[2012] JMSC Civil 13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV O5708

BETWEEN	***ALANA GRAY***	***CLAIMANT***
A N D	***ALVIN CARLEY***	***DEFENDANT***

Mrs. Ingrid L. Clarke-Bennett & Mrs. Shanna Stephens instructed by Pollard, Lee Clarke & Associates for the Claimant.

Judith Cooper-Batchelor for the Defendant

Heard: 20th September, 3rd & 4th November 2011 & February 10, 2012

Coram: Anderson, K. (J.)

[1] This matter was brought before this Court by means of a Fixed Date Claim Form which was filed by the Claimant on November 4th, 2009. That Claim Form is supported by three (3) Affidavits as have been deposed to by the Claimant, as well as by an Affidavit which was deposed to by Andrea Reid. The first of these Affidavits was filed on November 4th, 2009 and was deposed to, before a Notary Public of the State of New York. The requisite certification that as at the date when this Affidavit was witnessed by Diana Collins, she (Diana Collins) was a Notary Public in and for the State of New York and that in such capacity she was then authorized to administer oaths in that state (New York), as is required by virtue of Section 22 (2) (c) of the Judicature (Supreme Court) Act, has been attached to the end of that Affidavit. There is a Supplemental Affidavit which was filed on September 27th, 2011 and which purports to have been

deposed to by the Claimant. There are however, problems with respect to this particular Affidavit and these are discussed below.

[2] In the Fixed Date Claim Form as filed, the Claimant sought, pursuant to Rule 8.6 of the Civil Procedure Rules, the following reliefs:-

1) A declaration that the property comprising all that parcel of land part of Ensom Pen in the parish of Saint Catherine being the Lot numbered 828 on the plan of Ensom Pen registered at Volume 1085 Folio 920 of the Registered Book of Titles, which is registered in the name of the Defendant is held by the Defendant in trust for himself and the Claimant as tenants-in-common holding as follows: Equal Shares of (50%) percent.

2) An Order that the Registrar of Titles rectify the Certificate of Title and Duplicate Certificate of Title registered at Volume 1085 Folio 920 of the Register Book of Titles to reflect the Claimant as a registered co-proprietor of the said property holding as tenant-in-common with the Defendant as follows:
50% to the Claimant, 50% to the Defendant or in such proportion as the Honourable Court may deem just in the prevailing circumstances.

3) An Order for the Defendant to recompense the Claimant for all expenditure undertaken by the Claimant in respect of the subject property for the purpose of maintaining, repairing, improving or otherwise discharging the obligations in relation thereto.

4) Alternately, that the Claimant's share in the property be adjusted upward to reflect the level of expenditure undertaken by the Claimant in respect of maintaining, repairing, improving or

otherwise solely discharging all obligations in relation to the subject property.

5) Further or other relief as this Honourable Court may deem fit.

[3] Arising from an ex parte Application which was filed by the Claimant on March 18th, 2010, Miss Justice C. Edwards (then Ag.) Ordered that – "Personal Service of the Fixed Date Claim Form and Affidavit in Support of Fixed Date Claim Form herein and all subsequent process on the Defendant be dispensed with and service shall be effected by registered mail to the Defendant's last known address at P.O. Box 7270, St. Croix, U.S. Virgin Islands, 00820-7270 and by two (2) publications of Notice of these proceedings in the St. Croix Daily News or the St. Croix Virgin Islands newspaper in the U.S. Virgin Islands." It was further Ordered then, that the first hearing of the Fixed Date Claim Form was adjourned to September 28th, 2010. That First Hearing was further adjourned on two more occasions, until it came before me for hearing on September 20, 2011.

[4] On that date when the matter came before me, an oral Application was made by counsel for the Claimant, for there to be granted, a variation of the Order vis-à-vis service of the Fixed Date Claim Form as had been made by Justice C. Edwards (then Ag.). It is to be noted that neither the Defendant nor any representative of the Defendant was present at the hearing before me on that date. A variation of this Court's earlier Order in terms of service of the Fixed Date Claim Form was then granted by me insofar as it was then Ordered that – "The publication of the notice of the Claim as made on May 14 and 28, 2010 by means of publication of same in the Virgin Islands Daily Newspaper shall stand as being in compliance with earlier Court Order requiring publication to have been made on those dates." Further, it was then also Ordered by me, that the – "Order of this Honourable Court as dated 19th April, 2010, requiring service of Notice of

Claim on the Defendant to be made via publication in the St Croix Virgin Islands Daily News or St. Croix Daily News be varied so as to instead require that such notice be published in the Virgin Islands Daily Newspaper."

An Affidavit of publication has been deposed to by the Attorney for the Claimant and same was filed on July 5th, 2010. That Affidavit refers to the publication on May 14th and 28th, 2010, of Notice of the hearing of the Fixed Date Claim Form herein, in the Supreme Court, on the 28th day of September, 2010 (this being one of the earlier scheduled first hearing dates). The respective publications were attached to that Affidavit.

[5] There were two further Affidavits filed by the Claimant one of which was filed on September 27th, 2010. Also, there was filed on September 19th, 2011 the Affidavit of Althea Reid (which was also filed on the Claimant's behalf). These Affidavits were all sent via registered mail to the Defendant's address in St. Croix, U.S, Virgin Islands, in accordance with the Court's earlier Order allowing for substituted service of all Court documentation upon the Defendant. The earlier Order was made by Master Simmons on March 5th, 2010.

[6] The Defendant did not, until long after the Closing Submissions of the Claimant in this case had been passed to the Court, file any Acknowledgement of Service. By the time that the same was filed by the Defendant, Judgment in this matter was reserved by this Court. That Acknowledgement of Service was filed on December 13th, 2011 and states therein, that the Defendant did not receive either the Claim Form or the Particulars of Claim, but that he intends to defend against the Claim and that he does not admit to any part of the Claim. To date however, no Defence in the form of an Affidavit in response/opposition to the Claim, has as yet been filed by the Defendant. Clearly, the Defendant through his counsel could have done this, albeit though it would have been

somewhat belated, as the Defendant is represented by Counsel and would have been able to review the Court file and make copies of documents on the Court file either through the Supreme Court registry or through consultation and collaboration in that regard, with the Claimant's counsel. In any event however, this has not been done.

[7] Thus, as this Court is empowered by Rule 27.2 (8) of the Civil Procedure Rules to do, in respect of Fixed Date Claim Form matters, I Ordered that this matter be tried at that First Hearing and disposed of summarily. Although the Court has, at the First Hearing of a Fixed Date Claim Form, all the powers of a Case Management Conference, this Court also has the power, in a Fixed Date Claim Form matter, upon a First Hearing, to dispose of the matter summarily, if the Claim is undefended or if the Court considers that the matter can be dealt with summarily. Accordingly, I Ordered that this matter be dealt with summarily, as, not only is it suitable for resolution by that speedy means, but also, it is an undefended Claim. Nonetheless, I Ordered the Claimant's counsel to file a Supplemental Affidavit on the Claimant's behalf, setting out therein, evidence of the value of the relevant property. I also Ordered that the Claimant was to file further Submissions specifically addressing therein, the calculation of the extent of the Claimant's interest in the relevant property. Both that Supplemental Affidavit and the Claimant's Submissions were to have been filed on or before September 27th, 2011 and the Claimant complied therewith. I have therefore considered both of these documents as well as the Fixed Date Claim Form and Affidavit of Claimant in support of Fixed Date Claim Form.

[8] I have referred, at paragraph 1 of this Judgment, to there being problems with the Supplemental Affidavit as purports to have been deposed to by the Claimant and which was filed on September 27th, 2011 – this pursuant to the Court's Order in that regard. This would be a convenient juncture at

which to address these problems, as by doing so it will enable the parties to understand what considerations have led to this Judgment.

[9] The 'Supplemental Affidavit of Alana Gray' as that document is headed, purports to have been an Affidavit deposed to by Alana Gray. That "Affidavit" though, has not been dated and purports, on the fourth (4th) page thereof, to have been signed to, on a date unknown, by Alana Gray, before a person whose title on the Affidavit is simply termed as – 'WITNESS.' Thus, this 'witness' although having signed the 'Affidavit' does not purport to be either a Justice of the Peace or a Notary Public, either in Jamaica or in any other country for that matter. There have been exhibits appended to this 'Affidavit' these being respectively, a Valuation Report for the relevant property, which is located at No. 22 Seaton Crescent, Ensom City, in the parish of Saint Catherine, as well as a Certificate of Title for said property, in addition to various reliefs and invoices pertaining to alleged expenditure on same by the Claimant. There exists no endorsement on any of these exhibits or any certificate attached to any of the same and of course therefore, the requirements of Rule 30.5 (4) of the Civil Procedure Rules have not at all been met. **Rule 30.5 (4) provides, in relation to documents to be used in conjunction with an Affidavit, that – "Each exhibit and bundle of exhibits must be – (a) accurately identified by an endorsement on the exhibit or on a certificate attached to it signed by the person before whom the affidavit is sworn or affirmed; and (b) marked (i) in accordance with Rule 30.2 (e) and (ii) prominently with the exhibit mark referred to in the Affidavit."** If that was the only problem with this "Affidavit", that would be bad enough, but apart from the exhibits referred to in that Affidavit not having been properly witnessed ("Certified") and marked, there are other problems. One of these is that the contents of that "Affidavit" were being deposed to in the presence of a Justice of the Peace, Notary Public or Magistrate. The Judicature (Supreme Court) Act at Section …thereof, requires an

Affidavit to be sworn to or affirmed before a Justice of the Peace, Notary Public or a Magistrate.

[10] Interestingly enough, there is more on this issue. After the jurat of that "Affidavit", there is a page in the 'Affidavit' which is headed – "JAMAICA S.S" and which purports to have been written under the signature of Jennifer M. Smith – Justice of the Peace for the parish of Kingston. Above the signature, there reads as follows – "Appeared before me at 4 Parkington Plaza, Kingston 10 in the parish of Saint Andrew on the 27th day of September, 2011 ANTHEA REID the attesting witness to this Affidavit, and declare that she personally knew ALANA GRAY the person signing the same and whose signature the said ANTHEA REID attested, and that the name purporting to be the signature of the said ALANA GRAY is her own handwriting that she was of sound mind and freely and voluntarily signed such affidavit." What this wording makes clear, is that ANTHEA REID is the attesting witness for this "Affidavit." ANTHEA REID'S purported signature does not appear either on any of the exhibits attached to this "Affidavit", nor on any certificate attached to any of the exhibits which are attached to this 'Affidavit.' In fact, as aforementioned, none of the exhibits attached to this 'Affidavit', carry with them, any certificate whatsoever. Furthermore, Anthea Reid does not purport to be a proper person in law who can witness an affidavit, that being either a Justice of the Peace or a Notary Public or a Magistrate. Added to this, is that this 'Affidavit' is undated as to when same was purportedly executed by ALANA GRAY in the presence of ANTHEA REID. Furthermore, it is also notable that in the body of this 'Affidavit', at paragraph 1 thereof, just as per her earlier Affidavit, Mrs. Gray suggests that her place of abode and postal address is 83 Ridge View Avenue, Yonkers, New York 10710, in the United States of America. Yet, unlike her earlier Affidavit which expressly purports to have been signed before a Notary Public of the state of New York, United States of America and has attached to it, below the

jurat, the certification of Luis Diaz, County Clerk and Clerk of the Supreme Court, Bronx County, New York, that Diana Collins, who is the attesting witness to that Affidavit, was at that time of taking the same a Notary Public in and for the State of New York, duly commissioned and sworn and qualified to act as such throughout the State of New York and that as such, she was duly authorized by the laws of the State of New York to administer oaths and affirmations. In addition, in this Certification, Mr. Diaz states that the signature on the annexed instrument' (which is the affidavit of ALANA GRAY) has been compared with the autograph signature deposited in Mr. Diaz's office and that Mr. Diaz believed the signature to be genuine. Mr. Diaz has affixed his signature to that certification. Furthermore, there has been attached as a separate page to each exhibit to that particular Affidavit, a similar certification from Mr.Diaz.

[11] In the circumstances, whilst this Court can and does accept not only the validity in law of that earlier Affidavit in support of the Fixed Date Claim Form, but also, that which had been deposed to in that Affidavit by ALANA GRAY, this Court cannot and does not accept the validity of the purported Supplemental "Affidavit."' That Supplemental Affidavit does not conform with the requirements of the applicable Rules of Court insofar as the exhibits attached thereto are concerned, or as to the laws of Jamaica, insofar as the witnessing of that Affidavit is concerned.

[12] Fortunately though for the Claimant and her Claim, the evidence as deposed to by the Affiant/Claimant in her latter "Affidavit" is in large part, the same as had been deposed to in her earlier Affidavit, except that, in an effort to comply with this Court's Order as had been made on September 21st, 2011, there was attached to that latter "Supplemental Affidavit", a Valuation Report pertaining to the relevant property, as had been prepared in 2006 by D.C. Tavares-Finson and Company. Unfortunately for this Claimant, this Court cannot and will not take the same into account

for the purposes of the Claimant's application. However, the evidence as deposed to by the Claimant in her earlier Affidavit, is accepted in full by this Court. This evidentiary matter having been addressed, I go on below to address the substantive issues surrounding the Claimant's Application.

[13] The Claimant's Application by means of Fixed Date Claim Form, seeks in the main, declaratory relief from this Court as to the share of property which is registered at Volume 1085 Folio 920 of the Registered Book of Titles, which is registered in the Registered Book of Titles and which comprises all that parcel of land, part of Ensom Pen in the parish of Saint Catherine, being the lot numbered 828 on the plan of Ensom Pen. In the heading of the Fixed Date Claim Form as filed by the Claimant, reference is made to Part 8.6 of the Civil Procedure Rules, 2002. That particular Rule of Court provides that – **"A party may seek a declaratory judgment and the court may make a binding declaration of right whether or not any consequential relief is or could be claimed."**

[14] Essentially, the evidence provided by Ms. Gray in her first Affidavit, when summed-up, is as follows:-

The Claimant and the Defendant were, in or around 1971, in a common-law relationship with one another. At that time, the parties agreed to seek to purchase property which was to be used for the benefit of themselves and their children. It was then agreed upon, orally as between themselves that they both would have been registered as proprietors of the property to be purchased, "holding as tenants-in-common in accordance with their contractual agreement."

By Instrument of Transfer dated January 1, 1972 and registered on June 12th, 1972; the property known as Lot 828, Seaton Crescent, Ensom City, in the parish of Saint Catherine, being all the land comprised in the Certificate of Title registered at Volume 1085 Folio 920 of the Registrar Book of Titles (hereinafter called "The subject property") was transferred

into the name of Mr. Alvin Carey. The certificate of Title for the subject property was appended to the Claimant's Affidavit as an exhibit. The purchase price paid for the subject property was $5860.00, of which $167.00 was paid by Alvin Carley (hereinafter called "the Defendant") and the remaining $5693.00 was, according to that which has been deposed to in paragraph 6 of the Claimant's Affidavit, advanced by the Bank of Nova Scotia and secured by a mortgage on the property. The Claimant has also deposed in paragraph 6 of her Affidavit to having pooled her resources with the Claimant in such a way as to have facilitated the Defendant in having made the said down payment of $167.00. The Claimant goes on to allege in her Affidavit, at paragraph 7 thereof, that it was agreed between herself and the Defendant, that they would both contribute to the mortgage payments and the maintenance and upkeep of the property and that it was always agreed as between themselves, that her name would be on the title for the said property as a tenant-in-common as to one half of the property. Shortly after the purchase of the subject property, the Claimant and the children of the Claimant and the Defendant began to live thereon. However, the Defendant migrated to St. Croix, U.S. Virgin Islands. The Claimant has, in her evidence, deposed to having paid, between October 1972 and June 1990, every instalment falling due under the mortgage, from her personal funds, until that mortgage was fully discharged in June, 1990.

[15] At this juncture, before proceeding further with the alleged facts of this matter, it is important to note three (3) things, these being that the Certificate of Title which has been appended to the Claimant's Affidavit as an exhibit, has recorded thereon, a single mortgage, which is numbered 241342 and which was registered on June 12th, 1972, from Alvin Carley (the claimant) to Ensom City Mortgage Society Ltd. in the sum $5693.00. Thus, the Claimant's evidence as to the identity of the mortgagee has been expressly contradicted by the Certificate of Title which has been

appended to her Affidavit. The Claimant deposed to the mortgagee being: Bank of Nova Scotia Jamaica Ltd., whereas in fact, the mortgagee was: Ensom City Mortgage Society Ltd. The Certificate of Title does indeed reflect that the said mortgage was discharged on September 5, 1990, albeit that the Claimant deposed to the same having been, "fully discharged in June 1990." (Paragraph 9 of her Affidavit). It is difficult to understand why it would have been, that if the Claimant had indeed, as she has claimed, been making payments of the mortgage sum for such a long period of time, of seventeen (17) years and nine (9) months), she would or could have been simply mistaken as to the entity that such payments were being made to. Secondly, this Court was initially gravely concerned about the fact that the Claimant provided no documentary evidence whatsoever in support of her claim, in an effort to prove that she was the person who, as she deposed to in her affidavit in support of Fixed Date Claim Form, solely made the requisite monthly payments under the mortgage, from her personal funds. This seemed, to this Court, at first blush, to be highly unusual, given the fact that the Claimant has exhibited various receipts, evidencing payments made by her towards the maintenance and repair of the subject property over a number of years, in addition to property tax receipts which evidence payments made by her, of property tax, with respect to the subject property. What is clear from all of the documentary exhibits appended to the Claimant's Affidavit in support of Fixed Date Claim Form is that the Claimant is an excellent keeper of records and also that she has, for a long time now, believed that it would be useful for her to keep such records. I considered in that context, that if there had been no reasonable explanation for the absence of such documentary proof of mortgage payments by the Claimant, then the outcome of this Claim may have been somewhat different. As it is however, such reasonable explanation has in fact been provided by virtue of an Affidavit of Alana Gray which was filed on September 19, 2011 and an Affidavit of Anthea Reid filed on same date. In those Affidavits, what

has been deposed to is that the Claimant paid all the mortgage payments due under the mortgage from her personal funds at the Duke Street branch of the Bank of Nova Scotia Jamaica Ltd., where the mortgage to complete the financing for the purchase of the subject premises was obtained. Further, the monthly payment was $55.00. The Claimant was given a booklet from which a leaf was taken each time she made a payment, leaving a stub in the booklet, stating the payment information. Upon having instructed her attorneys in this matter – Pollard, Lee Clarke and Associates, the Claimant states that she had then presented to the attorney at the time who had conduct of this matter, a black leatherette bag containing all of her mortgage payment booklet as well as receipts for renovation works, building materials, maintenance and upkeep of the premises. The Claimant, however, did not retain copies of any of the documents in that bag which she handed to the attorney-at-law. The Claimant further deposed that it was subsequently brought to her attention by her attorneys-at-law that the black leatherette bag could not be found, despite exhaustive efforts made by the attorneys' office to locate the same. Clearly though, some of the contents of that bag remained in the attorneys' office. This is why there were several receipts appended to the Claimant's affidavit in support of Fixed Date Claim Form, evidencing renovation works, the purchase of building materials - payments made for the maintenance and upkeep of the relevant premises; all of which go to show that these payments were personally made by the Claimant. Furthermore, the bank was not able to assist in providing copies of the lost receipts, because, as the Claimant was told by an officer of the bank, the bank's records in that regard would no longer exist, as the bank's records are not kept for more than five years. In any event though, it is clear to this court, for the reasons adumbrated at paragraph 14 of this Judgment, that the Claimant is clearly confused about the entity which financed the purchase of the relevant premises by way of mortgage. The source of that confusion, though, remains unclear to this Court. Nonetheless, the

Claimant's evidence as to the presentation of the mortgage payment booklet stubs to the Attorney having conduct of this matter at the time, is sought to be supported by Ms. Anthea Reid, who was, on the date when she swore to her affidavit, a secretary employed at the office of Pollard, Lee Clarke and Associates. Whilst she has given no evidence suggesting receipt of the relevant mortgage payment booklets by any member of staff of the law office where she once worked, she has suggested in her Affidavit that the attorney who had conduct of the matter who allegedly received those booklets, no longer has conduct of this matter at the firm. Ms. Reid has also deposed to there having been extensive searches conducted for the leatherette bag said to contain the mortgage payment booklets, but the same has not been found. What is unknown to this Court however, is whether the Attorney who previously had conduct of this matter at the firm is still employed in that firm, or whether any efforts were made to contact that Attorney to verify whether the mortgage payment booklets had in fact been received by him or her from the Claimant. At this stage therefore, this Court has only been left with the Claimant's evidence in this regard. It would undoubtedly have been helpful if further evidence in that regard had been provided, especially since the making of the mortgage payments by the Claimant is of necessity, such a crucial part of the Claimant's overall case as presented to this Court. Nonetheless, although left only with the Claimant's evidence as to the handing over to Pollard, Lee Clarke and Associates of the relevant mortgage payment booklets evidencing the payment by her of the sum of $55 each month towards the mortgage sum borrowed to enable the purchase of the relevant house, this Court is prepared to accept the Claimant's evidence in this regard, as not only does the same stand as being entirely uncontradicted to date, but also, otherwise appears credible. In fact, this is true for the entirety of the Claimant's evidence, which this Court accepts as being truthful, albeit undoubtedly, as stated above, mistaken as to the

entity to which the mortgage payments were being made each month and of course, as to the entity which granted the mortgage.

[16] The third matter of note at this time, is that there is reflected on the relevant Title, a Caveat No. 1283023 lodged on the 20th day of April, 2004 "by Alana Gray estate claimed equitable interest." This is of importance, although it is somewhat surprising that the Claimant has not at all referred to this Caveat, which was lodged by her, in her Affidavit. What the lodging of this Caveat by the Claimant does show though, beyond peradventure, is that the Claimant had, for some time now, at least from as of early 2004, recognized and been contending that she had an equitable interest in the subject property. In her Claim which is now before the Court and which was filed on November 4, 2009, the Claimant is claiming for her name to hereafter, by Order of this Court, be registered on the Title as joint and equal owner of the subject property, as tenants-in-common with the Defendant. It is being contended by the Claimant that she has an equitable interest in the subject property, arising both from her alleged agreement with the Defendant, as to whose names ought to have been placed on the Title for same, once the property was purchased, but also based upon expenditure incurred on the subject property, by the Claimant, using her personal funds. The veracity of her overall contention in this regard, is in this Court's view, supported by the caveat which the Claimant lodged in 2004.

[17] From the Claimant's evidence, what is clear, is that the only contribution towards the relevant property's purchase and for maintenance, as made by the Defendant, was the sum of $167.00 which was paid to the financial institution as the requisite deposit for the financing of the home's purchase co-mortgage funds provided by that institution. Whilst the Claimant has stated that she, along with the Defendant, pooled their resources to enable that deposit payment to be made, there is no evidence as to the

extent of each party's contribution to that alleged 'pooling' of resources. Thus, this Court will accept that the only extent of the Defendant's contribution to the home through the years, has been the payment of the sum of $167.00. The purchase price for the relevant property was $5860.00. Apart from the deposit, the remainder of the purchase price was paid by means of mortgage obtained through the Ensom City Mortgage Society Ltd. and that mortgage was discharged on the 5th September 1990. This is made clear from the abstract of title appended to the Claimant's affidavit in support of fixed date claim form, as an exhibit. Of course though, bearing in mind the interest on the mortgage which no doubt would have been paid by the Claimant over time, by means of her regular monthly payments from her personal funds and bearing in mind that she (the Claimant) would have solely maintained the relevant property through the years also been the sole person paying taxes in respect of same, it is clear that the Claimant's contribution vis-à-vis the relevant home, has been much greater financially than just her contribution to the payment of the principal sum borrowed under the mortgage.

[18] The Claimant has sought, in her Fixed Date Claim form as filed to have this Court make an order granting her 50% of the relevant home's value. In supplemental submissions as filed by the claimant, on September 27th 2011, the suggestion therein was made that 80% share ought to be granted to the Claimant. The Claimant however, in her Affidavit in Support of Fixed Date Claim Form, has not requested such (See paragraphs 14-16 of that Affidavit of hers, in that regard.) It is clear that the Claimant and the Defendant agreed that they would acquire the relevant property and each have a 50% share in same (See paragraphs 4,7,14,15 & 16 of the Claimant's Affidavit in Support of Fixed Date Claim Form, in this regard). Nonetheless, does the fact that the Claimant has not in her Fixed Date Claim Form, **specifically** requested that a greater share of the relevant

property be awarded to her by this Court, prevent this Court from Ordering same, if the equity and justice of the case so demands? Also, is the Claimant precluded, by virtue of her oral agreement with the Defendant, from acquiring any greater that a 50% share of the relevant property, this notwithstanding that she has made a far more significant financial contribution towards the purchase and maintenance of same, than the sum of 50%? These are questions which this Court must, of necessity answer and will do so, below.

[19] In answer to the first of the two questions set out by me at paragraph 18 above, it must be noted that although specifically having, in her Fixed Date Claim Form as filed, requested a 50% share in the relevant property, the Claimant has also sought – "'Such further or other relief as may be just." This Court takes the view that in the circumstances it is not precluded from awarding to the Claimant **other relief**, which is greater that 50% of the share specifically claimed by the Claimant in her Claim Form, provided that this Court is satisfied, on a balance of probabilities, that the justice and/or equity of this case so demands.

[20] As regards the second question, it had long been the law that where a person makes a promise to another, even as regards land, and the person to whom that promise as been made, acts to his or her detriment in reliance on that promise, then even thought that promise has not been set out in writing, the party who made that promise, is estoppel from preventing the promisee – this being the party to whom the promise has been made, to rely on that promise. See in that regard, Volume 16 – Halsbury's Laws of England, 4th edition, paragraph 1514. The question which must be answered then at this juncture, is the second one which I have raised in paragraph 16 above.

[21] In this case, the title to the relevant land has been registered solely in the Defendant's name. On that land there is a house, which was present thereon, when the entire property was acquired by the Claimant and the Defendant, who were then living together as common law spouses. That land and house were acquired through funds provided by Ensom city Mortgage Society Ltd. The mortgage was entered into exclusively by the Defendant, as the mortgagor thereof. However, it was the Claimant who made all of the requisite mortgage payments in respect of that property, until the mortgage in respect thereof, was discharged in June, 1990. Additionally the Claimant's evidence, which I accept, was that she exclusively maintained the house and paid all property taxes pertaining thereto. Subsequently, the Claimant and Defendant separated from one another and have never lived together since. The Claimant has stated in paragraph 2 of her Affidavit in Support of Fixed Date Claim Form, "that by oral agreement entered into between myself of the one part and Mr. Alvin Carley of the other part in or around 1971, the parties agreed to look to the purchase of property to be used to the benefit of ourselves and our children and on which property we would both be registered as proprietors thereon holding as tenants in common in accordance with their contractual agreement." At paragraph 4 of that same Affidavit, the Claimant has stated – "That at the time of the purchase of the subject property it was understood and agreed between myself and Mr. Carley that the said subject property was being purchased for the use and benefit of ourselves and our children, and that it would be owned jointly by both of us in equal shares." This is an assertion which this Court accepts as being truthful and which the Claimant further re-iterated in the same Affidavit, at paragraph 7 thereof. Shortly after the purchase of the subject property of the subject property, the Claimant and the children began to live on the property acquired by means of mortgage but the defendant then migrated to St. Croix, U.S. Virgin Islands. This Court does not presently know the whereabouts of the parties' children, as no information has been provided

to it in that regard. However, bearing in mind that the children were apparently living when the house and land were acquired by the Defendant solely in his name, arising from an Instrument of Transfer which is dated January 1st 1972, it is safe to conclude that those children are now mature adults. It should also be noted that the Claimant apparently no longer lives at the house so acquired, as she currently works and lives in Yonkers, New York.

[22] The starting point in resolving a legal dispute such as this, is as per the following which was stated by Viscount Dilhorne in **Gissing v. Gissing – (1971) A.C. 886, at page 900** – **"I agree with my noble and learned friend Lord Diplock that a claim to a beneficial interest in land made by a person in whom the legal estate is not vested and whether made by a stranger, a spouse or a former spouse must depend for its success on establishing that it is held on a trust to give effect to the beneficial interest of the claimant as a *cestui que* trust. Where there was a common intention at the time of the acquisition of the house that the beneficial interest in it should be shared it would be a breach of faith by the spouse in whose name the legal estate was vested to fail to give effect to that intention and the other spouse will be held to be entitled to a share in the beneficial interest. The difficulty where the dispute is between former spouses arises with regard to the proof of the existence of any such common intention. It may be, as in this case, that the claim to a share in the beneficial interest is not made until years after the acquisition of the property. It is most likely that there will be no documentary evidence pointing to the existence of any such common intention. In a great many cases, perhaps in the vast majority, no consideration will have been given by the parties to the marriage, to the question of beneficial ownership of the matrimonial home at the time that it is being acquired. If, on the evidence, that appears to have been the case,**

then a claim based on the existence of such an intention at the time must fail." (Emphasis mine) **Later on, at page 901, Viscount Dilhorne stated – "I appreciate that there may be great difficulty in establishing such an intention where the dispute is between former spouses but that does not alter the question to be decided. In every case it has to be established that the circumstances are such that there is a resulting, implied or constructive trust in favour of the claimant to a beneficial interest or a share in it. In the case of former spouses that will ordinarily depend on whether it can be inferred from the evidence that there was such a common intention. My Lords I do not think that any useful purpose will be served by my expressing any views on what will suffice to justify the drawing of such an inference. In one case the evidence may just fall short of doing so, in another it may just suffice. But what is important is that it should be borne in mind that proof of expenditure for the benefit of the family by one spouse will not of itself suffice to show any such common intention as to the ownership of the matrimonial home."** (Emphasis mine)

[23] This Court has noted that the Claimant has referred, in paragraph 2 of her Affidavit in Support of Fixed Date Claim Form, that both the Claimant and the Defendant were to be registered as the proprietors of the relevant property, holding as tenants in common, "in accordance with their contractual agreement."

This case has not been brought before this Court as a breach of contract case and rightly so. **In this regard, Lord Pearson in Gissing v. Gissing, at page 902 of the Court's Judgment in that case, stated the following – " 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**

negotiating or concluded 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 circumstance. The starting point, in a case where substantial contributions are proved to have been made, is the presumption of a resulting trust, thought 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 trust rather than through contract law. Of course, if an agreement can be proved it is the best evidence of intention." (Emphasis mine).

[24] In order to determine the extent of the share of the matrimonial home as and when same is sold, that should be allotted to the Claimant, this Court must ascertain **the common intention** of the parties. It is not the intention of one or the other of the parties that matters. What matters, is the **common intention.** Once the common intention has been ascertained by the parties, then the Court must give effect to the same by Ordering that, as in most cases will have to be done, the extent of each party's beneficial share in the matrimonial home, will depend on, the extent of each party's financial contribution to the acquisition of that matrimonial home. Payment towards the upkeep of the matrimonial house or even payments of family expenses by a party to a marital union, will not and cannot be taken by this Court as providing conclusive or even prima facie evidence that the party who has made such payments was, in accordance with the common intention of the parties, intended to have a share in the matrimonial home. See on this point: **Gissing v. Gissing and also Pettitt v. Pettitt [1970] A.C. 777.** This no doubt is because, whenever one is involved in a marital union and living in a house, it is to expected, as a matter of course,

that each party to the union will contribute their fair share towards payment of the day-to-day expenses associated with living therein. Thus, even when such payments are made, this by itself cannot be taken as constituting a sufficient basis upon which to conclude that by having made such payments, it shows that it was the parties' common intention that each party would have a beneficial share in the matrimonial home and/or the extent of that share should be determined by the quantum of the payments made towards upkeep and family expenses by one party. One can immediately see the injustice which this could create, in that a party who has, from his or her own funds, paid for the matrimonial home in full, will not be able to recover the full value thereof, in the event that the marital union is terminated and a dispute over the beneficial shares of the respective parties in the relevant property, were to arise. The extent of the party's (who has paid in full for that matrimonial home) share in that home, will be dependent on the extent of the other party's contribution to the maintenance of the home and the maintenance of the family, particularly where children are involved. The latter is a legal requirement (i.e. maintenance of children) and the former is a necessary pre-requisite for enabling one to live reasonably comfortably in one's place of abode. Should then, either of such payments, automatically give rise to an inference of a common intention to share a beneficial interest in the matrimonial home, much less to share that interest to the extent of their making of such payments in proportions to the overall household and residence expenses, inclusive of any mortgage expenses paid exclusively by the other party? I think not. The task of the Court in ascertaining the common intention of the parties, is not as simple as that. **This point was made clear by Lord Diplock on the Gissing v. Gissing case, at pages 909-910, where he stated – "Difficult as they are to solve, however, these problems as to the amount of the share of a spouse in the beneficial interest in a matrimonial home where the legal estate is vested solely in the other spouse, only arise in the cases where the**

Court is satisfied by the words or conduct of the parties that it was their common intention that the beneficial interest was not to belong solely to the spouse in whom the legal estate was vested but was to be shared between them in some proportion or other. Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage installments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of an express agreement between the parties there would be no material to justify the court in referring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate and the difficult question of the wife's share does not arise." (Emphasis mine)

[25] This Claim brought by the Claimant, is, even though undefended, by no means an easy one to resolve, in terms of determining the Claimant's beneficial share of the relevant property. What is in no doubt however, is that based upon the express agreement of the parties, prior to having acquired that home, the Claimant is entitled to a minimum of 50% beneficial share in the matrimonial home. The difficult question though, which still has to be decided, is whether the Claimant is legally entitled to

a larger beneficial share than 50% of the matrimonial home and if so, what the extent of that share should be. Although initially, it appears from her Affidavit in Support of Fixed Date Claim Form that the Claimant was prepared to limit herself to a 50% beneficial share of the matrimonial home, this no longer seems to be the case, as the Claimant's counsel has strongly submitted, in submissions filed on the Claimant's behalf, that the Claimant should receive an 80% beneficial share in the matrimonial home, this no doubt based on the Claimant's evidence, which this Court accepts, that the Claimant exclusively made all of the mortgage payments for the said house and exclusively maintained the said house as well as exclusively paid property tax with respect thereto.

Thus, there exists in this case, an express common intention, in the form of a verbal agreement between the parties and conduct on the part of the Claimant and albeit to a much lesser extent by the Defendant, from which it may be inferred that the Claimant was and intended, by both parties, as their common intention to have a much greater beneficial share of the matrimonial home, then 50% thereof. The difficulty with drawing this latter- mentioned inference though, is that to do so, I would have to firstly, be able to take into account a common intention of the parties which would have, if it arose at all, had to have arisen after the expressly stated common intention had been made known.

Secondly though, and perhaps more fundamentally, I would have to conclude, by inference, that the expressed common intention of the parties, at one later stage or the other, no longer remained as the parties' common intention. I do not believe that I would, in the particular circumstances of this particular case, wherein there was an express agreement between the parties as to their common intention that each party would have equal share in the property that was acquired, be entitled to move on to consider inferences that could be drawn by virtue of the respective parties' conduct thereafter, as to the extent of the beneficial share to be held by each party, in the matrimonial home. On this point,

see – **Gissing v. Gissing**, **per Lord Diplock, at pages 906 A- 908 D and Eves v. Eves [1975] 1 W.L.R. 1338 and Grant v. Edwards [1986] Ch. 638 and Oxley and Hiscock; and Lloyds Bank plc v. Rosset [1991] A.C 107, at page 132 E – 133C, per Lord Bridge of Harwick.**

[26] As regard the date when the common intention is to be inferred, it is clear from the caselaw, that it is the whole course of dealing between the parties and in particular their interactions or individual actions insofar as the relevant house is concerned, which is to be taken into account – **See in this regard, Oxley v Hiscock, at paragraph 69, per Chadwick L.J; and Gissing v. Gissing, per Lord Diplock, at page 909 D-E.**

[27] It should be made clear that resulting trusts are no longer the means by which Courts are to resolve disputes as to beneficial shares in property, by parties who once lived in marital harmony with one another, whether they are married or unmarried. **See in this regard, paragraphs 24 and 25 of the U.K. Supreme Court's recent Judgment in Stacks v. Dowden as per Lord Walker and Lady Hale.** Thus, it is the common intention of the parties that is now the primary consideration for the Courts in case such as this. In this regard, it is the law vis-à-vis constructive trusts/proprietary estoppel, which is relevant and applicable. To that extent, the quantum of each party's financial contribution to the acquisition of the marital home is highly relevant, but only relevant insofar as it provides a basis upon which the common intention of the parties both as to which of them were to have a beneficial share in the matrimonial home and the extent of that share, is concerned. The quantum of a party's financial contribution does not lead to there being a resulting trust arising in that party's favour, with the beneficial extent thereof being dependent solely on the extent of financial contribution. **As stated in paragraph 24 of the Court's Judgment in the Jones v. Kernott case (2011) UKSC 3 – "In the context of the acquisition of a family home, the presumption of a resulting trust**

made a great deal more sense when social and economic conditions were different and when it was tempered by the presumption of advancement while retaining the presumption of resulting trust would place an even greater emphasis upon who paid for what, an emphasis which most commentators now agree to have been too narrow: hence the general welcome given to the "more promising vehicle" of the constructive trust." See: Gardner and Davidson at (2011) 127 LQ.R. 13, 16. The presumption of advancement is to receive its quietus when Section 199 of the Equality Act 2010 is brought into force. "See also paragraph 53 of the Court's Judgment in this case, on this point.

[28] Finally on this matter, before rendering Judgment herein, it is useful to quote from paragraph 46 of the U.K. Supreme Court's. Judgment in the **Jones v. Kernott** case, wherein the Court stated – **"It is always salutary to be confronted with the ambiguities which later emerge in what seemed at the time to be comparatively clear language. The primary search must always be for what the parties actually intended, to be deduced objectively, from their words and actions. If that can be discovered, then, as Mr. Nicholas Strauss Q.C. pointed out in the High Court, it is not open to a court to impose a solution upon them in contradiction to those intentions, merely because the Court considers it fair to do so."** See also, paragraph 52 of the Court's Judgment in that case.

[29] **In the circumstances, I award Judgment in the Claimant's favour and conclude and Order that she is entitled to a 50% beneficial share in the house and land situated at Lot 828, Seaton Crescent, Ensom City, in the parish of St. Catherine, being all the land comprised in the Certificate of Title registered at Volume 1085 Folio 920 at the Register Book of Titles and which is currently registered in the sole name of the Defendant.**

[30] **Also, I Order that the Register of Titles rectify the Certificate of Title and Duplicate Certificate of Title registered at Volume 1085 Folio 920 of the Register Book of Titles to reflect the Claimant as a registered co-proprietor of the said property, holding same as tenant-in-common with the Defendant in the quantum of 50% each.**

[31] **The Claimant is awarded 50% of the costs of the Claim and if such costs are not agreed, then the same shall be taxed by the Registrar.**

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Honourable Kirk Anderson, J.