IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2009 HCV 00519

BETWEEN	**DEAN HINDS**	**CLAIMANT**
AND	**JANET WILMOT**	**DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn and Kinghorn for the Claimant.

Ms. Savernia Chambers for the Defendant.

HEARD: March 9, April 7 and July 15, 2011

Division of property-claim for equitable interest in property- former co-habitants-title in the name of one party-separate mortgage loans taken by both parties to improve property-effect of statutory declaration denying equitable interest-payment of mortgage installments-common intention of the parties.

EDWARDS J (Ag.)

Facts

[1] The claimant Mr. Dean Hinds, by way of a Fixed Date Claim form with supporting affidavit filed on February 10, 2009, sought a declaration that he is entitled to a 75% share in property situated at Lot 25 Bonsai Drive, Sydenham Gardens in the parish of St. Catherine. On the day of trial an application was made and an order granted to amend the claim to substitute a 50% share for the 75% share initially sought.

[2] The title to the property is registered in the name of the defendant Janet Wilmot solely. The land was purchased by her in July 2001. The parties met in 2005 and began

an intimate relationship. The claimant was and still is a serving member of the Jamaica Constabulary Force. The defendant described herself as a business woman.

[3] At the time the parties met the defendant had already begun constructing a dwelling house consisting of two bedrooms, two bathrooms, a kitchen, dining room, living room, carport, verandah and washroom on the property. The structure was only partially complete being only blocked up to window height. Her evidence was that she had spent a total of $1,300,000.00 in constructing the building to that level. The evidence from the valuation report she presented showed that the incomplete structure was valued in January 2006 at $2,300,000.00.

[4] Soon after the parties began their relationship the claimant offered to give to the defendant his benefit under the National Housing Trust (NHT) scheme. In December 2005 both parties obtained separate loans from the NHT. The loan to the claimant and that to the defendant was expended on completing the construction of the house. The defendant borrowed a total of $1,450,000.00 taken in two trances. The first was taken in January 2006 in the sum of $800,000.00 and another in April 2006 in the sum of $650,000.

[5] A loan of $1,000,000.00 at an interest rate of 7% was granted by the NHT in the claimant's name and secured by the subject property; mortgage payments were calculated at $8,147.22 per month. The circumstance as to why the claimant agreed to give his benefit under the NHT scheme to the defendant was disputed.

[6] The claimant, in applying for the build on own land loan from the NHT for the improvement of the said property, swore to a statutory declaration in which he stated, as far as is relevant to these proceedings, that:-

a) “I am a co-applicant with Janet Wilmot for a build on own land/home improvement loan from the National Housing Trust;

b) That I have no legal or equitable interest in the property being used to secure my loan, nor do I wish to obtain a legal or equitable interest therein.

c) That I am aware and agree that by so applying I have utilized my sole National Housing Trust housing benefit and that I am therefore not entitled to any future housing benefit from the National Housing Trust.”

[7] Work on the property commenced in April 2006 and was completed in September of the same year. In September 2006 the parties began living together in the said house. After the house was completed a fence was also constructed around the property. Unfortunately, the relationship broke down amidst allegations of physical abuse and infidelity on the part of the claimant. The parties separated in November 2007.

[8] There is no evidence of the value of the property to date. It is admitted that the claimant paid some of the mortgage installments on the $1,000,000.00 taken out in his name. The defendant paid off the NHT loans for the claimant and herself in February 2008.

Issues

[9] I am of the view that the matter can best be resolved by a determination of the following issues:

(1) Whether there was evidence of an express agreement showing a common intention that the claimant would acquire an equitable interest in the property pursuant to which the claimant acted to his detriment.

(2) Whether in the absence of such an agreement there was evidence from which a court could infer such a common intention in reliance on which the claimant acted to his detriment.

   a. Whether the claimant’s loan from the National Housing Trust which was used to complete the construction of the premises is evidence

from which the court can infer a common intention for him to acquire an equitable interest in the property; if not

b. Whether the payment of some of the mortgage installments is conduct evidencing a common intention by the parties to alter the beneficial interest in the property.
c. Whether the claimant made any other substantial contribution to the improvement of the property which would entitle him to a beneficial share in the property; if not

(3) Whether the claimant expended any sums on the property for which he is entitled to restitution.

The Applicable Legal Principles

[10] Where a person in whom the legal title to land is not vested claims an interest in that said land, he must prove that the one in whom the legal title is vested, holds it as trustee on trust for his beneficial interest. This is the English Law of trust and the principles are applicable to this jurisdiction. Such a trust may be a constructive or a resulting trust.

[11] In the case of a resulting trust, where two persons contribute to the purchase of a property and the purchase is made in the name of one only, there is a presumed common intention that the party in whose name title is vested holds the property on resulting trust for both of them in the proportion of their respective contribution to the purchase price. See the judgment of Viscount Dilhorne in **Gissing v Gissing** (1871) AC 886.

[12] In the case of a constructive trust, this arises where at any time two or more persons have a common intention, expressed or implied by words or conduct, that one or more is to have a specific share in the property or an uncertain share to be ascertained in due course according to their contributions; so inducing that person(s) to act to their detriment in the reasonable belief that they are thereby acquiring the agreed interest: See **Grant v Edwards** (1986**)** 2 ALL ER 427. To establish this intention there must be evidence pointing to its existence.

[13] The detriment or prejudice to one party makes it unconscionable for the other to deny him an interest in the property under an expressed or inferred declaration of trust. He will then get what is agreed: See **Re Densham** (1975) 3 ALL ER 726, where one party contributed only one ninth of the purchase price but there was an oral agreement that she was to have an equal share of the property. The court held that this agreement was valid. He may also rely on a constructive trust where he paid for capital improvements or carried out building works himself. However, equity will not assist a volunteer.

[14] These principles, which were declared as far back as the majority judgment in **Pettitt v Pettitt** (1970) A.C. 777, have been consistently applied in this jurisdiction. See **Trouth v Trouth** (1981) JLR 409; **Azan v Azan** (1988) 25 JLR 502 and **Chin v Chin** SCCA No. 261/2001, unreported.

[15] The law in this area was recently revisited by the H.L. in **Stack v Dowden** (2007) UK HL 17, where the House comprehensively examined the principles applicable to the equitable trust in domestic relationship and the way the law has developed since **Pettitt v Pettitt, Gissing v Gissing, Lloyds Bank plc v Rosset** (1991) AC 107 and **Oxley v Hiscock** (2004) EWCA Civ 546. These principles were adapted and applied by my brother The Honourable Mr. Justice Roy Anderson in his judgment in **Plummer v Plummer,** HCV 00864 of 2006, delivered June 15, 2009 (unreported).

[16] In **Stack v Dowden** the Law Lords recognized and affirmed that the starting point of the equity was that sole legal ownership equaled sole beneficial ownership. The principle is that where there is sole legal ownership it is incumbent on the party claiming

an equitable interest to show that he had any interest at all and if so what that interest amounted to.

[17] Lord Hope at paragraph 8 said "where title to a dwelling house is taken in one name only, the presumption is that there is sole ownership in the named proprietor". The party claiming otherwise must, therefore, show that there is:

a. A beneficial interest; and

b. The nature of that interest.

[18] To ascertain whether there is a beneficial interest it is necessary to ascertain whether there was an expressed agreement as to the beneficial interest, the contributions each party made to the purchase price if any, or, whether a common intention could be inferred from any words or conduct of the parties and from any substantial contributions to repairs, renovations and or improvements to the property, made by the claimant. This is to be done against the background of the relationship of the parties at the time and their whole course of dealing in relation to the property.

[19] Baroness Hale put it this way:

> ***"The search is to ascertain 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***."

[20] Her Ladyship was quick to point out that the search was only for what the parties must have intended and that in pursuit of that, the court must be mindful not to abandon the search in favor of a result it considered fairer.

[21] Referring to the speech of Chadwick LJ in **Oxley v Hiscock** (2004) EWCA Civ 546, (2005) Fame 211, Lord Walker stated at paragraph 36:

> "***That summary was directed at cases where there is a single legal owner. In relation to such cases the summary, with its wide***

> ***reference to "the whole course of dealing between them in relation to the property", is in my opinion a correct statement of the law, subject to the qualifications in paragraphs 61ff of Lady Hales' opinion. I would only add that Chadwick LJ did not refer to contributions in kind in the form of manual labor on improvements, possibly because that was not an issue in the case. For reasons already mentioned I would include contributions in kind by way of manual labor, provided that they are significant.***

[22] Lord Neuberger of Abbotsbury held the view that beneficial interest in the home although generally determined at acquisition, may possibly be altered post acquisition. He generally recognized however, that compelling evidence was required, before it could be inferred, that subsequent to the acquisition of the property, the parties intended to change the beneficial interest. Such compelling evidence could be discussions and statement of actions of the parties subsequent to the acquisition from which such an intention might be inferred. Significant improvements to the house may justify an adjustment to the beneficial interest, such improvements by necessity having to be substantial in order to qualify. Decorations or repairs would not qualify unless significant.

[23] Lord Neuberger observed at paragraph 141 that;

> ***"consistently, with what has already been discussed, I am unconvinced that the original ownership of the beneficial interest could normally be altered merely by the way in which the parties conduct their personal and day to day financial affairs. I do not see how the fact that they have lived together for a long time, have been in a loving relationship, have children, operate a joint bank account and share the outgoings of the household, including in respect of use and occupation of the home, can of themselves, indicate an intention to equalize their original unequal shares."***

[24] At paragraph 143 he went on further to say:

> ***"even payments on decorations, repairs, utilities and council tax, although related to the home, are concerned with its use and enjoyment as apposed to its ownership as a capital assets."***

[25] The principles can therefore be summarized as follows:

I. Evidence of a common intention can either be expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.

II. Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See Nourse, L.J. in **Turton v Turton** (1987) 2 ALL ER 641 at p.684.

III. In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property may be evidence from which the court could infer the parties' intention: **Grant v Edwards (1986)** 3 WLR 120**,** per Lord Brown-Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and/or show that the claimant has acted to his detriment on reliance on the common intention.

IV. The claimant must have acted to his detriment in direct reliance on the common intention.

[26] In this case, for the claimant to succeed, he would have to prove by credible evidence that there was a common intention that he should have a beneficial interest in the property. He would either have to show that there was an express agreement for him to take a share or point to such words and/or conduct from which such an agreement may be inferred. He must show that he has acted to his detriment on the basis of that common intention. Certainly any substantial contribution to the cost of improving the capital asset

would be a basis on which, in the absence of an express intention, one may be inferred, unless the contrary is shown.

[27] In this particular case the claimant must demonstrate on the preponderance of the evidence that at the time of the further construction and or improvement to the property:

a) There was an express common intention that he should have a beneficial interest in it; or

b) The conduct of the parties was such that the court could infer that there was an implied common intention that he should have a beneficial interest in the property; and

c) That he has acted to his detriment on the basis of that common intention.

[28] The principles of law are the same for married couples as for unmarried couples although, as noted by Baroness Hale in **Stack v Dowden** at paragraph 40, the inferences that a court may draw from their conduct may be influenced by their relationship.

Overview of the Evidence

[29] The claimant contended that he and the defendant had discussions regarding his acquisition of an equitable interest in the house and that at the time they had plans to marry. The defendant denied this claim. She asserted that no such discussion took place and that in fact she expressly indicated to the claimant that the property was for the benefit of the children of her marriage. She said it was the claimant who offered to assist by giving her his NHT benefit. She indicated that she was unaware that this was even possible. Her evidence is that she was at the NHT when the claimant offered to meet her

there and on hearing the reason for her visit, he offered her his benefit. This was denied by the claimant. I however, believe the defendant in this regard.

[30] In paragraph 8 of his affidavit filed February 10, 2009, the claimant said that they both came to the conclusion that because they were going to live together and begin a life together he would assist to bring the house to completion and the house would be theirs. In the said affidavit he said that he considered that they had a serious relationship and were making plans to marry. However, in cross-examination the claimant denied he had any plans to marry defendant. The evidence of the defendant is that at no time did the claimant propose to her or discuss marriage with her even though they had discussed living together.

[31] The claimant told the court that the defendant had no money to complete the construction and he decided to help her out and assist her to finish the house. However, the defendant showed documentary proof that she had begun the process to access her NHT benefit before she met the claimant.

[32] The claimant said they had a discussion relating to how they were going to go about dealing with their affairs in the house. In paragraph 9 of his affidavit he asserted that the matter of his having an interest in the property was taken so seriously by both of them, that they sought the advice of an attorney as to how to get his name on the title. He said that due to lack of funds that plan fell through. However, in cross-examination he admitted that he sought the advice of the attorney on his own. He could not recall when he did so. The attorney whose advice he claimed to have sought is the said attorney now on record for him.

[33] He said that in 2006 he was in the Jamaica Constabulary Force but he could not recall his gross or his net salary at the time. He could neither admit nor deny that his net salary was $26,000 in September 2006. Counsel for the defendant cautioned the court to be skeptical of his claims since he claimed that he was able to save up to April 2006; had cash in hand to spend on the construction; took out several loans but could not find funds to pay to have his name placed on the defendant's title. He was asked why he thought he was entitled to 50% share and his answer was that the loan the defendant secured could not construct a house of that size. He said he was the one who bore most of the cost to build the house.

[34] He identified his major contribution as being cash in hand as well as loans. He said the cash in hand came from his salary and associates. He claimed his cash in hand was used in the construction. He said he began applying cash in hand from day one at the time the property was to have been bushed. He however, could not recall the amount of cash in hand. He also claimed to have paid someone to do the plumbing. He said that to the best of his recollection, the defendant's contribution to the construction was only to the extent of her loans. He however, admitted that he did not pay for the windows to the house, which the evidence showed was paid for by the defendant. He presented no receipts for the expenditure he claimed to have made on the house.

[35] He claimed that apart from the NHT loans, he received loans from RBTT Bank, National Commercial Bank, Scotia Bank and other lending institutions which were expended on the house. He claimed to have placed himself in a lot of debt with regards to the construction of the house.

[36] He said in his affidavit that the defendant was unemployed and as a police officer he had to struggle to make ends meet and repay all his loans. He said that he felt it would be worth it however, as they would own a house together. He indicated also, that by September 2006 the house was complete and "looking lovely"; only the gate was absent and a few additional touches were left to be made.

[37] He claimed to be entitled to recover from the defendant all sums of monies expended on improving the house, however, when asked the total sum expended by him he was unable to say. When asked to give a rough estimate his response was $3,000,000. 00. He was unable to state the total cost to complete the house. He did not say what the $3,000,000.00 was expended on.

[38] The documentary evidence presented by the defendant showed that in January 2006 the value of the land and incomplete structure was $2,300,000.00. Although the claimant said the loan could not complete a house of that size and he contributed most of the cost, the site visit sheet dated June 2, 2006 indicated most of the work was completed, except for the electrical and plumbing installations which were partially completed, the painting, absorption pit, bathroom and kitchen fixtures and doors and windows and tiling. There was also at that time $200,000.00 worth of electrical and plumbing materials, sand and gravel left at the site.

[39] The last payment certificate from the NHT dated August 30, 2006 and attached to the affidavit of the defendant, indicated that the measured work done on the premises at that date was valued at $2,450,000.00, a sum which equaled the total value of their loan. The evidence is that the house was finished in September and was quite nice according to the claimant. As submitted by the attorney for the defendant, there is no dispute that the

defendant paid for the painting to be done and for the windows to be installed. Even taking into consideration the cost of bathroom and kitchen fixtures and finishing, it is not difficult to reject the defendant's claim that he spent approximately $3,000,000.00 cash on the construction. He gave no evidence as to exactly what this additional $3,000, 000.00 was expended on.

[40] The claimant also contends that he was the one who paid Mr. Marvin Smith to build a side fence. He said that he made several payments but was however, unable to say how much he paid to Mr. Smith. He was also unable to say how much he paid to pave the yard.

[41] Even though the claimant has maintained that he took several loans to assist in the completion of the house, the evidence in cross-examination is that the RBTT loan was taken out November 17, 2006, the BNS Loan in September 25, 2006, NCB loan in November 2006 and the MBM Finance Loan is undated. These loans were taken out after the completion of the house. The parties moved into the competed house in September 2006.

[42] The letter from RBBT bank dated March 7, 2008 addressed to the claimant indicated a loan was made November 17, 2006 for $300,000.00 for the purpose of repairs to family home. Repayments were to commence December 2006. The letter from MBM Finance Limited dated November 12, 2008 only confirmed that at the close of business November 11, 2008, he had a loan balance of sixteen thousand nine hundred and twenty-three dollars and eighteen cents ($16,923.18). There was no indication as to when this loan was taken, the principal sum or for what purpose. In cross-examination the claimant did not further enlighten the court in this regard.

[43] The letter from Scotia Bank dated September 6, 2007 indicated that the claimant had a Scotia Plan loan taken out on the 25th September, 2006 in the sum of $407,200.00 for the purpose of home improvement. The letter from the National Commercial bank dated November 23, 2006 indicated that the claimant secured a banking facility of $263,640.00. This too was for home improvement.

[44] He explained that he took out all these loans because when he calculated the construction costs and labour costs he realized the NHT loans would not be sufficient to complete the house so he had to source additional funds. It has already been shown that this was not true as all these loans were taken out after the parties moved into the "nice and lovely" house. There is no evidence as to what these loans were supposed to be expended on. In any event, the MBM Finance loan aside, this amounts to little over nine hundred thousand dollars and is no where near the three million dollars the claimant said he spent on the house. The claimant lacks credibility on this issue and is not to be believed. The proven facts belie his testimony.

[45] Interestingly both the letters from RBTT and National Commercial Bank are addressed to the claimant at Lot 200 Westmeade, Bridgeport P.O. although at those times he would have been living at Bonsai. The evidence is that Lot 200 Westmeade is the claimant's family home which is owned by his mother. He once resided there. The evidence of the defendant is that the claimant had told her that he would be assisting his mother in repairing their family house.

[46] The claimant did not make all the payments on the NHT Loan. On his evidence the loan could have gone into arrears in 2006 or 2007. The claimant's account at the NHT was 08200027879. On that account the unchallenged evidence is that $15000 was paid

on arrears to that account in November 2007 by the defendant. She paid a further $15,000 on the arrears to that account in December 2007. January 8, 2008 a further $9,975.00 was paid by the defendant to the account. In February 2008 the defendant paid off on all three loans with the NHT.

[47] The documentary evidence provided suggested that the life of the claimant's loan was 30 years; that, up to February 2008, the claimant only paid a total of $105,913.86 to the mortgage account. After the mortgage was paid by the defendant the claimant collected a refund cheque of $51,530.27 representing an overpayment of the mortgage sums. He explained that the refund resulted from the fact that although the account was closed, NHT was still collecting mortgage payments from his salary. The defendant however, told a different story. Her evidence was that she overpaid on the mortgage when she closed out the accounts. The claimant admitted that he had not paid back the loan because it was closed. He received written confirmation from NHT that the account was closed. He said he could not say how it was closed.

[48] I conclude on a preponderance of evidence that there was no express agreement that the claimant would take a beneficial interest in the property. The court rejects the claimant's contention that there was a discussion or verbal agreement that the property should be owned by both of them. In this regard the claimant was not a credible witness. I find that the parties intended to occupy the finished house together but I adopt and hold the view taken in previous authorities, that an intention to share the premises is not to be equated with an intention to share in the beneficial interest in the property. I also find on a balance of probabilities that the claimant did not expend any substantial sums on the construction of the premises from cash in hand and other loans.

The Effect of the NHT Loan Benefit

[49] There is no dispute that the claimant gave the defendant the benefit of his entitlement to an NHT loan valued at one million dollars which was applied to defray the building cost of the house in question. By obtaining and using this loan on the expansion and completion of the property can the court find, as submitted by counsel for the claimant, that this was conduct from which it could infer that there was a common intention for him to acquire an equitable interest as a result?

[50] In **Young v Young** (1984) FLR 375, the court considered whether merely lending to the transaction could produce a share in the beneficial interest in the house. The court seemed to have concluded that if the family home could not have been acquired without the contributing party incurring liability or potential liability, this may be grounds for inferring a common intention to take a beneficial interest.

[51] In this case there is no evidence that the construction could not have been completed without the claimant's benefit. There is no doubt that in gifting it to the defendant the claimant acted to his detriment as he can no longer access another housing benefit. But it still requires a finding that there was an implied common intention to benefit before the court can go on to consider the issue of detriment.

[52] Does this course of conduct point to an intention? If there was such a common intention, does the fact that defendant discharged the mortgage alter the common intention of the parties at time of the acquisition? Intention is at time of the acquisition and cannot be unilaterally changed by one party. In **Turton v Turton** (1987) 2 ALL ER 641 Nourse, L.J stated at page 684.

> ***"It must always be remembered that the basis on which the court proceeds is a common intention, usually to be inferred from the***

> ***conduct of the parties, that the claimant is to have a beneficial interest in the house. In the common case where the intention can be inferred only from the respective contribution, either initial or under a mortgage to the cost of its acquisition it is held that the house belongs to the parties beneficially in proportions to those contribution."***

[53] Counsel for the claimant cited **Aubrey Forrest v Dorothy Forrest** SCCA 78/93, decided April 7, 1995 where the issue was whether the payment of the outstanding balance of the mortgage by the wife to save it from being auctioned, gave her a greater share of the beneficial interest. In that case the house was registered in the joint names of both parties with the intention to share equally in the beneficial interest. The wife asked the court to alter the beneficial interest and grant her a greater share because she paid off the mortgage. In that case Forte JA said;

> "**The question to be decided, however, is whether the payment of the mortgage arrears entitles the wife to a greater share in the property, that which they intended at the time of the acquisition. In my view, in the absence of evidence as to an agreement either expressed or implied between the parties to vary the original beneficial interest, as was clearly in the intention of the parties at the time of the acquisition, the court can do nothing else but give effect to what was the common intention of the parties. There being no such evidence in this case, the court cannot vary the beneficial interest of the parties based on mortgage payments being paid by one of the parties. However, the wife would be entitled to recover the share of the mortgage arrears payment, to which the husband would have been liable to pay, that is, 50% thereof."**

[54] In my view the distinction between that case and this one is plainly obvious. In **Forrest v Forrest** the parties were joint legal and beneficial owners. The wife was seeking an alteration in the beneficial shares based on her payment of a greater share of the mortgage. In the instant case the claimant is seeking an equal share of the beneficial interest in the property based on his claim that there was an expressed common intention

for him to take an equal share in the beneficial interest in the property (which I have already found does not exist); or an implied common intention for him to so share in the beneficial interest, evidenced by his taking out the loan and making payments on the mortgage. In such a case, if the court found that there was such a common intention coupled with detrimental reliance, his share would then have to be determined in direct co-relation to his contribution and the common intention of the parties.

[55] Counsel for the claimant asked the court to consider on what other basis the claimant could have agreed to take out a mortgage loan, give up his sole housing benefit, burden himself with the repayments and proceed to fence the property, if it was not on the basis that he would be part owner of the property. He asked the court to consider and adopt the views of Nourse LJ in **Grant v Edwards** and apply it to the case at hand.

[56] In **Grant v Edwards,** Nourse L.J said at page 434"

> ***"Was the conduct of the plaintiff in making substantial indirect contributions to the installments payable under both mortgages conduct on which she could not reasonably have been expected to embark unless she was to have an interest in the house? I answer that question in the affirmative. I cannot see on what other basis she could reasonably have been expected to give the defendant such substantial assistance in paying off the mortgage on his house. I therefore conclude that the plaintiff did act to her detriment on the faith of the common intention between her and the defendant that she was to have some sort of proprietary interest in the house".***

[57] Whilst that may have been the position in **Grant v Edwards**, I cannot agree that the same is applicable here. On the contrary. It appears to me that based on the conduct of the parties, they had the opposite intention. At the time he applied for the loan the claimant signed a statutory declaration denying any interest or any right to an interest in the property. This is taken from the evidence to have been an informed decision. There

were alternative legal routes available to them. This act by the claimant at the time of the securing the loan showed that there was in fact no common intention for him to have a beneficial interest in the house. There is no evidence of anything expressed or implied from which the court can go behind the clear declarations of the claimant.

[58] In **Francis Jackson v Lawrence Jackson** (1990) 27 JLR 1, Pitter J said;

> **"where the intention of the parties as to whom the property is to belong, or in what definite shares each should hold is ascertainable, effect will be given to that intention".**

[59] He found support for that proposition in the case of **Rimmer v Rimmer** (1952) 2 AER 863. In **Francis Jackson** the parties were tenants in common of property which was the matrimonial home. The husband had signed an agreement agreeing to transfer his share to the wife in consideration of a loan. The court found that this agreement showed the intention of the parties as to how the beneficial interest in the property was to be held.

[60] In **Stack v Dowden** Lord Hope of Craighead took the view that parties are free to enter into whatever bargain they wish. If the bargain is clearly expressed and proved the court ought to give effect to it. Taking a similar approach I am of the view that the declaration made by the claimant showed sufficiently the intention of the parties at the time, which was not to alter the beneficial interest in the property.

[61] I agree that the fact that he gave up his right to an NHT loan could be viewed as a detriment to him. However, the claimant proved that it was quite possible for him to secure loans elsewhere, which on the evidence he had done on several occasions in order to effect repairs to his parent's home. It is also quite possible that, based on the NHT policy, he could secure the NHT benefit due to some other associate or family member at a later date, in the same way the defendant secured his.

[62] I find that the separate loans and the voluntary declaration made by the claimant is clear evidence of a lack of common intention for him to take a beneficially interest in the home. I note also that on the letter of commitment for the claimant's NHT loan the other applicant is listed as the defendant. The relation between the parties is noted (JAF) a common abbreviation for Just a Friend.

[63] The loan taken by claimant was a home improvement loan to assist with the completion of the house. There was a clear and declared intention of a volunteer to assist rather than to acquire a beneficial interest in the property. This was clearly a situation not unknown to the NHT and which they are suitably equipped to facilitate. I reject counsel's submissions as to the reasons for the NHT requiring this declaration where benefits are being transferred, that is, that it is to legally protect NHT. That may be so, but it also protects the legal owner from volunteers, who may later want to claim a beneficial interest in the property, when there was no such intention at the time the loan was acquired. The giving up of benefits to others by volunteers is clearly encouraged and facilitated by the NHT.

[64] The defendant herself had secured two loans from NHT and it cannot be said that but for the loan from the claimant she could not have completed the house. In fact the defendant was able to secure a loan from another financial institution which enabled her to clear both the claimant's and her loans from the NHT. The court is not so cynical that it could not find that the claimant gave up his benefit in consideration of love and affection. The ability of the NHT to facilitate such situations shows recognition that they exist, by and large.

[65] The evidence which I accept is that the claimant also made gifts of love and affection in form of home improvement loans taken from other financial institutions for the benefit of his parent's home where he had lived. There is no evidence that this was based on any intention to take beneficially in that property. The maxim is that equity will not assist a volunteer and this is so no matter how generous he has been.

The Mortgage Payments

[66] It is not in dispute that, after taking out the loan and making the voluntary declaration denying he had a beneficial interest in the property, the claimant moved in and paid some of the mortgage installments. The question for the court is whether having expressly declared that he had no interest in the property at the time he took the loan for the benefit of the defendant, he may now claim an interest based on the payment of some of the mortgage installments. In my view it would require cogent evidence to establish on a balance of probabilities, that it was the common intention of the parties that the claimant by paying the mortgage installments would acquire a share in the beneficial interest.

[67] It is generally authoritatively accepted that payment of mortgage installments can alter beneficial interest in certain circumstances. The court usually considers whether liability under a mortgage should be treated as a capital contribution to the acquisition of the property so as to affect the beneficial interests.

[68] In this particular case the court has to take into consideration two things. The first is that the legal and beneficial interest crystallized at the time of acquisition and lie in the defendant. Therefore, to alter the beneficial interest there must be an expressed agreement to do so or a common intention implied from the conduct of the parties evidenced by

some substantial contribution by the claimant to the improvement of the property. In certain circumstances contribution to the mortgage would suffice. However, the mere fact that one party has spent time and money on improving or repairing the property of another will not be sufficient for a court to draw such inference; the court must be in a position to infer an intention to alter the beneficial interest. See **Bernard v Josephs** (1982) 3 ALL ER 162.

[69] The second consideration is that where, as in this case, the parties expressly declared their position at the time of the acquisition of the loan, the claimant would have to prove that subsequent to his declaration, there was an agreement to alter the beneficial interest or that the payments of the mortgage installments was such conduct of a substantial nature as to cause the court to infer or impute that their was a common intention to alter the interest. If it were found that he paid the mortgage in reliance on this common intention or agreement, it would give rise to a constructive trust or a proprietary estoppel.

[70] The court would have to consider whether when the claimant paid the mortgage installments he was encouraged so to do by the defendant on the basis that he would be rewarded; or whether there was an expressed agreement that this would give him an interest in the property. If there was such an agreement or he was so encouraged, the defendant would be estopped from resiling from this promise in the **Ramsden v Dyson** (1865) LR 1 HL 129) sense or there would be a constructive trust in the claimant's favour, if he acted to his detriment in reliance on it. In such a case the defendant would hold the property on trust for the claimant in a share to be determined.

[71] The claimant made payments on the mortgage which, even though he claimed that deductions were being made from his salary, undisputedly went into arrears. There is no evidence from him as to how many payments he made. No salary slips were shown of the deductions. It is hardly likely that if salary deductions were being made there would be arrears. I reject that the mortgage payments were being deducted from his salary.

[72] The evidence is that the monthly repayment was $8147.22. According to the defendant's evidence he paid between November 2006 and September 2007. He then went into arrears. He again paid between February 2008-April 2008. He again went into arrears. Those arrears were paid by the defendant. After terminating the relationship he made only three payments to the loan sum. After the Mortgage was cleared by the defendant, he claimed and collected the refund of $51,530.27 representing the overpaid portion on the loan repayment.

[73] Payment of mortgage installments referable to the acquisition of the property may be seen as capital contribution. Payment of mortgage installments referable to improvement of the property, in the absence of an express agreement, would have to be a substantial, regular contribution to the capital asset. If it is substantial, this may be conduct from which it may be inferred that there was a common intention to share in the beneficial interest which was acted on by the claimant to his detriment in the reasonable belief that by so acting he was acquiring a beneficial interest. However, this has to be determined against the background of the nature of the relationship between the parties and their whole course of dealing in relation to the property.

[74] Lord Bridge in **Lloyds Bank v Rosset** noted that if there was to be a finding of an actual agreement, arrangement or understanding between the parties it must be based on

evidence of express discussions between the parties even if “imperfectly remembered”. If the claimant is relying on his act of detrimental reliance he must show that it was done on the basis of a representation made out to him by the defendant and must be related to a common intention at the time. This approach was approved by Forte JA in **Azan v Azan.**

[75] After signing the statutory declaration there is no evidence as to any express agreement or discussions between the parties that the claimant was going to acquire an interest if he paid the mortgage on the loan. In fact there was no evidence from either side as to how the claimant came to have paid the installments. Did they agree that the claimant would give up his benefit which gave him no interest but that if he paid the mortgage he would then get an interest? There is no such evidence. It may be true that one might assume that a person taking a loan takes on his own behalf and is not making a gift. But this is a rebuttable assumption. The facts may suggest otherwise and may in fact point to a gift.

[76] The undoubted truth is that many domestic relationships are so arranged as to have their basis on gift giving by one party. It may also be assumed that in certain cases of cohabitation where one party owns the premises and the other is living rent free, it may be expected that that party would make a contribution to the living expenses in one form or the other. In this case the evidence is that the claimant only contributed to the electricity bills in the home apart from the monthly payments he made on the NHT loans.

[77] Judicial subjectivity aside, propriety rights cannot be determined by individual moral opinion. So if parties arrange their lives on the basis of gift giving, that is one dominant party pays the rent and utilities for the other, or some of the mortgage installments, until the relationship breaks down, the court has no mandate to impute in

this arrangement any notion of common intention to grant to the gift giver an equitable interest in the interest of "fairness".

[78] Therefore this court cannot say that, because in his declared intention to assist the defendant the claimant paid approximately $105,913.86 in mortgage payments (of which he was refunded $51,530.27), it is only fair and just to give him a proprietary interest, in the absence of any evidence of any common intention for him to take such interest. He can only succeed on established legal principles.

[79] In any event I may just be permitted to take judicial notice that in the case of mortgage payments the early life of the installment covers interest payments and not the principal. In such a case the claimant's contribution to the capital asset is de minimis. See the reasoning of May LJ in **Young v Young** (1984) FLR 375 at p. 380 and that of Lord Bridge of Harwich in **Lloyds Bank v Rosset** p.1118 (c).

[80] The parties lived together for little over a year before the claimant left for warmer and greener pastures. In his witness statement he said,

> **"Having broken off the relationship I decided that I wanted to recover from the defendant all those sums of monies that I expended on improving the house. The defendant has asserted that it is her house and that she never told me to give her anything and so I cannot get back anything from her."**

I find that statement very telling.

[81] The law in this area where a mortgage is involved developed around mortgages acquired for the purchase of the property. In this case this was a home improvement loan. It was a mortgage acquired to improve a property where the legal and beneficially interest lay solely in the defendant. In the case of a loan for home improvement or build on own land, the legal and beneficial interest remain as it were at the time of the acquisition and

the money to clear the loan does not affect the beneficial interest in the absence of a clear intention, express or implied, for it to do so.

[82] In such a case, where there is no express or implied intention to alter the beneficial interest, the payment of the mortgage by one person not the legal owner can only give rise to a monetary claim against the legal owner (if the circumstances permit) and does not create any proprietary interest in the payee. Taking the argument to its logical conclusion, even if the claimant was not the borrower from the NHT but he paid the mortgage installments, he still could not acquire a beneficial interest in the absence of evidence of a common intention that he would do so. If I may be allowed to borrow the words of Viscount Dilhorne in **Gissing v Gissing**, the law does not permit a court to ascribe to the parties an intention they never held.

[83] The defendant by her own account is used to getting and accepting gifts from friends and family. It is time to perhaps to be reminded of the Trojan horse, to beware Greeks bearing gifts and to look a gift horse in the mouth.

Other Contributions by the Claimant

[84] Was there any other conduct between the parties from which the court could infer a common intention? Counsel for the claimant pointed to the fact that the parties moved into the home together as common law spouses after its completion. This is a course of conduct, he argued, which shows the parties common intention to own the property jointly. He also pointed to the fact that after moving in both persons continued to expend on improving the property until they separated. However, as I have already stated a common intention to live together and share a home, by itself sheds no light on the intentions of the parties with respect to the beneficial interest.

[85] The claimant said that he gave financial, emotional and physical support to the defendant. He said he paved the yard and built a fence around it. In support of his claim he provided an affidavit from Mr. Marvin Smith. Mr. Smith was cross-examined. He was hired to do the masonry work on the premises. It was he who did the work to complete the house. He also built the fence after the house was completed. He said he was introduced to the defendant by a Mrs. K because the defendant was enquiring about a mason. He met her on the premises of her house. He said he met her and the claimant and discussed what needed to be done. In his affidavit he said the claimant took the lead in the discussions. It is the evidence of the defendant that Mrs. K came with Mr. Smith and whilst the claimant was present he did not take the lead in the discussions.

[86] Mr. Smith agreed that when he arrived at the site he saw building materials there. He said he turned over a finished house to them on his part of the contract. He however, was not responsible for the painting or the tiling. He said the defendant came to the site to see that things were running smoothly but that most times she was accompanied by the claimant. He claimed not to have had much interaction with her and that she was not an active participant in the building of the house. He admitted that when the decking was being cast she came and cooked for the workmen.

[87] The evidence of the defendant was that she would visit the work site almost daily. She was the one who ensured the workmen were not wasting time and that the materials were delivered in good time. She also kept in touch with the site officer from the NHT who visited the premises periodically for inspection. She said she cooked daily for the workmen providing both food and drink.

[88] Contrary to Mr. Smiths claim that he had very little interaction with her, the defendant gave evidence that she pestered him about the arch between the dining room and the living room which he adjusted; about the poorly constructed concrete base for the kitchen sink which he adjusted; about the concrete kitchen counter which was too long which he remedied; she also spoke to him about the use of the cement. This is supported in part by the site visit sheet which noted that there were variations to be done to off set the cost of the construction. In considering the evidence I take into account the fact that at the time the claimant was a member of the JCF and would be limited to his off duty times. He himself gave no evidence of the amount of time he spent on the site or what he did there.

[89] Mr. Smith told the court that he was paid for his labour by Mr. Hinds. At first he denied that he was ever paid by the defendant but later admitted that he was sometimes paid by the defendant in the company of the claimant. The evidence from the defendant is that the NHT made out a number of cheques to them based on the loans and after cashing the cheques, sometimes the claimant would pay him, sometimes she would pay. I accept her evidence in this regard.

[90] He said he did not know who paid for the construction material. When his attention was brought to paragraph 7 of his affidavit he explained that he only said they were paid for by the claimant because he ordered them through him. He said that if there was a problem on the site it was Mr. Hinds that he called.

[91] The defendant gave evidence as to how the materials were purchased. She said that the NHT required that invoices be obtained from the stores, upon receipt of such invoices cheques would be made out to the various establishments. She claimed that she

was the one who did all the purchasing of the materials. NHT payment certificates and receipts exhibited by the defendant supports this contention, as the receipts are in the name of the defendant only.

[92] Mr. Smith said the cost of his labour on the house was between four hundred and five hundred thousand dollars. The defendant's evidence was that Mr. Smith's labour cost was four hundred thousand dollars. The claimant was unable to say how much Mr. Smith was paid for his services.

[93] The defendant admitted in evidence that the $1,800,000.00 obtained by both of them in January 2006 could not complete the house. She obtained another $650,000.00 which she said could complete the construction work. She admitted that to complete the house inclusive of fixtures would take more money. She told the court she could not now recall how much more it took to finish the house. She said that money came from her children and her friends. Her children she said sent her money from overseas and a friend sent her to take materials from a certain company. He would leave a cheque at the company and she would go there and collect the materials. She said her children have been taking care of her by sending money every month since 2005.

[94] She had also been collecting rent from 2 premises since 2005, both aggregating a monthly total of $73,000.00. That she said was used to provide food in the house and pay utility bills. This rental was her only source of income at the time along with the help from her children and her friends.

[95] She denied that the clamant contributed to the cost of construction outside of the $1,000,000.00 loan. I accept that the construction cost was met by the NHT loan. The painting, windows and tiling were paid for by the defendant.

[96] It is now trite that ordinary domestic actions and making improvements for one's domestic and creature comfort do not alter the beneficial interest in property. Neither does the activities of a spouse or 'special friend" in doing odd jobs around the house and making minor renovations and improvements. The wife's or girl friend's cooking and cleaning and looking after the kids, is not per se, sufficient from which to infer an intention to share property beneficially. Such conduct must be one pointing inexorably to the claimant's acting upon a common intention to take a beneficial interest. There must therefore be shown, in such a case, firstly the existence of the common intention and that the claimant's actions amounted to his acting upon that intention.

[97] Of course the more burdensome, unusual or exceptional the act, is the more likely the courts are to say it is evidence of an action on the common intention. But the court must first clear the hurdle of finding the common intention. So if there is evidence of a lack of common intention, the actions being relied on will be found to be the acts of mere volunteer. See **Grant v Edwards** at page 126. The claimant has failed to show that his emotional and physical support and his financial contribution to the building of the fence and paving the yard pointed to a common intention that he would share in the beneficial interest. In **Gissing v Gissing** Viscount Dilhorne at page 786 stated that "payment for a lawn and provision of some furniture and equipment for the house does not itself point to the conclusion that there was such an intention."

[98] The burden is on the claimant to establish that the equitable interest lies other than with the legal estate. This, the claimant has failed to do.

The Issue of Compensation

[99] Should the defendant be compensated for his expenditure? There was no claim for compensation in monetary terms only a claim for a beneficial share. However, in evidence the claimant did say he believed he was entitled to his money back. In cross examination he said that he could not recall the exact date when he decided he wanted back his money spent on the construction of the house. Although the claim is not framed in monetary terms I will consider the possibility of compensation in such cases, based on the applicable legal principles.

[100] Lord UpJohn in **Pettitt v Pettitt** page 818 said:

> "***My Lords, the facts of this case depend not upon the acquisition of property but upon the expenditure of money and labour by the husband in the way of improvement upon the property of the wife which admittedly is her own beneficial property. Upon this it is quite clearly established that by the law of England the expenditure of money by A upon the property of B stands in quite a different category from the acquisition of property by A&B.***
> ***It has been well settled in your Lordships' House (Ramsden v Dyson (1865) L.R.H.L. 129) that if A expends money on the property of B, prima facie he has no claim on such property and that, as Sir William Grant M.R., held as long ago as 1810 in Campion v Cotton (1810) 17 Ves. 263, is equally applicable as between husband and wife. If by reason of estoppel or because the expenditure was incurred by the encouragement of the owner that such expenditure would be rewarded, the person expending the money may have some claim for monetary reimbursement in a purely monetary sense from the owner or even, if explicitly promised to him by the owner, an interest in the land (see Plimer v Wellington Corporation (1884) 9 AC 699.***
> ***But the respondent's claim here is to a share of the property and his money claim in his plaint is only a qualification (sic) of that. Plainly in the absence of agreement with his wife (and none is suggested) he could have no monetary claim against her and no estoppel or mistake is suggested so, in my opinion, he can have no charge upon or interest in the wife's property.***

[101] It is clear therefore that expenditure on the acquisition of the property is to be considered differently from expenditure on the property after acquisition. Expenditure after acquisition can confer no beneficial interest to one party outside of an agreement so to do, or if one side was encouraged to so, believed or promised such an interest and the other party acted on the strength of such promise or encouragement. Equity will not allow the dishonest promisor to resile from the promise. On the other hand the promisee may claim restitution, if he is not a volunteer.

[102] In contrast where a proprietary estoppel is averred (and that is not the case here) it typically consists of asserting an equitable claim against the conscience of the true owner. The claim is a mere equity. It is satisfied by the minimum award necessary to do justice and most often leads only to a monetary award.

[103] The claimant contributed to the cost of building the side fence and paving the back of the yard. It was argued that this was done for the sole benefit of securing his dogs on the premises. There is no question of the building of the fence and the paving of the yard being sufficient to secure a beneficial interest in the ownership of the premises. The only issue is whether there was a promise of monetary recompense for so acting.

[104] The evidence of Mr. Marvin Smith is that there were about 4-5 dogs on the premises belonging to the claimant. He agreed he was told by Mr. Hinds to complete the fence quickly so that he could secure the dogs properly. He said there was already a back fence which he built on top of. There was no fence to the side and he built one. The front fence he blocked up but did not render or dress. He said the fences were built after the house was completed. He also said he was told by the claimant to pave the yard but he did not tell him why. He did not say how much he was paid to do this work.

[105] The defendant's evidence is that the neighbour's to the back and to the left side of her house had already constructed their fences. The right side of the house to an open lot and the front were not fenced. She said at that time the claimant was breeding dogs and had about eighteen dogs in the yard. He wanted to secure them. He made arrangements with Mr. Smith who began construction of a fence to the front in December 2006. She said the claimant then piled blocks to the side of the yard so that he could untie the dogs. She claimed that the front fence was completed by her in 2008 at a cost of $45,000. She also paid $20,000.00 to have it painted; she paid to have fancy grill work done to the front portion of the fence; she constructed two front gates onto the front fence at a cost of $172,000.00. She claimed to have also paid to rebuild the curb wall to the front of the house and tiled the driveway from the garage to the gate. This was not challenged.

[106] As to the paving of the back of the yard, this she said was done by the claimant as she could not live with the mess the dogs made in the clay dirt in the yard. The materials used were those already at the premises. The front driveway, she said, was paved by Mr. Smith at the same time as the work on the house.

[107] The claimant admitted to keeping dogs on the premises. He denied that he reared dogs but admitted to having up to five dogs on the premises at one time. He disagreed that he paved the back yard because of the dogs. He claimed to have been solely responsible for building the fence around the premises. He denied he used material left over from the construction of the house. He said he needed a fence for security and not to secure the dogs.

[108] He also claimed that when he moved out the front fence was completed but the side and back fence was not yet rendered. He could not recall how much he paid to build

the fence. He could not recall if Mr. Marvin Smith came and saw material in the yard. When pressed he could recall scarcely little of his cash contributions to the construction or improvement on the premises outside of the NHT loan. The evidence of the defendant is to be preferred to the claimant's in its entirety.

[109] Surprisingly he also could not recall if he operated a joint account with the defendant. He said he operated several savings accounts in 2006 but he could not recall how much he had. When pressed he said he could recall three of them and agreed the defendant's name was not on any of them.

[110] As I have said the claimant's claim is not for reimbursement but for an interest in the property. In light of the evidence, as I have already found, the building of the fence and paving of the yard in the absence of an agreement, could not give rise to an equitable interest in the property. As for any need to order restitution to the claimant there is no evidence that there was a promise that he would be rewarded in monetary terms for his effort.

[111] Some commonwealth jurisdictions have accepted unjust enrichment as a valid claim in cases like these. Where those claims succeed the claimant is held to be entitled to the return of sums which was expended on the refurbishment or purchase of the house, whilst the parties lived together, in expectation of continued cohabitation or marriage. This is generally based on the courts notion of fairness. It is especially relied on in Scotland where there is no separation of the legal or beneficial interest and parties can only claim monetary compensation. See **Satchwell v McIntosh** 2006 (Sh ct) 117.

[112] However, in this case, it cannot be said that the claimant derived no benefit from building the fence. I accept that it was constructed, at least partially, to secure his dogs. I

find that the fence was only partially constructed by him and he has failed to indicate the cost to him for the said construction. I accept that the defendant made substantial building improvements to the fence since then and there is no evidence of unjust enrichment.

Conclusion

[113] There are infinite numbers of domestic relationships in existence and the parties may arrange their lives in one of an infinite number of ways. Lord Morris of Borth-Y-Gest in **Gissing v Gissing** gave recognition to this when he said;

> "**In the infinite variety of circumstances that may arise there will be cases where there is separate ownership of property in a husband and case where there is separate ownership in a wife and cases where there is joint ownership; there may be a payment which gives rise to a resulting, implied or constructive trust; there may be a gift of money by one to the other; there may be a loan from one to another; there may be services rendered in respect of which some reward was expressly or impliedly promised; there may be services rendered without any contemplation of any such result; there may be services rendered or payments made without any thought that any property rights could be or would in any way affected. When the full facts are discovered the court must say what is their effect in law. The court does not decide how the parties might have ordered their affairs; it only finds how they did. The court cannot devise arrangements which the parties never made. The court cannot ascribe intentions which the parties in fact never had."**

[114] Although I have outlined the contributions relied on separately for ease of reference, I have considered the conduct of the parties in totality in light of their dealings with the property and have concluded that in applying the applicable equitable principles, the claimant's claim fails. Costs to the defendant to be agreed or taxed.