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JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 27/81

BEFORE: THE HON. MR. JUSTICE ZACCA - PRESIDENT
THE HON. MR. JUSTICE ROWE, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN: DORRETT TROUTH - PLAINTIFF/APPELLANT

A N D: MAURISTON TROUTH - DEFENDANT/RESPONDENT

Mr. Horace Edwards, Q.C., and Mr. H. Harris for the appellant.

Mr. David Muirhead, Q.C. and Dr. Adolph Edwards for the respondent.

November 9, 10, 11 and 30, 1981.

CAMPBELL, J.A. (AG.):

The appellant by an Originating Summons dated the 17th day of June, 1975 sought declarations against her husband the respondent under the Married Women's Property Act in respect of:

(a) Landed properties being Lot 19, Belvedere Road, Forrest Hills, Saint Andrew, registered at Volume 586 Folio 39 of the Register Book of Title, and Lots 47 and 48 Cadastral No. 98 in the parish of Saint Hubert, Quebec, Canada.

(b) Certain furniture and household appliances in the premises at Lot 19 above.

The reliefs sought in her said Originating Summons as elaborated in her supporting affidavit were:

(a) An order declaring that she is beneficially entitled to one half undivided share in Lot 19, Belvedere Road, Forrest Hills registered at Volume 586 Folio 39.

(b) An order declaring the value of the said property and for the payment to her of her due share or alternatively that the property be transferred to her and the respondent as joint tenants.

(c) An order declaring that she is beneficially entitled to the fee simple in Lots 47 and 48 in the parish of Saint Hubert, Quebec, Canada.

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(d) An order declaring that she is solely entitled to the furniture and household appliances which she brought from the U.S.A. in November 1967.

The Originating Summons was heard on the 4th, 5th, 8th and 9th December, 1975 by Vanderpump, J. who on 25th May, 1976 gave judgment declaring that the appellant:

(a) Is beneficially entitled to one-third share in the property known as Lot 19, Belvedere Road, Forrest Hills.

(b) Is beneficially entitled absolutely to Lots 47 and 48 Cadastral No. 98 in the parish of Saint Hubert, Quebec.

(c) Is entitled solely to the furniture and appliances now in her possession valued at $3,200 being furniture and appliances which she brought from the U.S.A. in November, 1967.

In regard to (b) the respondent made no claim to any beneficial interest. He had paid only the last amount of $329 of the purchase price of $3,361 Canadian. The title to the lots was in both their names but he expressed his willingness to execute all necessary transfers to have his name removed from the title when called upon by the appellant to do so.

In regard to (c) the respondent also made no claim.

Issue had accordingly been joined only in respect of the property described as Lot 19; whereas the appellant was claiming one half share beneficial interest, the respondent contended that she was entitled to a beneficial interest only to the extent of her financial contribution which he stated was $4,700.

The primary facts established from the affidavits and oral evidence were that the appellant and the respondent both then divorcees with children from their respective earlier marriages, were married in New York, U.S.A. on 27th August, 1966. The appellant is a State Registered Nurse and the respondent a Medical Practitioner. They had met in Jamaica a few years before, became friendly, fell in love and remained so even after she had gone to reside in the U.S.A. since about 1964.

On Christmas eve, 1965 the respondent in an overseas

telephone conversation with the appellant informed her that he had found a lot namely Lot 19 Belvedere Road, Forrest Hills; further that as they were planning to get married he proposed purchasing the said lot for both of them and to start building the matrimonial home thereon. He further informed her that the purchase price was £2,050 and that he could have a mortgage of £1000 on the lot if he was able to make a down-payment of £1,050. He likewise informed her that he had paid down £500 and asked if she could provide £500 being roughly the other half of the down-payment which if she could, he would find the extra £50 and complete the down-payment.

She agreed and caused to be paid over to him in early January 1966 the sum of £500 and the lot was acquired in the name of the respondent only.

On 18th January 1967, the respondent disclosed to the appellant, who was now married but still in the U.S.A. that he intended looking for an already constructed house in a suitable locality for purchase using for this purpose the proceeds of a contemplated sale of their lot as an alternative to building the matrimonial home on the lot. He disclosed however that everything depended on his being able to reduce considerably the mortgage on the lot as a condition precedent to successfully negotiating a loan for implementing whichever plan he ultimately decided upon.

Before the end of January, 1967 the appellant no doubt in response to this letter, dispatched to the respondent U.S. $3,000. The respondent used a part of this sum to clear the balance of the mortgage on the land. The appellant visited Jamaica in July, 1967 and gave the respondent a further U.S. $800. She finally returned home in November, 1967 bringing with her furniture, electrical appliances, refrigerator, stove, washing machine and a stereo all to the value of $3,200. These furniture, appliances and equipment were purchased from the appellant's savings and were intended by her as an indirect contribution to the construction of the matrimonial home.

The construction of the matrimonial home began in March, 1968 and was completed in October, 1968. The appellant had returned home pregnant and remained at home until January, 1969 when she started working at Meads Johnson Jamaica Limited earning £14 a week. During the time that the appellant was unemployed at home she was given $30 a week for household expenses while the respondent, in addition to paying the mortgage instalments and other expenses in connection with the house then under construction, paid the rent and all extra household expenses in respect of a house on Elizabeth Avenue, Saint Andrew where they resided. He continued to give her this $30 a week even after she was employed. The appellant, out of her earnings and private loans carpeted the living and dining rooms of the matrimonial home and bought additional furniture all totalling $2,335.

In addition the appellant spent at least $20 a week of her own money towards the house-keeping for their joint benefit. The respondent admitted that her direct and indirect contribution to the matrimonial home was substantial. He however disputed her contention either that she contributed to or met the bulk of the household expenses or that such as she did contribute was by way of contribution to the construction costs of the matrimonial home.

The learned trial judge from these primary facts which he accepted made specific findings as hereunder:

1. There was an understanding between the parties arising out of the conversation between them on Christmas eve, 1965 at a time when they were yet unmarried that the land then proposed to be acquired would be transferred in both their names. It was because of this understanding that the appellant caused to be paid to the respondent the first £500 which roughly represented half the down-payment. He however made no specific finding that the understanding that the transfer was to be in both their names meant that they were to share the beneficial interest equally.

2. The use by the respondent of the words "our favourite plan" and his need for "participation" in his letter to the appellant in December 1965 soon after the Christmas eve conversation referred unequivocally to the

purchase of Lot 19 and the building thereon by both of them jointly of the matrimonial home, to achieve which, he needed her contribution direct and indirect.

3. The subsequent letter of the respondent to the appellant in January, 1967, disclosing his plan either of purchasing a house in a suitable locality utilising therefor the proceeds of sale of their lot or alternatively of building on the said lot equally referred to the joint venture upon which they were agreed and upon which they were embarking namely the acquisition of a matrimonial home either by purchase or construction for the achievement of which the appellant should continue to make the great sacrifice of remaining in New York to earn money to contribute to the project.

4. Both spouses contributed towards the building of the matrimonial home from the very outset, the appellant by making direct payment to the respondent and indirect payment to the extent of the furniture, appliances and equipment purchased and the cost of carpeting borne by her. The learned trial judge in this regard, while accepting that the appellant used her money for their joint benefit by spending at least $20 a week towards the housekeeping, made no finding that this expenditure constituted in the circumstance qualifying expenditure referable to the joint venture on which they were engaged. I think the learned judge was right because in the light of the respondent's own contribution to the household expenses which he at no time reduced, the more reasonable inference to be drawn from the wife's contribution was a desire on her part to share in the day to day household expenses without any expectation that such expenditure would create any additional beneficial interest in the matrimonial home.

5. The house was constructed at a cost of $28,000 of which the parties contributed $15,000 and obtained $13,000 on mortgage. The appellant for her part contributed by direct payment to the respondent the sum of $2,040. She made additional indirect contribution totalling $5,335. The respondent in addition to his direct contribution, thereafter met the mortgage instalments, rates, taxes and insurance on the house. Their respective contributions were made pursuant to a joint enterprise with the common intention that both should share in the beneficial interest in the property.

The appeal before us is concerned principally with the share of the beneficial interest to which the learned judge adjudged

the appellant entitled.

Ground 1 which is the main ground of appeal is as follows:

> "That the learned judge having found, as he did in several passages, that there was an understanding between the husband and wife that the title to the property should be in both their names, and that the building of the matrimonial home was a joint enterprise, to which they both contributed, with the common intention that both should share in the beneficial interest, and that the wife acquired a beneficial interest therein, it was not open to him to find as he did: 'I therefore impute a trust in which the defendant is to hold the premises for them both jointly and that a fair division in all the circumstances should be as to 2/3 to the husband and 1/3 to the wife.'
>
> The learned trial judge should have given effect to his findings as to the parties' intentions and found that the wife was entitled to a half share therein."

This ground of appeal is based in my view on the assumption that once there is a finding of a common intention that property acquired through the contribution of spouses was to be transferred into their joint names, this not only creates a trust of the beneficial interest in the hand of the spouse in whom the legal estate is vested, but additionally and without more, necessarily, inevitably and automatically establishes equality of shares in the beneficial interest in favour of the spouses.

While this assumption may have had some legal foundation prior to 1970 by invoking the concept of "family assets", the true legal principles governing the establishment of a trust of the beneficial interest in property in favour of a person in whom the legal estate is not vested, whether based on express agreement or implied from conduct, and the apportionment of shares in the said beneficial interest are now clearly laid down in Gissing v. Gissing (1970) 2 All E.R. 780 (H.L.).

Mr. Edwards submitted before us that since the evidence in this case established the existence of an agreement or understanding between the parties, contemporaneous with the acquisition of the land

namely that it was to be transferred into both their names, and that the common intention was to build the matrimonial home as a joint venture or joint enterprise, and that the appellant made substantial contribution to this joint venture, the inevitable legal consequence followed namely that she not only acquired a share in the beneficial interest but also that her share must be determined as being one half.

Considerable reliance was placed by Mr. Edwards on Smith v. Baker (1970) 2 All E.R. page 829 the facts of which culled from the judgment of Lord Denning, M.R. were as follows:

The husband and the wife were married in 1957. They had been courting for five or six years before marriage and they had been saving up. The wife had a goodly sum in her savings account. They wanted to build their own house. They bought a plot of land in 1958 for £95 of which most was the wife's money. The plot was conveyed into the husband's name. They built a bungalow on the plot as a matrimonial home. They did not employ a building contractor. They did much of the work themselves buying material and employing labour. The wife gave up her own work and earning of £10 a week for fifteen or sixteen months solely to help with the building operations, which help she gave throughout the period during which the house was being built. The husband's mother provided £2,500 for buying material and employing labour. This sum the husband's mother intended for her son's benefit but she was equally happy that her daughter-in-law would benefit indirectly. After the house was completed a loan of £1000 was obtained on mortgage upon it. Some of the loan was used for a holiday, some to pay for a car and the balance of £400 was put into a joint account at a bank which was opened for the husband and wife.

The marriage unfortunately broke up. A Summons was taken out by the wife before the registrar under Section 17 of the Married Women's Property Act, 1882 (iusdem generis our Section 16) and she was on the above facts adjudged entitled to a half share in the house. The wife died intestate before the registrar's order could be

drawn up. In the mean while the husband appealed against the registrar's decision and made the administrators of the deceased wife the respondent. The appeal was dismissed by the Court of Appeal.

I surmise that in relying on this case, Mr. Edwards was not seriously contending that the facts therein were substantially similar to the case before us. Reliance was placed on this case, in my view, because of the views expressed by the learned judges of appeal as to what should be the approach in determining the shares of spouses in property in relation to which there is a dispute between them.

Lord Denning, M.R. dealing with the issue whether the wife acquired an interest in the equitable estate said at page 828:

> "In all these cases, the first question is: was this a matrimonial home acquired by their joint efforts, intended to be the home for them and the children (if they had any) for the future as far as they could see? The answer here is clear. This home was acquired and built by the joint efforts of both of them as a continuing provision for the future. Each contributed a great deal in time and money. It was a joint enterprise. The wife contributed money for the plot, and money's worth for her part in the building operations. The husband contributed by his work and his mother by £2,500. Their subsequent dealing throws a light on it. They raised money for their joint purposes and put the balance into a joint account. The registrar put it quite succinctly when he said:
>
> > 'It is quite clear that the parties "pooled" their income and, in my view, there was a general atmosphere of joint ownership to the income and capital of the parties.'
>
> I think that the registrar directed himself quite rightly. This house was acquired by the joint efforts of both: it was joint property although in the name of the husband only."

Turning to the question which is more apposite to the one before us namely the apportionment of shares Lord Denning on the same page said:

> "The remaining question is: in what proportions? In most of these cases the parties do not get down to proportions. It is impossible to say what they would have agreed about it if they had thought about it. In the absence of any clear division the only course that the court can take now, as it did before Pettitt v. Pettitt, is to

say that it should be half and half."

Widgery, L.J. at page 829 said:

> "To my mind there are really three essential points in this case. One starts with the fact that the legal title to the house is in the husband; but it is common ground between parties in argument before us that some agreement whereby the wife acquired some beneficial interest is clearly established in this case. That being so, the only remaining question is: what share should be attributed to her? Should an attempt be made nicely to calculate what her share ought to be having regard to the amount that she put into the cost of the site and the value of her work subsequently, or ought one to approach the matter on the broader basis that the husband and wife are jointly entitled to the property, treating it not as being the subject of a mathematical division but as 'ours'? In cases where their own understanding of the situation would be that the property is 'ours' then the conclusion ought to be that they have equal beneficial interests in it." (underlinings mine).

Karminski, L.J. at page 829 said:

> "The most interesting and perhaps the most difficult point in this appeal is the question of proportion to which both Lord Denning, MR and Widgery LJ have referred. Applying, I hope some measure of reality to what happens when a marriage is entered into and a home is bought, the spouses are creating a home for themselves and probably, they hope, for a family. Nice questions of division are not applicable. In this kind of case where the means of the parties though considerable are somewhat limited, if they were asked the question at the time of the marriage: 'To whom does the home belong?' I agree with what Widgery LJ has just said, that the answer would undoubtedly be: 'Ours'. 'Ours' therefore, implies no mathematical apportionment; but if they were pressed for an answer they would almost undoubtedly say: 'Ours', of course, equally."

As I understand the views expressed by the learned judges of appeal, they are that because of the special relation of husband and wife, when they acquire property such as a matrimonial home, this manifests an intention to make a continuing provision for their future. If the spouse to whom the legal title to the property is not conveyed, does make substantial financial contribution direct or indirect towards the acquisition, such acquisition is conceived as being a "joint venture" or a "joint enterprise" creating "joint property."

Proof of this joint venture or joint enterprise is sufficient not only to create an implied resulting or constructive trust of the beneficial interest in favour of the spouse in whom the legal title is not vested but is also sufficient to establish the share to which the said spouse is entitled, because once it is found that the parties had the understanding that their endeavour constituted a "joint effort" or a "joint venture" or a "joint adventure to create joint property" which is "ours" they must be presumed to have had the common intention of sharing equally in the property. This presumption derives from the special status of marriage.

Mr. Edwards, it appears to me, places considerable reliance on these views expressed by the learned judges of appeal. If I understand him correctly, he is saying that the appellant having paid roughly half of the down-payment on the land on the understanding that both their names would be on the transfer, and having contributed substantially though not equally towards the building of the house in circumstances where the respondent had referred to their endeavour at the time of acquisition of the lot as "our favourite plan", the use of the word "Our" as opined by Widgery, L.J. and Karminski L.J. does mean sharing equally in the crystallised plan.

Mr. Muirhead's submission in answer thereto is that while he does not dispute the correctness of the decision on the facts in Smith v. Smith (supra) reliance cannot be placed on the views expressed by the learned judges therein in so far as they treated "spouses" as special. The case was decided before Gissing v. Gissing (supra) which in laying down the principles applicable to the determination of disputes between spouses over property jointly acquired by them, stated that such principles are equally applicable to the determination of property disputes between strangers. The implication flowing therefrom is that since expressions such as "joint venture", "joint enterprise", "joint property and "ours" do not aid in determining the proportionate shares of disputants who are strangers, they can be of no evidential value for similar purposes when the disputants are spouses. The only

relevance of the disputants being spouses is that greater difficulty will in general be experienced in endeavouring to quantify the financial contribution direct or indirect made by the respective spouses in the acquisition of the property due to the generally informal and imprecise accounting between them.

Mr. Muirhead further submitted that the learned trial judge having correctly applied the principles laid down in Gissing v. Gissing, to the facts found by him, his judgment and order apportioning 1/3 share to the appellant cannot and ought not to be disturbed even though he considers the apportionment over generous.

In Gissing v. Gissing the facts summarised by Lord Diplock at pages 793 and 794 are as follows:

> "The matrimonial home was purchased in 1951 for £2,695 and conveyed into the sole name of the appellant (husband). The parties had by then been married for some sixteen years and both were in employment with the same firm, the appellant earning £1000 and the respondent £500 per annum. The purchase price was raised as to £2,150 on mortgage repayable by instalments, as to £500 by a loan to the appellant from his employers and as to the balance of £45 and the legal charges was paid by the appellant out of his own money. The respondent made no direct contribution to the initial deposit or legal charges, nor to the repayment of the loan of £500 nor to the mortgage instalments. She however in 1951 when the house was purchased spent £190 on buying furniture, a cooker and a refrigerator for it. She also paid £30 for improving the lawn. She continued earning at the rate of £500 per annum until the marriage broke down in 1961. During this period the appellant's salary increased to £3000 per annum. The appellant repaid the loan of £500 and paid the mortgage instalments. He also paid the outgoings on the house giving to the respondent a housekeeping allowance of £8 to £10 a week out of which she paid the running expenses of the household and he paid for holidays. The only contribution which the respondent made out of her earnings to the household expenses was that she paid for her own clothes and those of the son of the marriage and for some extras. No change in this arrangement was made when the house was acquired. Each spouse had a separate banking account, the wife's in the Post Office Savings Bank and each made savings out of their respective earnings. There was no joint bank account and there were no joint savings. There was no express agreement at the time of the purchase or thereafter as to how the beneficial interest in the house should be held."

On these facts Buckley, J. held that the conduct of the respondent was "quite insufficient to support the contention that this is a case in which some constructive trust should be erected on the circumstances attending the purchase of the house as a result of which she would have some equitable interest in the property."

On appeal by the wife, the Court of Appeal (Lord Denning, M.R., Phillimore, L.J., Edmund Davies, L.J. dissenting) held that she was entitled to a half share in the house.

Lord Denning, M.R. in his judgment reported in 1969 Gissing v. Gissing, 1 All E.R. at 1046 said:

> "It comes to this: where a couple, by their joint efforts, get a house and furniture intending it to be a continuing provision for them for their joint lives, it is the prima facie inference from their conduct that the house and furniture is a "family asset" in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work and who stays at home. If they both contribute to it by their joint efforts the prima facie inference is that it belongs to them both equally: at any rate when each makes a financial contribution which is substantial."

The husband appealed. The House of Lords in allowing the husband's appeal stated, following its own decision in Pettitt v. Pettitt (1969) 2 All E.R. 385 per Viscount Dilhorne that the principle laid down by Lord Denning, M.R. cannot be regarded as good law.

The significance of Gissing v. Gissing (supra) lies not really in the allowing of the appeal which on the facts was clearly warranted but firstly in the opinions expressed by the House denying the existence of any special principle of law as being applicable to the determination of property disputes between spouses, and secondly in laying down the true principle of law on which any such claim to property is based irrespective of the parties.

Viscount Dilhorne at 785 said:

> "My Lords, in my opinion the decision in Pettitt v. Pettitt has established that there is not one law of property applicable where a dispute as to property is between spouses or former spouses and another law of property where the dispute is between others."

Lord Pearson at page 787 said:

> "But this appeal is not concerned with any such application. It is concerned solely with a property claim arising in the sphere of property law as distinct from matrimonial law, and contract law."

Dealing with the true legal foundation of a spouse's claim to a share in the beneficial interest in property the legal estate in which is vested in the other spouse, Viscount Dilhorne in agreeing with Lord Diplock's opinion thereon said at page 785:

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

Lord Pearson on this matter also said at pages 787 and 788:

> "I think it must often be artificial to search for an agreement made between husband and wife as to their respective ownership rights in property used by both of them while they are living together. In most cases they are unlikely to enter into negotiations or conclude contracts or even make agreements. The arrangements which they make are likely to be lacking in the precision and finality which an agreement would be expected to have. On the other hand, an intention can be imputed; it can be inferred from the evidence of their conduct and the surrounding circumstances. The starting point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust although it may be displaced by rebutting evidence. It may be said that the imputed intent does not differ very much from an

> implied agreement. Accepting that, I still think it is better to approach the question through the doctrine of resulting trusts rather than through contract law. Of course, if an agreement can be proved it is the best evidence of intention."

Dealing with the evaluation of the proportionate share to which a spouse is entitled once a resulting trust is raised on the evidence Lord Reid expressed himself thus at page 782:

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

Lord Pearson in the same vein said at page 788:

> "I think also that the decision of cases of this kind has been made more difficult by excessive application of the maxim 'Equality is equity.' No doubt it is reasonable to apply the maxim in a case where there have been very substantial contributions by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helful or right for the court to feel obliged to award either one-half or nothing."

Lord Diplock at page 792 also said:

> "I take it to be clear that if the court is satisfied that it was the common intention of both spouses that the contributing wife should have a share in the beneficial interest, and that her contributions were made on this understanding, the court in the exercise of its equitable jurisdiction would not permit the husband in whom the legal estate was vested and who had accepted the benefit of the contributions to take the whole beneficial interest merely because at the time the wife made her contributions there had been no express agreement as to how her share in it was to be quantified. In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse on which each must have

> acted in doing what each did even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. It is only if no such inference can be drawn that the court is driven to apply as a rule of law and not as an inference of fact the maxim 'equality is equity' and to hold that the beneficial interest belongs to the spouses in equal shares."

It is clear from the principles of law enunciated in the opinions expressed in Gissing v. Gissing (supra) that in the absence of a clearly expressed agreement covering both the basis on which property is acquired by spouses and the proportionate share of the beneficial interest therein to which each is entitled, their common intention in relation to these matters must be ascertained and given effect to by invoking the principles of law governing implied, resulting or constructive trusts. In invoking and applying these principles of law the principal consideration is the existence and quantum of financial contribution direct or indirect made by the spouse who is seeking to establish in his or her favour a resulting trust.

In the case before the learned trial judge there was no clearly expressed agreement establishing unequivocally the common intention of the parties in regard to the matrimonial home. The learned trial judge in drawing the correct inference that the acquisition of Lot 19 and the construction of the matrimonial home thereon was intended as a "joint effort", "joint venture" or a "joint enterprise" this being the reasonable inference to be drawn from the respondent's correspondence with the appellant, was under no illusion that expressions such as 'our lot' and 'our favourite plans' were singularly of no probative value in determining the proportionate share of the beneficial interest to which the appellant was entitled. What then were the primary facts which could be considered as sucficient indicators of a "probable common understanding" between the parties as to how the beneficial interest was to be shared? The request for a half share of the down-payment on the understanding that

the appellant's name would with the respondent's be on the transfer could mean that from the outset the respondent was indicating that the appellant would be a joint owner with up to a half beneficial interest provided she contributed substantially half of both the purchase price of the land and the construction cost of the matrimonial home built thereon. This was their favourite plan for which the respondent needed the appellant's "participation" which was neither impossible nor improbable provided she remained working in the U.S.A. at the higher salary available there albeit at great sacrifice to herself. In so far as she fell short of this contemplated participation it would not be unreasonable to infer that their probable common understanding equally encompassed a situation where she would get a proportionately reduced share. Her earnings and savings were never pooled as in Smith v. Baker from which an inference could be drawn that they contemplated equality in all assets acquired. The determination of her proportionate share was thus essentially a question of fact applying the principle enshrined in Gissing v. Gissing (supra). The learned trial judge quantified the direct contribution of the appellant towards the cost of construction of the matrimonial home in the amount of $2,040 and her indirect contribution in the amount of $5,335 making a total of $7,375. He accepted the evidence of the respondent that the cost of the matrimonial home was $28,000. Relating her contribution to the cost of the home as stated by Lord Pearson in Gissing v. Gissing (supra) page 788 this would give a little over a 1/4 share in the beneficial estate but much less than the 1/3 share adjudged to her.

Mr. Muirhead cited to us Falconer v. Falconer, 3 All E.R. (1970) page 449 being the first case heard by the English Court of Appeal after Gissing v. Gissing. I think the reason for his citing this case was to emphasize that the finding by the learned trial judge that the appellant spent at least $20 a week towards household expenses for the joint benefit of her and the respondent was not a finding which could be utilised in evaluating her contribution to the cost of the

matrimonial home because unlike in Falconer v. Falconer (supra) there was no finding that this sum or any part thereof contained an element of the mortgage instalments being paid by the respondent so rendering such housekeeping expenditure by the appellant referable to the construction cost of the matrimonial home. The submission though correct is of academic interest, because the learned trial judge did not in fact credit the appellant with such contribution and there is no appeal based on his having wrongly excluded this sum. Much of the further submission by Mr. Muirhead, erudite and analytical as it was, in seeking to justify the learned trial judge's apportionment based on the evidence as to contribution, appears to me to have been arduous work unnecessarily undertaken because the essence of this ground of appeal was that the learned trial judge having found that the parties were engaged on a "joint venture" should without more inevitably adjudge the appellant's share in this joint venture as being one half, even though her contribution could reasonably be quantified and even though it was appreciably less than half albeit substantial. This proposition as I have earlier shown was based on the presumption flowing from the concept of "family asset" which presumption has been effectively laid to rest in Gissing v. Gissing (supra)

The learned trial judge's approach to the apportionment was clearly right and the actual apportionment a fair and reasonable estimate based on the appellant's contribution direct and indirect to the construction of the matrimonial home. This ground of appeal accordingly fails.

Ground 2 of the Notice and Grounds of Appeal complains that the learned trial judge did not make clear the person who is to get the benefit of the deduction of $3,200, being the value of furniture, from the proceeds of sale of Lot 19 Forrest Hills prior to its apportionment. To understand this ground I set out hereunder the order of the learned trial judge so far as is relevant.

2. As to Lot 19 Forrest Hills, there will be a declaration that these premises are held on trust for sale by the husband and to be sold by him and the proceeds of sale after deduction of:

   $10,000 mortgage balance
   3,800 value of improvement
   3,200 value of her furniture

   i.e. after deduction of $17,000 from the sale price, the remainder is to be divided as to 2/3 to him and 1/3 to her.

3. Declaration that plaintiff is entitled solely to furniture and appliances now in her possession amounting to $3,200.00.

It is clear that, like the balance of mortgage which the respondent will have to pay off, and for which he should be put in funds to a like amount namely $10,000 out of the proceeds of sale, before distribution of the balance, so also he is to receive $3,200 from the proceeds of sale of the property to balance the value of the furniture and appliances which the appellant is ordered to have even though the value of these furniture and appliances had been treated as indirect contribution to the house in evaluating her share in the beneficial interest therein. The furniture and appliances now belong to the respondent as they notionally merged into the fabric of the building. As they are in fact in the possession of the appellant and since she wants to retain them, the respondent should be compensated for the loss of him of the said furniture and appliances. It may well be that the appellant could have been ordered to pay for these out of her own share of the proceeds calculated before deduction of this $3,200. In the form in which the order is made there could be merit in the argument that the appellant has obtained a double benefit and ought not to complain. There is no merit in this ground of appeal.

Ground 3 of the grounds of appeal complains that the learned trial judge in giving the respondent credit for $3,800 being improvement to the home, erred through misreading the evidence including the affidavit of the respondent. The pith of the complaint is that the cost of the improvement was $7,000 and not $9,000, consequently the value of the equity was $1,500 and not $3,800.

The learned trial judge made a finding as hereunder:

> "The addition to the house was provided solely by him, she made no contribution to that. I hold therefore that portion to be his. See Falconer (1970) 3 All E.R. 449, 450. The equity amounts to $3,800 (i.e. $9.000 less $5,200 owing, 52/H). This addition was commenced prior to his being informed of her caveat being lodged."

The reference by the learned trial judge to '52/H' meant paragraph 52 of the husband's affidavit which by its terms incorporated a valuation report, the relevant part of which is as hereunder:

> We value this premises as is, land and building in the amount of sixty thousand dollars (J$60,000.00), and prior to additions in the amount of fifty-one thousand dollars (J$51,000.00).

It is clear therefore that the learned trial judge in accepting the valuations of the land and building prior and subsequent to the additions found that the improvement by way of addition was $9,000.00 which figure he used in determining the respondent's extra equity in the home.

This ground of appeal like Ground 2 was not seriously argued, it fails as being without merit.

Ground 4 of the appeal complains that the learned trial judge in granting relief to the appellant ought to have ordered that her name be entered on the registered title to the matrimonial home. This was a relief sought by the appellant as an alternative to a declaration sought by her of the value of the property in dispute and the payment to her of her ascertained share therein. This her principal relief having been granted there can be no justifiable cause for complaint. This ground of appeal also fails.

In the circumstance and for the reasons given the appeal is dismissed with costs to the respondent to be agreed or taxed.

President,

I agree with the conclusion of Campbell, J.A. (ag.) that this appeal should be dismissed.

Rowe, J.A.,

I have read the judgment of Campbell, J.A. (ag.) herein. I agree with his conclusion that the appeal should be dismissed.