[2012] JMSC Civ. 109

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2008 HCV 03799

BETWEEN	**PHILLIP HENRY**	**CLAIMANT**
A N D	**PATSIE PERKINS REID**	**DEFENDANT**

IN CHAMBERS

Mr. Rudolph Smellie for the claimant.

Miss Jacqueline Wilcott and Mr. Michael Howell instructed by Knight Junor & Samuels for the defendant.

Heard: 9th, 10th and 11th November, 2011 and 31st July, 2012

DIVISION OF PROPERTY – BENEFICIAL INTEREST – CONSTRUCTIVE TRUST – COMMON INTENTION – PROPRIETARY ESTOPPEL – UNCONSCIONABLE CONDUCT

EVAN BROWN, J

[1] Both parties shared an intimate relationship of a considerable duration. The claimant contends, and the defendant denies, that a dwelling house at 2B Lances Close, Manley Meadows Kingston 2 was acquired with their joint contributions, during the currency of their relationship. It is agreed that improvements were made to the property during the time of conjugality. However, that agreement masks the maelstrom of disagreements lurking below. The parties sharply disagree that the claimant made a financial contribution to the improvements.

[2] It is against that background that the claimant claims against the defendant:-

(1) A declaration that the claimant, pursuant to section 6(1) of the **Property (Rights of Spouses) Act**, is entitled to one half share of property known as 2B Lances Close, Manley Meadows, Kingston 2 in the parish of Saint Andrew.

(2) In the alternative, a declaration that, by virtue of the doctrine of resulting and/or constructive trust, and/or equitable estoppel, the claimant is entitled to an equitable interest in the said property, and an order as to the extent of such interest.

(3) An Order that:

(i) the said property be sold and the proceeds of such sale be apportioned between the parties in accordance with their respective interests therein as determined by the Court;

(ii) the said property be valued by a reputable valuator agreed by the parties or, if not so agreed, determined by the Registrar of this Court, and the costs of such valuation be Transferred to enable the sale of the said property to be completed, then the Registrar of this Court be empowered to execute said Agreement or Transfer in place of the defendant, such execution to be as valid as if effected by the defendant herself.

The claim under the **Property (Rights of Spouses)** Act was abandoned during the cross-examination of the claimant.

[3] The claim for an equitable interest in the property rests on a purported agreement, sometime in 1998, that the defendant would use her National Housing Trust (NHT) benefits to acquire the property in her name, while the claimant would assume the responsibility for servicing the mortgage. That agreement it was said, rested on their common understanding that the beneficial interest in the premises would be jointly owned in equal shares. The claimant said that he honoured their agreement by handing either to the defendant or her daughter, $8,000.00-$10,000.00 monthly.

[4] The claimant further averred that in 2004, pursuant to the same agreement, he added to the original structure a living room, kitchen and verandah. That, he said, was accomplished largely by his own resources: financial, labour and expertise. The claimant said he contributed $400,000.00 and the defendant, no more than $100,000.00. Two bedrooms and a bathroom were added in 2006. The claimant also bore the lion's share of the cost of this expansion. The defendant, the claimant contended, only sometimes made up shortfalls.

[5] For the veracity of these weighty contentions the claimant relied on nothing with indelible ink, just the intangible say so. There was also reliance on two witnesses. So, he banked on credibility for the proof of his case. The wisdom or the lack thereof, of that decision will shortly be exposed. In essence, how did he fare under the crucible of cross-examination?

[6] In cross-examination he admitted that he neither knew the value of the property nor what the purchase price and monthly repayment were. He never asked for any account of the payments. Consistent with asserting that he was the sole financial provider, the claimant said that any payments made in excess of $10,000.00 would have come from him. He was bold enough to maintain that he was asking the court to believe that he paid the additional sums for a figure that he did not know. That notwithstanding, he could not explain the final mortgage payment having been made in February, 2004; neither was he aware of what that payment was.

[7] The claimant accepted that he had no receipts evidencing any of the alleged expenditures or payments. He sought to explain the absence of documentary proof, in respect of the expenditures, by saying most of the receipts were in his car that got damaged in 2005. He later said he had all the receipts in a car, not in a house, in agreement with cross-examining counsel. The receipts were destroyed while the car was in the garage.

[8] The claimant asserted that he bought all the materials for the expansion in 2004. The receipts for those purchases were among those destroyed in the car while at the garage. Notwithstanding that bald assertion, the claimant came up short when receipts in the names of the defendant's daughter were put to him. He was asked if he could account for that fact, in the light of his assertion and he said he could not. Insofar as the 2006 expansion was concerned, he denied that the defendant bought all the materials, and insisted he was the sole breadwinner.

[9] Against this background, the disinterested observer might find it something of a puzzle that the claimant agreed that purchasing a house is a very important event in a person's life, requiring monitoring. Yet, at no time did he go to the NHT to find out about the property. In this vein, another stark contradiction on the claimant's case arose in relation to the joint bank account he tendered into evidence. That account bore the names of the claimant and one Alvin Henry. The claimant said he didn't put the defendant's name on the account as they were not married. In addition, the account didn't disclose to whom it truly belonged. Neither did it reveal that any money was withdrawn from it for mortgage payments.

[10] The claimant and defendant were not married to each other. The defendant at all material times was married to another man. This the claimant knew from about three months into their relationship. He first said under cross-examination that he didn't know the defendant had no intention of getting a divorce. However, towards the end of the cross-examination he said for fourteen (14) years the defendant made no move to get a divorce but asserted he was happy with that. Then came the about-face, he knew she had no intention of getting a divorce. To quote him, "yet with that in mind I still claim I put all my money and investment in the house."

[11] Consistent with not making any inquiry of the NHT concerning the house, he at no time asked to look at the title. So, it was only one month before the time

of giving evidence that he knew that the defendant's daughter's name is on the title. He denied that he was aware of that fact from 2008. He went on to state that had he known from then he would not have put in all the work that he did.

[12] The claimant called two witnesses in support of his case. Patrick Grey, the first of the two, said he was a labourer employed to the claimant generally, but specifically on the house at Lances Close. Mr. Grey said he and the other workers were paid by the claimant. However, Mr. Grey didn't know who purchased the materials.

[13] Lindell Davis, the second witness, said he saw the claimant working on the house before the defendant's return in 2005/2006. While he was in the habit of picking up the claimant at the house over a four (4) year period, he neither knew the name of the road nor the number of the premises. He never worked with the claimant on any project and didn't speak to the thorny issue of funding for the expansions.

CASE FOR THE DEFENDANT

[14] On the other side of the litigation line, the defendant said she bought the house in her name, before entering into an intimate relationship with the claimant. That was in 1998, about three (3) months before being made redundant. The house was valued over $800,000.00 and the monthly mortgage was about $7,000.00. The mortgage was serviced from the redundancy payment. According to the defendant, a portion of her redundancy payment was placed on fixed deposit from which she paid the mortgage. The fixed deposit was dedicated to mortgage payments, she insisted. Like the claimant, no documentary proof was tendered in support of this critical area.

[15] Although denying that the claimant took over the mortgage payments in consideration of the "loving" relationship they had, the defendant admitted receiving the sum of $8,000.00 from the claimant. However, her contention was

that payment was rental received from the claimant when he occupied the premises for a part of her sojourn abroad. Before going abroad in the year 2000, the claimant gave her money by virtue of their relationship but he wasn't paying the mortgage.

[16] In support of her rebuttal of the claimant's evidence that he was responsible for the expansion of the house, the defendant called Hughal Allen, building contractor. He testified that he built the living room, kitchen and verandah in 2004, that claimant took credit for. Mr. Allen also said that a small bedroom was a part of this expansion. Counsel for the claimant took Mr. Allen to task about the existence of this small bedroom. Mr. Allen said that was the plan he was working with and didn't know if there had been any conversion.

[17] Mr. Allen said he was paid $280,000.00 for his labour. In cross-examination he said he gave no receipts for this sum which he received in traunches. While he worked on the building the claimant would visit the site, and even criticize the work being done. This, the claimant would do maybe twice for a month, and two months would go by without the claimant visiting at the site. However, Mr. Allen said he neither knew nor enquired who the claimant was.

[18] In re-examination Mr. Allen said the plan he worked from was issued by the NHT and passed by the Kingston and St. Andrew Corporation (KSAC). He said he allowed the KSAC two days to attend and inspect the steel work. That was done after he put the steel into the foundation. This was in response to the challenge that there was no small bedroom which Mr. Allen insisted was part of the plan.

[19] The next witness called was Detalyn Clarke, a long-standing friend and former co-worker of the defendant. Miss Clarke confirmed that the defendant purchased the house while employed at Cifuentes. Miss Clarke asserted that the down payment was partly financed by the defendant's mother. They lost contact

for some time and were only re-united after the defendant's return from England in 2005.

[20] Mrs. Lisa James Sinclair next took the stand. She was the defendant's former co-worker and neighbor. It appears both moved into their respective premises in 1998. She was asked to oversee the premises during the defendant's overseas stay. She was provided with a key for emergencies and a phone number for a Desna, the defendant's daughter, as the house was locked up.

[21] When the defendant was again overseas, Mrs. James Sinclair was not given a key but continued her oversight responsibility. The defendant maintained contact with her by phone. According to her, the defendant called her during her second stay overseas to say the claimant would be staying there as his house had burnt down. Mrs. James Sinclair didn't think the claimant stayed at the premises for a year. She would see the claimant giving money to Desna. Mrs. James Sinclair said it was rent but didn't know how much was changing hands. In cross-examination she said she made this observation from her house. Further, that she came to the conclusion that it was rent as this is what Desna told her as, to quote her, "I wouldn't know if it's rent or what."

[22] Mrs. James Sinclair confirmed that a soldier and his family of two rented the premises after the claimant's departure. Further, that this family occupied the premises during the expansion which was undertaken by Mr. Allen, who she knew from the community. Upon the defendant's request, she allowed the tenants to use her clothes-line facilities during the expansion. In cross-examination Mrs. James Sinclair said the soldier's bartender told her they were going to leave as the dust was not good for the baby. She did not agree with the suggestion that she was not speaking the truth concerning the soldier.

[23] The only time she saw Mr. Henry at the premises during this time was when the construction was completed, save for the tiling. Under cross-examination she said she remembered this as the claimant told her that Mr. Reid asked him to do the tiling, windows and doors. It was suggested to her that the claimant did everything else and she was just there to support her friend. Her response was no, and that Mr. Henry too was her friend but he was not speaking to her.

[24] Mrs. James Sinclair swore that she overheard an argument between the parties in which the claimant said he had put sweat into the two upstairs bedrooms he had either built or worked on. When she was taxed on the truthfulness of having heard this argument, her response was that it was the claimant who told her this when he showed her the court order to leave. She claimed to know that the defendant bought the materials for this expansion. She sometimes heard the claimant asking the defendant to purchase materials to complete something he was doing. During this argument, the defendant supposedly told the claimant that he could charge her for the two rooms, get his money and go. Some time thereafter the claimant showed Mrs. James Sinclair the court order for him to vacate the premises. In her words, she told him "it was Patsie's house so if they are not getting along then he should leave."

ISSUES

[25] The first issue for resolution is whether there was an agreement between the parties that the defendant would take over the mortgage payments for the premises consequent on her redundancy? If there was such an agreement, did the parties intend that the claimant should thereby become entitled to a share in the property? Even if there was no written agreement, did the claimant make contributions to the acquisition and expansion of the property which are referable only to a common intention that the claimant should take a share of the property? If there was such a common intention, how should the property be apportioned

between the parties, especially in circumstances where there is no indication of the precise contribution?

THE LAW

[26] There is a *prima facie* inference in law that a purchaser of land, having paid the purchase price and taken a conveyance and grants a mortgage in his sole name, intends to acquire both the legal estate in fee simple and the beneficial interest: **Gissing v. Gissing** [1971] AC 886,910. To establish a claim to an entitlement to a portion of the beneficial interest, that inference has to be rebutted. To rebut that inference, it must be established that the beneficial interest is held on trust by the defendant trustee for the benefit of the claimant as a *cestui que trust* (literally, 'he for whose benefit the trust was created'; the beneficiary). According to the authors of Snell's Equity 31st ed. at page 463:

> *The underlying rationale is that the conscience of the trustee is bound to give effect to the entitlements of the beneficiary or to carry out the purposes for which the property was vested in him or which the law imposes on him by reason of his unconscionable conduct.*

[27] By imposing a trust upon the trustee, the law effects a division of the ownership of the property between trustee and the beneficiary. Equity thereby treats the trustee as taking the property subject to the entitlements of the beneficiary.

[28] In **Gissing v. Gissing**, *supra* page 902, Lord Pearson was of the view that the validity of the respondent's claim rested on a resulting trust in her favour, by virtue of her contributions towards the purchase of the property. However, at page 905 of the same case, Lord Diplock thought it was unnecessary to distinguish between resulting, implied or constructive trusts. Kodilinye and Carmichael in **Commonwealth Caribbean Trusts Law** 2nd ed. at page 136 say the new model constructive trust is 'virtually indistinguishable from a resulting trust.' By whatever name called, the principle is of appreciable antiquity. In **Wray v. Steele** 2 (1814) 2V&B 388,390 the Vice Chancellor said it had been settled

from the time of Charles II that "where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him, who paid the money."

[29] So then, the trust, whatever its characterization, rests on a rebuttable presumption that the claimant made a contribution to the acquisition of the property, in the absence of an expressed agreement to share the beneficial interest. Therefore, the court has to resolve the predicate questions of whether there was an expressed agreement between the parties that the claimant should take a share of the beneficial interest; if there was no agreement, was there an initial contribution to the cash deposit and legal charges; any contribution to the mortgage installments; any contribution to other expenses which are referable to the purchase and expansion of the house. Indeed, where both spouses contributed to the acquisition of the property, the presumption is that they intended to be joint beneficial owners, irrespective of the fact that both or one is the legal owner: **Pettitt v. Pettitt** [1970] AC 777, 815.

[30] However, as Lord Diplock said in **Gissing v. Gissing**, *supra*, page 908, even if no contribution is made to the initial deposit and legal charges, if 'regular and substantial direct contribution' is made to the amortization of the mortgage, it may be reasonable to infer a common intention from the beginning to share the beneficial interest. It is this common intention that the court seek to give effect to, but it must be co-existent with the acquisition of the property. If the parties did not consider the vesting of the beneficial interest at that time, a claim having common intention as its substratum must fail, per Viscount Dilhorne in **Gissing v. Gissing**, *supra,* page 900.

[31] In seeking to establish common intention, the conduct of the parties is relevant. In other words, there must be evidence from the parties' conduct from which it is reasonable to infer a common intention for the non-legal owner to take a beneficial interest. The defendant must have so conducted herself, in relation

to the acquisition of the property, that it would be inequitable to allow her to deny the claimant a beneficial interest in the property. To hold the defendant as having so conducted herself, it must be demonstrated that by her words and conduct she induced the claimant to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the premises**: Gissing v. Gissing**, *supra*, page 905.

[32] Although the facts in **Pettitt v. Pettitt**, *supra*, page 777 were dissimilar, the law declared therein was not. To quote from the head note:

> *In the absence of agreement and any question of estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other.*

In this case the former husband's claim was based on redecoration and improvements he had made to property owned solely by his ex-wife, increasing its value. The property was a cash purchase, financed without any input from Mr. Pettitt.

[33] The improvements made by Mr. Pettitt were characterized as 'ephemeral' by Lord Reid. The learned law Lord opined that it would be unreasonable for a spouse to obtain a permanent interest in the property in consideration of improvements of such a transient nature: **Pettitt v. Pettitt**, *supra,* page 796. It was a short step from there for Lord Reid to go on to say:

> *But if a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non-recurring nature, I do not think it is necessary to prove an agreement before that spouse can acquire any right.*

So, the statement in the head note has to be qualified when juxtaposed with Lord Reid's dictum.

[34] The law appears to be, in the absence of an agreement or estoppels, where the spouse who isn't the legal owner makes capital improvements to the property of which the other spouse is the legal owner, with the acquiescence of

the legal owning spouse, the non-owning spouse can thereby obtain an interest in the property. However, where the improvements are of a temporary nature, unless there is an agreement or estoppel, the spouse making the improvements does not by that fact acquire any interest in the property solely owned by the other spouse. So qualified, the argument appears to sound in the vein of the detriment to which the claimant was exposed. If that is correct, the House of Lords seems to be saying ownership of property requires a substantial capital outlay and consequently, a trust will not be imputed unless the claimant can show detriment, into which the defendant acquiesced, which permanently affects the property. That is of course, in the absence of any agreement to the contrary.

[35] The decision of the English Court of Appeal in **Burns v. Burns** [1984] 1 Ch 317 appears to support this view. The plaintiff did not in any way contribute to the purchase of the house. From her income she paid the utility bills, bought fixtures and fittings and certain domestic chattels for the house. Her claim for a beneficial interest in the house was dismissed in both courts. The Court of Appeal held, applying **Pettitt v. Pettitt**, *supra* and **Gissing v. Gissing**, *supra*, that Mrs. Burns had failed to demonstrate the existence of a trust in her favour. That was predicated on the fact of not having made a substantial contribution to the acquisition of the house, disentitling her to an inference of common intention to share in the beneficial interest; and, the acts described above fell short of the detriment threshold.

[36] The three preceding decisions were applied in **Grant v. Edwards and Another** [1986] 1 Ch.638. Allowing the plaintiff's appeal, it was held:

> *That where a couple chose to set up home together and a house was purchased in the name of one of the parties, equity would infer a trust if there was a common intention that both should have a beneficial interest in the property and the non-proprietary owner had acted to his or her detriment upon that intention; that there had to be conduct from which the common intention could be inferred and conduct on the part of the non-proprietary owner, whether directly or indirectly referable to the purchase of the property, that*

> *could only be explained by reference to a person acting on the basis of having a beneficial interest in that property.*

[37] Two premises supported the conclusion that the plaintiff was entitled to a beneficial interest. First, the excuse the defendant had given to the plaintiff for not putting her name on the title was construed as a common intention that the plaintiff should have a share in the property. Secondly, there was conduct which showed that she acted on that common intention to her detriment by making what the court described as in excess of normal contribution to the household expenses.

[38] **Grant v. Edwards and Another** was said to represent that rare class of cases in which oral declarations emanated from the parties evincing their common intention. Having so classified it, Nourse L.J. was in no doubt that the earlier decision in **Eves v. Eves** [1975] 1 W.L.R. 1338, was the authority to follow to arrive at a just decision: **Grant v. Edwards and Another**, *supra*, page 650. Both cases involved unmarried couples in which the conveyance was taken in the name of the male only and an excuse given to the female as to why her name was not being placed on the title. Further, both women thereafter conducted themselves in relation to the property in ways which made the inference irresistible that they were acting on the strength of having an interest in the property.

[39] According to Nourse L.J.:

> *First … if the work had not been done the common intention would not have been enough. Secondly, if the common intention had not been orally made plain, the work would not have been conduct from which it could have been inferred. Thirdly, and on the other hand, the work was conduct which amounted to an acting upon the common intention by the woman.*

[40] A distinction is therefore to be made between two types of conduct. The first gives life to the allegation of a common intention and the second

demonstrates that the common intention was acted upon: **Edwards v. Grant and Another**, *supra*, page 648.

[41] The cases of **Edwards v. Grant and Another,** *supra*, and **Eves v. Eves**, *supra*, represent cases in which the 'first and fundamental question' of whether there was 'any agreement, arrangement or understanding' between the parties that the beneficial interest in the property should be shared, was answered in the affirmative. Any such finding must be 'based on evidence of expressed discussions between the parties." The evidence of that agreement, or its terms need not be precise or perfect. Once the claimant establishes that, the outstanding question would be the reliance placed on the agreement. That is, to demonstrate that the claimant acted on the agreement to his detriment, or significantly altered his position in reliance thereon. That is the learning to be distilled from **Lloyds Bank plc v Rosset and another** [1990] 1 All E.R. 1111, 1118.

[42] The search for the common intention of the parties, to be inferred from the conduct of the parties, will be embarked upon only in the absence of any evidence of an agreement, arrangement or understanding. In the thinking of Lord Bridge of Harwich, direct contribution to the purchase price by the non-legal owner, whether to the deposit or amortization of the mortgage, justifies the necessary inference to impose a constructive trust on the legal owner: **Lloyd Bank plc v Rosset and another**, *supra*, page 1119. Lord Bridge's understanding of the authorities led him to express doubt as to the sufficiency of anything less than this to establish the creation of a constructive trust.

[43] Lord Bridge's approach was politely disapproved in **Stack v Dowden** [2007] UKHL 17. According to Lord Walker of Gestingthorpe, the law has move on since then. The inquiry is to discover "the parties shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it" per Lord Harwich and Baroness Hale in **Stack v**

Dowden, *supra*, adopting the approach of Chadwick LJ in **Oxley v Hiscock** [2005] Fam 211. It is to be noted however, that **Stack v Dowden** and **Oxley v Hiscock** were concerned more with quantification rather than the predicate question of whether the claimant had a beneficial interest.

[44] The law remains as it was declared by the Law Lords from the lofty heights of **Pettitt v Pettitt** and **Gissing v Gissing.** The principles therein distilled have been consistently applied in this jurisdiction by the Court of Appeal. According to McIntosh JA in **Eric McCalla et al v Grace Mc Calla** [2012] JMCA Civ. 31:

> *It is settled law, approved and applied in this jurisdiction in cases such as* ***Azan v Azan*** *(1985) 25 JLR 301, that where the legal estate is vested in one person (the legal owner) and a beneficial interest is claimed by another (the claimant), the claim can only succeed if the claimant can establish a constructive trust by evidence of a common intention that was to have a beneficial interest in the property and by establishing that, in reliance on that common intention the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties.*

[45] It appears that however substantial the contribution, the conduct which it evidences may be capable of another rational explanation, and if that is the case, since these are matters for a tribunal of fact, a court of appeal may be loathed to interfere. That seems to have been the position in **Thomas v. Fuller-Brown** [1988] 1 FLR 237, 246. The defendant who lived rent free in a house bought and owned solely by the plaintiff, designed and constructed a 'valuable' two-storey extension, made major alterations and other improvements to the house. He contended that it was unrealistic that all this was done for the consideration of room and board, along with pocket money. Or, as the trial judge found, that he was a kept man and had agreed to do the work in return for keeping him. Although the force of the submission was not lost on Slade L.J., he was unable to accept it. Slade L.J. was content to rest his decision on the explanation accepted

by the judge at first instance, saying both parties' conduct was 'perfectly capable of being rationally explained in the manner in which the judge thought.

PROPRIETARY ESTOPPEL

[46] If the claim were to fail for want of a common intention, might it yet succeed on the limb of proprietary estoppels? According to the authors of **Snell's Equity** 31st edition page 253, the essence of estoppels, whether at law or in equity, is preventing one party from denying a previously asserted state of affairs where the other party relied on it to his detriment. The species which may be pertinent to this case is proprietary estoppels. Perhaps the most celebrated hypothesis of proprietary estoppels is to be found in the judgment of Oliver J. in **Taylors Fashions Ltd. V. Liverpool Victoria Trustees Co. Ltd.** [1982] 1Q.B. 133. At page 144 it was said:

> *If A under an expectation created or encouraged by B that A shall have a certain interest in land, thereafter, on the faith of such expectation and with the knowledge of B and without objection by him, acts to his detriment in connection with such land, a Court of Equity will compel B to give effect to such expectation.*

[47] Similarly, the most time-honoured statement of the principle of estoppels is attributed to Fry, J. in **Willmott v. Barber** 15 Ch. D 96. At pages 105-106 of the judgment, Fry, J. declared the law in the form of what has come to be called, the five probanda. Fry, J. said:

> *A man is not to be deprived of his legal rights unless he has acted in such a way as would make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the first place the plaintiff must have made a mistake as to his legal rights. Secondly, the plaintiff must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. Thirdly, the defendant, the possessor of the legal right, must know of the existence of his own legal right which is inconsistent with the right claimed by the plaintiff. If he does not know of it he's in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your own legal rights. Fourthly, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken beliefs of his rights. If he*

> *does not, there is nothing which calls upon him to assert his own rights. Lastly, the defendant, the possessor of the legal right, must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the court to restrain the possessor of the legal right from exercising it, but, in my judgment, nothing short of this will do.*

That statement of the principle has been much modified by the re-interpretation of some of Fry, J.'s indispensable conditionalities.

[48] Buckley, L.J. understood Fry, J. to be saying that where a man has a legal right, he is not to be divested of it by reason of acquiescence, unless it would be dishonest or unconscionable to rely on that right after what has transpired: **Shaw v. Applegate** [1977] 1 W.L.R. 970, 977-978. Indeed, "the real test … must be whether upon the facts of a particular case the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right sought to be enforced, to continue to seek to enforce it." So then, if a property owner by her conduct has led the claimant to act to his detriment on the faith of that conduct, in the expectation that the claimant will obtain an interest in that property, the interest of the property owner may be held to be extinguished to the extent of the claimant's expectation.

REASONING

[49] As was said by Lord Bridge in **Lloyds Bank v Rossett**, *supra*, the initial and most important question to answer is, was there in fact an agreement between the parties that the claimant should have a share in the beneficial interest of 2B Lances Close in return for his servicing the mortgage? The claimant alleges that there was an oral agreement to this effect. The oral agreement was never reduced to writing, neither was it made in the presence of witnesses. So, as is the norm in familial matters, the parties were very informal in their dealings and subsequent disputes must be resolved by reference to imperfect and imprecise recollections, supported by their course of conduct.

[50] When the house was bought the parties were not living together. Neither did they discuss their doing so. From the claimant's evidence, there was no conversation about a sharing of the interests, legal or beneficial, when the defendant indicated to him that she was aware of the Manley Meadows Scheme. The claimant's involvement in the acquisition of the property arose three months into the life of the mortgage. And when it did, again there was no discussion of a sharing of the beneficial interest of the property. What the claimant said was, upon the defendant's request for help with the mortgage payments, consequent upon the loss of her job, he took over the payments. He asserted, without providing any basis for verification, that he made the payments on the common understanding he would share in the beneficial interest of the property. That common understanding seemed to rest on 'their close relationship' and an envisaged 'life together'.

[51] However, an understanding cannot be common if it is held by only one of the parties. The claimant didn't go so far as to allege, neither does the court so find, that there was any oral declaration from the parties evidencing their common understanding. Consequently, the instant case is distinguishable from both **Grant v Edwards and Another**, *supra*, and **Eves v. Eves**, *supra*. The existence of any such understanding between the parties falls to be determined by inference from their conduct: **Lloyds Bank v. Rossett**, *supra.* However, any inference which the court makes must come from proved facts, and only such as are reasonable and inescapable. Attention is now therefore turned to the disputed fact of contribution to the mortgage payments.

[52] No documentary proof was submitted concerning the mortgage. Indeed, it was left to the defendant to provide evidence of the value of the property at the time of purchase, and she only gave an approximation. Neither was the court provided with details of the down payment and the remainder of the purchase price that was liquidated by the mortgage. So, the best evidence of the monthly installments of about $7,000.00 came from the defendant. The claimant admitted

in cross-examination that he didn't know the purchase price and the monthly repayments. It is against this background that his assertion of contribution to the purchase by way of amortizing the mortgage has to be viewed.

[53] The claimant said he contributed $8,000.00 – $10,000.00 monthly for the payment of the mortgage. On the other hand, the defendant admits to the receipt of $8,000.00 monthly from the claimant. Their evidential paths diverge, however, on the question of the purpose for which the sum was delivered and received. Since the claimant didn't know what the monthly mortgage repayment was, how did he arrive at a figure that would satisfy the repayment, without running the risk of it going into arrears? Whereas it is acceptable that his memory of the exact figure he contributed may have faded, his absence of knowledge of monthly mortgage cannot reasonably be countenanced.

[54] The claimant further contended that he continued making contributions to the mortgage repayment until mid 2003 when the mortgage was redeemed. Under cross-examination the claimant made two damaging admissions. First, he agreed that the mortgage was paid off in February, 2004, and not in mid 2003 as he said in his witness statement. Secondly, perhaps a little astoundingly, he was unaware of what that final payment was. The claimant didn't know what the monthly mortgage repayment was, when it was redeemed or the final payment that resulted in its redemption.

[55] On the one hand, the defendant said the sum was received as rental for the claimant's use of the premises while she was abroad. There was no supporting evidence for this as the recipient during the relevant period, the defendant's daughter Desna, was not called. The only other witness who spoke to the purpose of the money was the impressive witness, Lisa James Sinclair. Although the court believed her, Mrs. James Sinclair, direct evidence on the point was inadmissible hearsay and no reliance is placed on it. Mrs. James Sinclair also spoke to the rental of the house after the claimant left. The court accepts

that evidence. However, that the house was being rented during this period isn't conclusive that the claimant was also a tenant, however probable it may be.

[56] There is, however, one illuminating bit of evidence from Mrs. James Sinclair which further turns the night of this issue into day. It remained unchallenged that Mrs. James Sinclair was given oversight responsibilities of the premises, along with Desna, in the defendant's absence. She was a mere neighbour, although being a Good Samaritan is always laudable. With the claimant's financial responsibility for the mortgage, it is no small wonder that the claimant was excluded from any responsibility for 2B Lances Close. Hence, it was Desna who gave the claimant the key to take up possession of the house.

[57] Having seen the defendant, the court accepts her evidence that the claimant was allowed into 2B Lances Close in pursuance of a tenancy arrangement, under which he paid $8,000.00 per month. The court also accepts the defendant's evidence that she made the final payment of $16,368.59 on 9th February, 2004 to redeem the mortgage. The court does not find that the claimant made any payments referable to the acquisition of the house in its original state. The latter finding is predicated of the claimant's avowed approach to financial matters with a partner to whom he was not married. That is, the claimant said he put his son's name on his bank account instead of the defendant's, because they were not married. Yet, the claimant would have the court believe that he assumed the more substantial venture of joint home ownership with that same person. The court cannot accept that the claimant's faith, commitment and trust in the defendant found the limestone rocks upon which a joint bank account rests impervious, but the igneous rocks of property acquisition penetrable.

[58] So, the court resolves the first issue in favour of the defendant, that there was no agreement for the claimant to assume the mortgage payment on the property when she was made redundant. Since there was no such agreement, by

parity of reason, there was no agreement that the claimant should become beneficially entitled in the property as a result of making mortgage payments. Similarly, the sum of $8,000.00 which the claimant handed to either the defendant or her daughter is not evidence of him acting to his detriment in reliance on the alleged agreement. The claimant was merely extinguishing his rental debt to the defendant.

[59] The claimant having made no contribution to the acquisition of the property, did he contribute to its expansion? And if he did, was there a common understanding that he should have a share in the beneficial interest of the property? The claimant contended that he bought all the materials for the 2004 expansion. However, he was wholly discredited on the point in cross-examination. First, he had no explanation for the receipts in Desna's name for building materials, a fact which was shocking when juxtaposed with his contention of having bought all the materials. Secondly, the court found the explanation for the absence of any receipts in his name for building materials too convenient for comfort.

[60] Accepting as the claimant did, that house ownership is a very important event in a person's life, why would he have kept all the receipts in his motor car? Even if the folly of so doing had not initially dawned on the claimant, when the car was being taken to the garage why didn't he remove his important documents from it? The claimant didn't strike the court as diffident, rather as a confident, self-assured man. Finally, the claimant offered no explanation as to how the receipts came to be damaged in the car. Was there a fire which consumed everything? Were the documents exposed to water damage? Alas, the evidence stopped at the naked assertion, they got damaged in the car while at the garage.

[61] The claimant's allegations in respect of the 2004 expansion did not stop at the purchase of building materials, but extended to the actual construction of the addition to the original structure. The court did not accept the evidence of the

claimant and his witnesses in this area also. While the claimant contended that he lived at the premises during this expansion, he was frontally contradicted by Mrs. James Sinclair. Mrs. James Sinclair struck the court as a witness who had no interest to serve and was prepared to speak the truth, leaving the chips to fall where they may. Mrs. James Sinclair not only swore that the house was then occupied by a soldier and his family, but also that the construction was carried out by Mr. Allen, a contractor she knew from the scheme.

[62] Mr. Hughal Allen testified on behalf of the defendant that he carried out the 2004 expansion at 2B Lances Close. He was a most persuasive and honest witness. He testified to the amount he was paid for the work and how he was paid. Mr. Allen spoke to working from a plan issued by the NHT and passed by the local planning authority, the KSAC. Mr. Allen even spoke to the number of days he gave the KSAC to inspect the steel work. That was the kind of evidence one would have expected from the claimant, a self-confessed building contractor and sub-contractor. The court accepts Mr. Allen's evidence that the claimant's involvement in the 2004 expansion was limited to visits at the site. The court rejects the claimant's evidence that he was the builder of the 2004 expansion of 2B Lances Close. The court finds as a fact that the contractor was Mr. Hughal Allen and that Mr. Allen used materials supplied to him for the purpose by Desna.

[63] The court's attention is now adverted to the 2006 expansion. There is no dispute that it was the claimant who did the work on this phase of the expansion. According to the defendant, the claimant said she should buy the materials and he would build the desired additional two rooms upstairs. The claimant said the purchasing of the materials and payment of the workmen was a joint effort, with him providing the lion's share. That is contradicted by the defendant who said that she bore all these costs. Mrs. James Sinclair said that she was witness to the claimant asking the defendant to purchase building materials. This was the evidence upon which Mrs. James Sinclair contended that it was the defendant who bought the materials for the 2006 expansion.

[64] As reliable as the court found Mrs. James Sinclair, her evidence on this point does not give this issue its quietus. Both parties were living together at this time and it is not unreasonable that the claimant may have provided some of the funds for the purposes he contends. Accepting that he did so, was it done upon a common understanding that he should share in the beneficial interest of the property? And if there was this common understanding, did he act upon it to his detriment?

[65] The claimant said when he undertook the 2006 expansion he "acted on the basis of the common understanding that the premises were beneficially owned by both." So, at this juncture the claimant was motivated by a settled belief that he was already a beneficial owner of 2B Lances Close. The claimant isn't saying that in 2006 when the expansion was contemplated he was led by the defendant to believe that he would thereby obtain a beneficial share of the property. The claimant's argument appears to be that in 2006, he was already a beneficial owner, retrospectively. However, the court has demonstrated, manifestly it is hoped, that there was no basis for this claim prior to 2006.

[66] The second point of note is the extent of any detriment that the claimant may have suffered as a result of his skilled and financial contributions in 2006. While it is an inescapable inference that the value of the property was thereby enhanced, there was no evidence as to what this might have been. How, then, should the court assess the detriment to which the claimant may have been exposed? The claimant has left it all for speculation, an ill-advised path for any tribunal of fact. Even if the court should assume in the claimant's favour some detriment, this by itself would not result in either a finding of a constructive trust or proprietary estoppel.

[67] Although the court accepts the reasonableness of the claimant making a financial contribution to the 2006 expansion, the more likely position is that that contribution was not substantial, having regard to the course of conduct of the

parties. Further, the court accepts that the defendant offered to pay the claimant for his labour. Although the defendant's claim to having provided all the funds for the 2006 expansion was not accepted, the court adjudged her a reasonable person. Consequently, her offer to compensate the claimant only for his labour is used as a yardstick of his financial contribution to the 2006 expansion.

[68] Whatever the claimant's financial contribution may have been, the provision of his labour, free of cost, is rationally explainable other than by reference to a common intention to become beneficially entitled to 2B Lances Close. The court accepts the defendant's evidence that the claimant carried on the work in his spare time. He therefore never gave up more lucrative employment in order to carry out the expansion. That is what one would expect of a cohabitee. In this regard, the claimant is in a position similar to the defendant in **Thomas v. Fuller-Brown**, *supra*. Although the claimant in the instant case cannot be described as a kept man, it is entirely plausible, and the court accepts, that he volunteered his labour, doing the work in his spare time.

[69] Returning to the question of the claimant's financial contribution to the 2006 expansion, without figures it is impossible to quantify what that was. The court is therefore unable to say that the claimant made 'improvements of a capital or non-recurring nature' entitling him to a share in the beneficial interest of the property: **Pettitt v. Pettitt**, *supra*. For, as was said in the same case by Lord Reid, it is not reasonable for one cohabite to obtain an interest in the property of the other in consideration of improvements of a transient nature. The court is not characterizing the improvements of 2006 as transient. What is being said, is that no finding can be made either way, and for the claimant to succeed he must discharge the burden that it was not.

[70] The court therefore finds that the claimant made no contribution to the expansion of the property which is referable only to a common intention that the claimant should have a beneficial share of the property. In respect of the 2004

expansion, the claimant's evidence that he bought the materials and constructed the additions is rejected. In respect of the 2006 expansion, the claimant himself alleged no inducement by the defendant. He sought instead to cast himself in the mould of a beneficial owner at that time. Further, his gratuitous work on the 2006 expansion is ambiguous. That is to say, it is explainable on the basis of a cohabitee doing work on the house in his spare time without requiring compensation, in consideration of love and affection. In any event, the unquantified extent of the claimant's contribution rendered it incapable of a finding warranting a decision in his favour.

[71] So, the claimant made no contribution to the initial deposit and legal charges. Neither did he make regular and substantial contributions to the amortization of the mortgage. In fact, he made no contribution to the purchase price at all, like the plaintiff in **Burns v. Burns**, *supra*. It is therefore not reasonable to infer any common intention for him to share in the beneficial interest in the property: **Gissing v. Gissing**, *supra*. Similarly, the claimant has failed to demonstrate that whatever detriment he suffered reached the requisite threshold. Consequently, the claimant has failed to establish a constructive trust, evidenced by a common intention that he should have a share in the beneficial interest of the property: **McCalla (Eric) et al v. McCalla (Grace)**, *supra*.

[72] So then, the claimant having failed to establish a beneficial entitlement to the property known as 2B Lances Close, can he rely on the principle of proprietary estoppel? It has been said that:

> *There are circumstances in which it is not possible to infer any agreement, arrangement or understanding that the property is to be shared beneficially but in which nevertheless equity has been prepared to hold that the conduct of an owner in allowing a claimant to expend money or act otherwise to his detriment will be precluded from denying that the claimant has a proprietary interest in the property.* ***Yaxley v. Gotts and Anr*** *[1999] EWCA Civ. 3006.*

[73] The question becomes, was the claimant acting under an expectation, created or encouraged by the defendant, when he expended money and money's worth in skill and effort on the property at 2B Lances Close that the claimant should have an interest in the property? If the claimant on the faith of such expectation and with the knowledge and acquiescence of the defendant acted to his detriment in connection to 2B Lances Close, equity will compel the defendant to give effect to that expectation: **Taylor Fashions Ltd v. Liverpool Trustees Co. Ltd**. *supra*.

[74] Having found that the claimant neither contributed any money towards the purchase price nor expended money and effort in the 2004 expansion, the question of proprietary estoppel arises only in relation to the 2006 expansion. The claimant didn't testify to any specific inducement from the defendant which would have affected his mind in the manner required by **Taylor Fashions Ltd v. Liverpool Trustees Co. Ltd**. Indeed, the defendant did not speak to having raised in the claimant any such expectation. The defendant recognizes that the claimant should be paid for his labour since there is to be a parting of the ways. That, however, does not translate into having created or encouraged in the claimant an expectation that he should obtain a proprietary interest in the property. In essence, the court can find no evidence which would compel it to say the defendant is guilty of such unconscionable conduct that equity demands that she be divested of her property: **Shaw v. Applegate**, *supra*.

[75] Having decided all issues of fact for the defendant, there is no need to go on to consider the question of apportionment. The claimant has failed to establish either that a constructive trust should be imposed on the defendant in his favour, or that the principles of proprietary estoppels apply. Consequently, judgment is given for the defendant. Costs is awarded to the defendant, to be agreed or taxed.