is entitled to a corresponding proportionate beneficial interest in the property by way of implied or resulting trust..."

The tenancy in common in the beneficial interest, in property held by parties as tenants in common as to the legal estate, is therefore presumptively held in equal shares in equity. This presumption, like all presumptions, except the irrebuttable presumption, may be displaced by the facts of the particular case. If a party contributes nothing he can claim nothing.

In the instant case, no presumption of a gift arises. The learned trial judge found, as he could on the evidence, that the appellant contributed

nothing to the initial acquisition of the property, he paid nothing by way of notice payment and his name was placed on the Title at the insistence of the mortgage company, in order to facilitate the respondent due to the deficiency in her earnings then.

This insistence by mortgage companies in having placed on the title to the legal estate the name of someone who is merely assisting the true owner to obtain financing for the purchase has caused continuing difficulties, in circumstances such as the instant case. Perhaps the provisions of section 535 of the Judicature (Civil Procedure Code) Law, in force prior to January 2003, which read:

> **"535.** Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out as of course an originating summons, returnable in Chambers, for such relief of the nature or kind following as may by the summons be specified, and as the circumstances of the case may require, that is to say, -
>
> Payment of moneys secured by the mortgage or charge;
> Sale;
> Foreclosure;
> Delivery of possession (whether before or after foreclosure) to the mortgagee or person entitled to the charge, by the mortgagor or person having the property subject to the charge or by any other person in, or alleged to be in possession of the property;
> Redemption;
> Reconveyance;
> Delivery of possession by the mortgagee."

should be seen as sufficient to protect the interests of mortgagee, mortgagor and the third person who assists in financing. Such an assisting third person may be, in some circumstances, an equitable mortgagee, who is adequately protected, without any resort to a compulsory inclusion of his name on the title to the legal estate.

I would dismiss the appeal.

SMITH, J.A.: (Dissenting)

I have the severe misfortune to differ from my learned brethren the President and Harrison, J.A. This appeal concerns the rights of parties who hold a registered title in fee simple as tenants in common. The appeal is by the defendant Mr. Robert Stephenson from an order of Theobalds J made on the 14th April, 2000.

The learned judge had before him a Writ of Summons by which the plaintiff/respondent sought against the defendant/appellant a declaration that she was the sole beneficial owner of land located at 4 Winsome Avenue, Meadowbrook Estate and registered at Volume 1097 Folio 737 of the Register Book of Titles. The learned trial judge granted the declaration sought and made consequential orders.

The parties met in the late 1960's. Their relationship which produced three children, ended in 1985.

In April, 1981, the property in question was purchased and conveyed into the names of both parties as tenant in common. A copy of the title was shown to the court. The parties gave divergent accounts as to the circumstances of the purchase. It is the contention of the plaintiff/respondent, Miss Carmelita Anderson that she negotiated a mortgage from Victoria Mutual Building Society to purchase the said property. She said that in order to qualify for the loan she asked the defendant/appellant to join her as a co-mortgagor. The defendant, she

said, had never made any monetary contribution or otherwise to the acquisition of the house or to the repayment of the loan.

The defendant/appellant, on the other hand, claimed that at all material times it was the intention of the parties to purchase and own the property jointly. He asserted that it was never intended or agreed that it should be owned by the plaintiff/respondent solely. He contended that he made substantial contributions toward the deposit and mortgage payments.

The learned trial judge rejected the contention of the defendant/appellant, ~~accepted~~ ~~the~~ ~~plaintiff/respondent~~ as a witness of truth and granted the declaration sought.

The defendant/appellant filed some six grounds of appeal. However, the real issue is whether it is open to a judge to hold that the beneficial interest in property conveyed to two persons as tenants in common is vested in one of them only.

To answer this question the ownership of land as joint tenants and tenants in common must be examined. Section 65 of the Registration of Titles Act provides:

> "Two or more persons may be registered under this Act as joint tenants, tenants in common or coparceners of any land. In all cases where two or more persons are registered as tenants in common or as coparceners of any land one certificate for the entirety or separate certificates for the undivided shares may be issued; but in

> the case of persons registered as joint tenants, one certificate only shall be issued."

It must be remembered that unlike the situation in this jurisdiction, after the 1925 Law of Property Act a legal tenancy in common of land cannot exist in England. Thus, many of the English cases after 1925 are not relevant to the issue now before this court.

A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares or to use technical language "without words of severance" – see "Cheshire's Modern Law of Real Property" 11th Edition p. 328. From the point of view of their interest in the land the joint tenants are united in every respect – title, time, possession and interest.

If on the other hand the conveyance of land contains words of severance that is words showing an intention that the persons are to take separate and distinct interests (for example that they are to take "equally" or ("in equal moieties")the result is a creation not of a joint tenancy but of a tenancy in common (**ibidem**). The two essential attributes of joint tenancy are (1) the absolute unity which exists between joint tenants and and (2) the right of survivorship or **jus accrescendi** by which on the death of one joint tenant his interest passes to the surviving joint tenant. This intimate union does not necessarily exist in a tenancy in common. The tenants in common are united in their right to possession but their union may stop at that point, for they may each hold different

interests and they may each hold under different titles and acquire their interests at different times - p335 **ibidem.** Each has a share and his share is undivided in the sense that its boundary is not yet demarcated but never-the-less his right to a definite share exists.

The **jus accrescendi** principle has no application to tenancies in common, so that, when a tenant in common dies his share passes to his personal representatives and not to the surviving tenant in common. A co-tenant may sell his undivided share without the consent of the other co-tenant – see ***Leiba v Thompson*** [1994] 31 JLR 183.

It is important to bear in mind that unlike the common law, equity prefers the certainty and equality of a tenancy in common to the chance of "all or nothing" which arises from the right of survivorship - see ***Re Wooley*** [1903] 2Ch. 206 at 211. The maxim "Equity leans against joint tenancy" means that a tenancy in common would exist in equity not only in those cases where it would have existed at law, but also in certain other cases where an intention to create a tenancy in common ought to be presumed – see the Law of Real Property by Megarry and Wade Fourth Edition at p. 401. In this work the learned authors list three special cases in which persons who are joint tenants at law are compelled by equity to hold the legal estate upon trust for themselves as equitable tenants in common:

(i) Purchase money provided in unequal shares

(ii) Loan on mortgage

(iii) Partnership assets.

As has been mentioned, where the property is conveyed to the parties as tenants in common each tenant in common has a distinct share in the property; each has a separate interest; the only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them.

There is no doubt that where land is conveyed to persons as joint tenants, contributions to the purchase may be relevant, for example see ***Lynch v Lynch*** [1991] 28 JLR 8. The significance of such contributions was considered in ***Grant v Edwards*** [1986] 2 All E.R. 426. In that case an unmarried couple lived in a house which was registered in the name of only one of the parties. The other party claimed a beneficial interest in the property. To establish a beneficial interest in the property the claimant had to prove that there was a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. That in turn had to be demonstrated by a common intention evidenced at the time of purchase price that they should both have a beneficial interest. Where there is no direct evidence of a common intention the contributions of the parties to the purchase price are relevant. In this regard, Sir Nicholson Browne-Wilkinson VC stated that

contributions made by a claimant may be relevant for four different purposes:

(i) In the absence of direct evidence of intention, as evidence from which the parties' intentions can be inferred;

(ii) As corroboration of direct evidence of intention;

(iii) To show that the claimant has acted to his or her detriment in reliance on the common intention;

(iv) To quantify the extent of the beneficial interest.

In the light of the foregoing, I must now turn to the issue in this appeal. It may, I think, be conveniently posed in the following question: Can a judge quantify the extent of the beneficial interests of parties registered as legal tenants in common by having regard to their respective contributions to the purchase?

Miss Gillian Mullings for the appellant contended that the judge may not. She submitted that the learned trial judge misdirected himself in holding that he had the right to determine the rights of co-owners of property by the use of the doctrine of constructive trust regardless of what estate those co-owners held in the land. The authorities, she submitted, are conclusive that a tenant in common has a definite share in property and this definite share cannot be taken away by the court. It was not open to the judge to give one tenant in common the entire beneficial interest and nothing to the other.

She further argued that the size of the share of each tenant in common is fixed once and for all. The declaration on the title that they hold as tenants in common is conclusive that both parties own shares. The practice of this court, she contended, has been to give tenants in common equal shares unless the conveyance stipulates otherwise.

In argument she referred to ***Richardson v Richardson*** English Report Vol. LX 462; ***Fisher v Wiggs*** English Reports Vol. 88 p. 1332 , 1335 and 1336; ***Murray v Hall*** English Reports Vol. CXXXVII 175; Blackstone Commentaries p. 193; ***Goodman v Gallant*** [1986] 1 All ER 311; The Law of Real Property, Megarry and Wade 4th Edition; Cheshire's Modern Law of Real Property 11th Edition.

Mrs. Sharon Usim for the respondent submitted that whether the legal interest in the property is vested in the parties as tenants in common or joint tenants has no bearing in law as to how the court determines their beneficial interests in the property. The title, she contended, indicates what the legal interests in the parties are. Once the conveyance indicates that property is held by tenants in common the presumption is strong that they hold equal shares but that presumption is rebuttable if there is evidence to suggest otherwise. The fact that the title indicates a legal estate in both as tenants in common is not absolute. Mrs. Usim cited ***Bernard v Josephs*** [1982] 3 All E.R. 162; ***Lynch v Lynch 28*** JLR 8 to support her submissions.

In my view the submissions of Ms. Mullings, counsel for the appellant, are to be preferred. The cases relied on by Mrs. Usim do not concern a conveyance in fee simple to tenants in common. It must be remembered that in England since 1925 there can be no legal tenancy in common. The decisions in cases such as ***Bernard v Josephs*** (supra), ***Grant v Edwards*** (supra) and ***Goodman v Gallant*** (supra) must be read in the light of this fact. Also the decisions in this jurisdiction which relate to conveyance of property to persons as joint tenants such as ***Lynch v Lynch*** (supra), should, I think, be distinguished. Indeed, none of the decisions of this court which were cited in argument relate to a legal tenancy in common. In my research I have not been able to unearth a decision of this court in which the issue in question arose. In ***Harris v Harris*** SCCA No. 1 of 1981 unreported 30th July, 1982 Carberry J.A. made a passing reference to a legal tenancy in common. At p. 23 the learned Judge of Appeal said:

> "In this case the intention of the parties at the time of the transaction was reasonably clear. They contracted to take the house as joints tenants. The title a registered one, was issued to them as Tenants in Common. Nothing indicates other than that they meant not only that the wife should take an interest, but that interest should be an equal one".

In ***Leiba v Thompson*** [1994] 31 JLR 183 the issue was whether a tenant in common could sell a distinct part of the property as sole owner. The Court held that each co-tenant could contract to sell his undivided

share without the consent of the other co-tenant. However, where the interest of a party is in an undivided share of the entire property he may not contract to sell three quarters (¾) of an acre for he has no interest in the property which may be quantified as three-quarters (¾) of an acre; had he contracted to sell his undivided share then the sale would have been valid.

A factual situation similar to the instant case arose in ***Muschinski v Dodds*** [1986] 160C.L.R. 583. In that case an unmarried couple purchased land by contract ~~under which they~~ were both liable. The woman paid the price of the land from her own funds ~~and agreed~~ to include the man's name on the title if he undertook to renovate the cottage and pay for a pre-fabricated house. The land was transferred to them as tenants in common in equal shares. The parties separated without the cottage having been renovated or the house acquired. The woman claimed the sole beneficial ownership of the land.

The High Court of Australia held that the presumption of resulting trust arising out of the provision by the woman of the whole of the price was rebutted. It was rebutted on the basis that the evidence pointed to an intention on the part of the woman to give the man a beneficial interest which was immediate and unconditional. It would seem that the Court did not attach any significance to the fact that the parties held the

property as tenants in common. The judges spent much time discussing resulting and constructive trusts. However, the Court did hold that:

> "There was no place in Australian Law for the notion of a constructive trust which was imposed by law whenever justice and good conscience required. Proprietary rights fell to be determined by principles of law and not by some mixture of judicial discretion, subjective views about which a party ought to win or the formless void of individual moral opinion."

Notwithstanding the approach of the High Court of Australia in the above case I am unable to accept that the principles of law which determine proprietary rights permit a judge to invoke the doctrine of constructive, resulting or implied trust with a view to depriving a tenant in common of his interest in land.

As a general rule the legal estate in land prima facie carries with it the whole beneficial interest. The law is settled that a party in whom the legal estate is not vested can establish a beneficial interest only if he can show the existence of a trust.

Where the legal estate is vested in two or more persons as joint tenants there is a presumption of fact that the beneficial interest is held in equal shares. However the authorities clearly show that this presumption may be displaced if it is shown that the common intention was otherwise. But when property is vested in persons as tenants in common in fee simple such a conveyance indicates a common intention at the time of acquisition that the parties were each to take a distinct share in the

property. In such a case the words "tenants in common" constitute a declaration of intention. In my view such a declaration of intention would give rise to a presumption in law, **presumptio juris et de jure,** that the common intention of the parties was that the legal owners should also be the beneficial owners. Such a presumption is conclusive and evidence is not admissible to contradict it.

If the parties had intended otherwise they would take the property as joint tenants. As joint tenants there would be not only unity of possession, but also unity of interest, unity of title and unity of time. Also the right of survivorship would apply. One could not sell his interest without the co-operation of the other. However, as tenants in common there is only unity of possession. There is no unity of title, time or interest. Tenants in common may have quite separate interests acquired at different times, they each may hold under separate titles. In ***Fisher v Wiggs*** (supra) at p.1336 it was said that:

> "Though tenants in common have several freeholds and joint tenants but one yet it is to be understood, that tenants in common have several freeholds but undivided and joint tenants have one undivided freehold".

Section 65 of the Registration of Titles Act recognises the separate titles of tenants in common.

A tenant in common may sell or other-wise dispose of his undivided interest without the consent of his co-tenant. He may also mortgage that

interest in which case the other co-tenant may never recover that land though he may be able to recover money. Further a co-tenant may die in which case the interest passes to his/her personal representatives. It would therefore be inconsistent for a person who intends to be the only beneficial owner to register someone else as tenant in common since there are so many imponderables that could make that intention impossible in reality.

The following quote from Challis Law of Real Property (3rd Edition p. 368) in my view aptly describes such tenancy:

> "A tenancy in common, though it is an ownership only of an undivided share is for all practical purposes, a sole and several tenancy or ownership; and each tenant in common stands, towards his own undivided share in the same relation that, if he were sole owner of the whole he would bear towards the whole."

Would a person who did not intend that another should have a beneficial interest in the property agree to have the property registered in their names as tenants in common? I think not. In my view a conveyance to persons as tenants in common indicates a binding common intention that the persons should be legal and beneficial owners of their separate shares. Such a title is direct evidence of the common intention and the question of constructive, resulting or implied trust does not arise. There is nothing in the evidence to suggest that the choice of tenancy in common was not informed and deliberate on the part of the parties.

The registration of the property as a tenancy in common is material in the determination of the common intention at the time of acquisition. As was said by Hardie Boys J in ***Gormack v Scott*** [1995] 13 FR NZ 43 at p. 49:

> "The nature of the interests that were registered must always be a strong indicator of expectations if not intentions".

I am clearly of the view that the learned trial judge fell into error when he held that it did not matter whether the parties were joint tenants or tenants in common. In so holding he treated the matter as if he were dealing with one title when he was really dealing with two freeholds: See ***Murray et al v Hall*** (supra).

I am also of the view that the learned trial judge had no jurisdiction to deprive a registered tenant in common of his beneficial interest in the property. By registering the property in their names as tenants in common, the appellant was not merely adding a name for convenience but was adding the important declaration that they held "several freeholds" with all the incidents of a tenancy in common. Such an endorsement on the Certificate of Title in my view, is conclusive of their position unless or until the conveyance is set aside or rectified. In those circumstances the trial judge, in my view had no power to invoke the doctrine of constructive, resulting or implied trust with a view to depriving the appellant of his interest. I may add here that s.153 of the Registration

of Titles Act provides the procedure for the cancellation or rectification of the Certificate of Title in cases of error or mis-description.

I agree with Ms Mullings that unless there is a stipulation to the contrary co-owners who hold land as legal tenants in common hold same in equal shares. Any stipulation stating otherwise must be made at the time of the conveyance. If there is no such stipulation it is conclusive that the legal tenants in common hold the property in equal shares.

Finally, I would venture to think that there is merit in the contention of counsel for the appellant that the contention of counsel for the respondent if correct would nullify the distinction between joint tenancy and tenancy in common and would create great uncertainty in the law.

For the above stated reasons I would allow the appeal and set aside the orders of the judge below.

ORDER

FORTE, P:

By a majority, appeal dismissed. Judgment of the court below affirmed. Costs to the respondent to be taxed if not agreed.