IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 01825 OF 2003

BETWEEN	**CLINTON CAMPBELL**	**CLAIMANT**
AND	**JOYCE McCALLUM**	**1ST DEFENDANT**
AND	**RENEA WHITMORE**	**2ND DEFENDANT**

Miss Marsha L. Smith, instructed by Ernest A. Smith and Company for the Claimant.

Mr. Bert Samuels and Miss Jacqueline Wilcott, instructed by Knight, Junor and Samuels for the Defendants.

Beneficial entitlement to property – visiting relationship – principles of constructive trust – absence of expressed agreement – common intention of the parties – requirement of detriment – quantification of the beneficial interests

Heard: the 18th and 19th February 2009 and the 11th February 2011

Campbell, J.

(1) The Claimant, Clinton Campbell, is a businessman, who contends that he lived as man and wife with Joyce McCallum, from 1988 until April 2001. He alleges that during that time they jointly acquired several assets, including three motor vehicles, two retail stores called, "Jus 4 You" and "Selections," a commercial property situated at Shop 10, Browns Town Plaza, Ocho Rios. The 2nd Defendant is the daughter of the 1st Defendant. He complains that the 2nd Defendant's name was added to the title of Shop 10, although she made no contribution, and she was a student at the time of its acquisition.

(2) On a Fixed Date Claim Form filed on the 3rd October 2003, and amended 23rd April 2008, he seeks declarations that Joyce McCallum and himself are entitled to a 50% of the beneficial

interest in the two retail outlets and Shop10, or that he is beneficially entitled to 50% percent interest of the net proceeds of sale of the entities and motorcar. Similar orders were sought in respect of the three motor vehicles, and further he sought that an account be rendered of all monies received or collected by Ms. McCallum and her daughter.

(3) It was submitted on behalf of the Defendants that for the Claimant to succeed, it is mandatory that the Court, where the evidence supports it, declares that the 2nd Defendant holds her interest on a resulting trust for the benefit of the Claimant and as this was not pleaded, the Court is estopped from making any such declaration. The 2nd Defendant is a legal and equitable owner of the store. At the very least it should be pleaded that her said legal interest was held on a constructive trust for the Claimant.

(4) Ms. McCallum has admitted to a relationship that lasted in excess of thirteen years. She describes it as "a visiting relationship," which is a well recognized form of relationship in this country, and a term with which our Family Courts are quite familiar. Ms. McCallum states that Mr. Campbell resided with his common law wife. On oath, under cross-examination, Mr. Campbell testified that he spent four days per week with his common-law wife and the remainder of the week with Ms. McCallum. The visiting relationship is characterised by the visiting partner being allowed to visit at will and to sleep over as his circumstances dictates. The description of the visiting male "being a man of yard "as the Claimant describes himself is not inconsistent with this type of relationship. The term, as I understand it, means that he is deemed to play the role of the male in the more stable household.

(5) M.G Smith, in the introduction to Edith Clarke's celebrated work, "**My mother who fathered me,**" in explaining the distinction in the socialisation process between local East Indian population and the Creole population in Jamaican society, says at page ii,

> "Firstly, all Creole systems for which we have adequate data institutionalize extra-residential, non-domiciliary, or visiting relations as one of several alternative conjugal patterns. In this conjugal form the partners live apart with their separate kin while the man visits his mate and contributes to the support of herself and their children. According to Stycos and Back, this extra-residential pattern is the most common form of mating among 'lower class' Jamaicans."

(6) Ms. McCallum has denied that Mr. Campbell contributed to the running of the home and stated that she helped him financially from time to time. In any event, six years after the start of the relationship, she describes herself as Joyce Campbell, on a receipt from the Dream Factory Shoe Outlet, in respect of a purchase on the 14th August 1995.

(7) On the evidence of Ms. McCallum, she had been in the "merchandising business" prior to the commencement of their relationship. She had already built her home at Lakemore Gardens in St. Catherine. She had no fixed location for selling her goods, which would be transported from one location to another as the market dictates. She testified in her evidence-in-chief that "I sold goods in Linstead on Tuesdays, in Falmouth on Wednesdays, Thursdays and Fridays; Saturdays, I sold in Ocho Rios." Mr. Campbell, in his affidavit sworn to on the 19th January 2004, at paragraph 2, confirms these sale days, but adds that Ms. McCallum and himself sold together and provided the further information that they also sold on Sundays at a flea market in Kingston.

(8) Many Jamaican vendors travel overseas to acquire their wares. The 1st Defendant states that at no time did she go abroad to do shopping on behalf of Mr. Campbell as a consequence of them being in any partnership. Because the goods were purchased overseas by the vendor, it would quite often be necessary for someone to be attending to the business while the vendor was

overseas sourcing the goods or those sale days would be lost. In addition, there was the business of clearing the imported goods, where those were shipped.

(9) Counsel for Mr. Campbell submits that his case rests on the principle of constructive trusts. **Halsburys Laws of England** (94th Edition) at p.320, states as follows: "A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trusts but which is held by a person in circumstances it would be inequitable to allow him to assert full beneficial ownership of the property;

and at page 321;

> "In recent times, Lord Denning, MR has sought to introduce 'a constructive trust of the new model,' that is, 'a trust imposed whenever justice and good conscience require it ... a liberal process founded on large principles of equity, to be applied where the legal owner cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it ... an equitable remedy by which the court can enable an aggrieved party to obtain restitution. Thus, on the merits of a case, a man may be treated as holding his house on constructive trust as to some share of it for his wife, or resident mistress . . . ."

(10) The path that the court should take in case of constructive trusts was recently laid down by the United Kingdoms House of Lords, in **Stack v Dowden {2007} UKHL 17**. In Lord Walker of Gestingthorpe speech, at paragraph 17;

> "There was however little else on which the House agreed, either in **Petit v Petit** or **Gissing v Gissing**. Revisiting these cases with hindsight derived from a further thirty five years or so of reported decisions, all the questions to be asked about 'common intention' trusts as they emerge from **Petit v Petit** and **Gissing v Gissing**, the most crucial is whether the court must find a real bargain between the parties, or whether it can (in the absence of any sufficient evidence as to their real intentions) infer or impute a bargain. In seeking to answer that question we must, I think, focus on the speeches of Lord Diplock, since these (and especially his later speech in **Gissing v Gissing**) have been hugely influential in the later development of the law. In **Petit v Petit (1970) AC 777** Lord Diplock (at page 822E) saw this task to be carried out, not by reference to the old presumptions of advancement and resulting trust, but by examining the facts and imputing an intention to the parties. He saw this as a 'familiar

> legal technique,' comparable to finding an implied term in a contract. Lord Diplock used the word 'impute' (in various parts of speech) at least eight times in the crucial passage between pp 822H and 825E."

(11) The judgment proceeded to contrast the situation where there was an actual agreement between the parties to a circumstance where this was absent. In **Lloyds Bank plc. v Rosset**, Lord Bridge, who wrote the single judgment of the court, drew attention to one "critical distinction" at page 132 E – G, stated;

> "If there is to be a finding of actual agreement, arrangement, or understanding between the parties it must be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been and at Lord Bridge continued (132H- 133B). In sharp contrast with this situation is the very different one where is no evidence to support a finding of an agreement or arrangement to share. . . ."

(12) Lord Walker opined that the house was unanimous in agreeing that a "common intention" trust could be inferred even where there was no evidence of an actual agreement. "The onus of proof is upon the person seeking to show that the beneficial ownership is different from the legal ownership. Baronness Hale, in **Stack v Dowden,** says at paragraph 56 of her judgment "So in sole ownership cases it is upon the non-owner to show that he has any interest at all in joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest."

(13) Ms. McCullum has denied that there was any agreement between herself and the Claimant. Mr. Campbell name does not appear on the title to any property, save for the Toyota. In order to succeed, he would have to demonstrate a constructive trust by showing that it would be inequitable for Ms. McCullum to claim sole beneficial ownership. This he could prove either by way of direct evidence or it could be inferred from the conduct of the parties. It must be shown that he had acted to his detriment by acting on this common intention.

(14) Was there a common intention on which Mr. Campbell acted? Was the conduct on which Mr. Campbell relied of such a nature that it is only referable to his having an interest in the property? In **Grant v Edwards** [1986] CL 638, Nourse LJ listed the form the events happening on acquisition could take. His final listing (d) is relevant, to these proceedings, "a common intention, not made explicit to the effect that the Claimant will have an interest if she acts in a certain way." It is clear from Nourse L.J's judgment that the conduct need not only be a contribution, it may be "of quite a different character". Whatever the court decides the quid pro quo to have been, it will suffice if the Claimant has furnished it."

(15) As so often happens in these matters, there is a divergence in the evidence as to the presence of an agreement, arrangement or common intention to embark on a joint-business. The Claimant states at paragraph 7 of his affidavit dated 23rd September 2003 and 19th January 2004 that the 1st Defendant and I decided to go into business together and in furtherance of the decision I invested $70,000 in the business. The money was not invested at one time but over a period of time.

(16) Ms. McCallum denies that there was a decision to go into business together, because she was well established in her own business for over eight years before meeting Mr. Campbell. She said that the Claimant did not invest $70,000, or any sum at all. Ms. McCallum stated that after two years of their meeting, he sold his vehicle and he then started his own business selling shoes in the Falmouth market. There is therefore no contention that Mr. Campbell had changed his occupation after meeting Ms. McCallum.

(17) Would there have been a discussion between the parties about his change of occupation, this is more so, since he was entering a business that she was familiar with, and he would be selling in the same markets, on the same days and travelling in the same transportation. Mr. Campbell admits that Ms. McCallum had been in business prior to their meeting. According to him she "was not doing a lot of sales at the time." Was the change effected by Mr. Campbell, a result of a common intention between himself and Ms. McCallum to enter into business?

(18) Mr. Campbell asserts that himself and Ms. McCallum acquired the Toyota van for their joint business, it was purchased and licensed in their joint names. Ms. McCallum says this is as a result of their intimate friendship, and done merely as a gesture of friendship. The possession of the Toyota was crucial to the conduct of the business as they moved goods to Linstead, Falmouth, Ocho Rios and Kingston. It was licensed as a private carrier of goods for and in connection with any trade or business carried on by them.

(19) Mr. Campbell claims to have invested the funds of the sale of his minibus into the business. Counsel for Ms. McCallum points to the varying amounts that Mr. Campbell claims to have invested in the business; the entire amount of $70,000.00 derived from the sale, the remainder of $20,000.00 after the purchase of a Lada, for his common-law wife, or $1000 and says his evidence is contradictory. The sale of his minibus, the purchase of the Toyota, and the importance of transportation to the business being conducted are, to my mind, important factors in the conduct of the parties. Was the vehicles placed in their joint names because they were in a visiting relationship? Or, was the sale of the minibus done to facilitate an investment in a joint business?

(20) In **Gissing v Gissing**, the spectre of a "sophisticated" witness who is aware of the requirements of the law making an answer to enable a judge to make a finding in the witness'

favour was raised. I respectfully agree with Lord Reid's conclusion that "that would not be a creditable state in which to leave the law." This problem may be addressed by looking at contributions that have been fundamental to the establishment of the business, even where the court is unable to find an express agreement or understanding, as I am unable to find on the state of the evidence presented.

(21) In the absence of an expressed agreement or understanding, the court is required to look if the facts disclose an implied constructive or resulting trust. The conduct of the parties may provide the basis from which the court could examine their common intention. Lord Reid in **Gissing v Gissing** had posed the following query; "If there has been no discussion and no agreement or understanding as to the sharing in the ownership of the house and the husband has never evinced an intention that the wife should have a share, then the crucial question whether the law will give a share to the wife who has made those contributions without which the house would never have been bought. I agree that this depends on the law of trust rather than on the law of contract, so the question is, under what circumstances does the husband become a trustee for the wife in the absence of any declaration of trust or agreement on his part. **It is not disputed that a man can become a trustee without making a declaration of trusts or agreement on his part. It is not disputed that a man can become a trustee. The facts may impose on him an implied, constructive, or resulting trust.** (Emphasis mine)

(22) and Lord Diplock, at page 268,

> "Parties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested In them jointly without having used express words to communicate this intention to one another, or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case - a common one where the parties are spouses whose

marriage has broken down – it may be possible to infer their common intention from their conduct."

(23) The Claimant could establish a beneficial interest in the property if he could demonstrate a constructive trust by showing it would be inequitable for the 1st Defendant to claim sole beneficial ownership. In order to do so, he will have to demonstrate a common intention that they should both have a beneficial interest and that he had acted to his detriment on the basis of that common intention and in the belief by so acting he would acquire a beneficial interest.

(24) The evidence of Ms. McCallum was that the Toyota was driven by an employee, a Mr. Stewart for her business, whilst Mr. Campbell drove an Econoline van for her business and his. If he drives for her six days per week, what is the salary that he has earned? The Claimant's evidence is that he bought the Econoline at an auction in New York, then drove the vehicle from New York to Miami, where it was shipped in Ms. McCallum's name. These are services he rendered for which he had not been compensated. If the businesses were separate, there is no explanation why the goods were not separated in different vans. I cannot accept the submission of counsel for Ms. McCallum that this is what a boyfriend is expected to do for his girlfriend. The conduct of Mr. Campbell in driving six days per week to the benefit of the defendant without remuneration; his role in the acquisition of Econoline van, having given up his prior occupation, is only referable to a common intention of the parties to pool their resources in a joint business.

(25) It has not been contradicted that there was a tyre business in operation. This business carried the name "High Five," the name of the mini-bus that Mr. Campbell claims to have sold in order to invest in the joint business. He asserts that they operated this tyre business jointly. He

has exhibited receipts for the tyres purchased in their joint names, or in the name "High Five Tire Store." It is clear that Ms. McCallum was not in the business of tyre sales prior to the entry of Mr. Campbell. Why are the tyres being purchased in their joint names if she is not involved in the purchase? It is noteworthy that it is Ms. McCallum that completes the importation procedure for the tyres. This reception of the High Five tyre business would also indicate a common intention to pursue a joint business venture by the parties.

(26) As already been noted, the Toyota was purchased in their joint names. It has not been challenged that the Econoline was purchased by Campbell, who then drove it from New York to Miami; the vehicle was shipped to McCallum, who had it registered in her sole name. The Claimant further alleged in addition, he was responsible for servicing all the vehicles and was named in the insurance certificate as the only driver of the vehicles. If the vehicles belonged solely to Ms. McCallum, why would she cede responsibility for their upkeep and insure them with the claimant as the only driver? The conduct of the parties would cause the court to impute to them the common intention of conducting their business together. I find that the arrangements are more in accord with a commercial partnership than an intimate relationship, as is contended by Ms. McCallum. To my mind, the conduct of the parties recognizes the superior knowledge of Mr. Campbell in the matter of motor vehicles, and places that sphere of their joint business under his sole control.

(27) Although Ms. McCallum alleged that the Claimant only sold shoes in the Falmouth market, whilst she sold clothing and shoes, he has tendered several receipts (see cc 4 – 17) for various items of clothing purchased by himself. Was the clothing in those receipts for her or for the joint business? The 1st Defendant also asserts at paragraph 8 that, "At no time did I go abroad to do shopping on behalf of the Claimant as a consequence of us being in any

partnership." However, the Claimant has produced a receipt of purchases by the 1st Defendant in the joint names of the parties from a Miami Linen establishment in 1999, and from an establishment called Tyre Connection, in respect of the tyres. Wherever the evidence of the Claimant and the 1st Defendant is in conflict, I prefer the evidence of the Claimant.

(28) Mr. Campbell alleges that himself and the 1st Defendant jointly instructed and paid for the building of burglar bars and an entrance grill at the store, "Selections", in Ocho Rios and a small gate at "Just 4 U", in Browns Town. The invoices from Mr. George Walker dated 13th November and 23rd February 2007 respectively, provides documentary support to the evidence of the Claimant. In both invoices, the draftsman makes no distinction between the parties, who are both named in the document. This supports the Claimant's allegation that he joined the 1st Defendant in the store after selling off the soiled and damaged goods that they deemed unfit to be placed in the shop.

(29) The joint instructions to the sales clerk, "to be careful of the people close to her" and that "109 pairs of shoes were being left and these were to be sold at $250.00 each, nothing less". This note dated 2nd July 1996 makes clear that both persons were of one mind in relation to the terms of sale of the item, that they both exercised control over the sales clerk and had the necessary joint-ownership of the goods to state a common price. Of prime importance is the fact that the parties felt it necessary that both of their names appear in the written instructions. What would be the purpose of including Mr. Campbell's name in these instructions if he was not a part of the management structure of the joint enterprise? The Defendant has discharged the onus placed on him to prove a common intention that he is beneficially entitled to an interest in the properties and retail outlets.

(30) Was there a detriment to Mr. Campbell as a result of his relying on the common intention between the parties? In **Gillette v Holt and Anor**, Mr. Gillette had met Mr. Holt, a farmer, when the former was still a schoolboy, who acted as his caddie. A friendship developed between the two. Mr. Holt proposed that Gillette should leave school early, against the advice of his headmaster, who urged that he should take his "O" and "A" Levels before leaving school. Mr. Holt had planned that he would go to Agricultural College, in the event, that did not transpire. Mr. Holt had intimated on several occasions that, on his passing, Mr. Gillette would be the beneficiary of the 536 acres farm. There was a falling out based on unproved allegations of Mr. Gillette conduct, Mr. Holt sought to renege on his promise. Mr. Gillette brought an action based on proprietary estoppels.

(31) On the question of detriment, the trial court focused on whether Mr. Gillette was underpaid, Lord Justice Walker quoted the trial judge's comment on this point.

> "Various other matters were relied on by Mr. Gillette in support of his case of detriment; for example, his refusal of enquires of other employers, the limited provision made for his pension, the domestic tasks undertaken by him and Sally (his wife) for Mr. Holt, and the money spent by him on improving the Beeches. The judge then looked at some of the advantages that accrued to Mr. Gillette as a result of his forty year stint with Holt, and concluded. "The Gillettes decided at an early age that their future lay with Mr. Holt, and as with most human relationships, that involved obligations and compensations. I cannot find in them such a balance of "detriment" as to support the case for a legal enforceable obligation."

(32) Lord Walker continued:

> "The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether

> repudiation of an assurance is or is not unconscionable in all the circumstances."

In overturning the trial judge's finding that the detriment was not established, opined;

> "I think that the judge must have taken too narrowly financial a view of the requirement of detriment ..."

(33) The joint venture had run from 1988 until April 2001. The Claimant had transported the 1st Defendant's goods six days a week, before the shops were acquired. He had sold his bus and left the business of public transport; given directions to staff and paid workmen. He had initiated the process that led to the acquisition of Lot 10, Browns Plaza, Ocho Rios, in the Parish of Saint Ann. The monies he had put in over the years.

Was the conduct of Mr. Campbell in making such substantial indirect contributions to the establishment and operation of the business conduct on which he could reasonably have expected to embark unless he was to have an interest in the house?

I cannot see on what other basis he could reasonably have been expected to give the Defendant such substantial assistance in the establishments, operation and conduct of her business. I therefore conclude that the Plaintiff did act to his detriment on the faith of the common intention between himself and the 1st Defendant that he was to have some sort of proprietary interest in the house. As I have indicated for the detriment to create a beneficial interest, it is required to be substantial, a requirement that I find is well met.

The quantification of the right.

(34) Lord Browne Wilkinson, commences his speech in **Grant v Edwards**, at page 437, letter C, with the following observation. "In my judgment, there has been a tendency over the years to distort the principles laid down in the speech of Lord Diplock in **Gissing v Gigssing** (1970) 2 All

ER 780 by concentrating on only part of his reasoning. For present purposes, his speech can be treated as falling into three sections; the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.

Once it has been established that the parties had a common intention, both should have a beneficial interest and that the Claimant has acted to his detriment, the question may still remain; what is the extent of the Claimant's beneficial interest?

(35) What is clear that the evidence of the Claimant's contributions may provide evidence from which the common intention may be inferred to corroborate direct evidence of intention and to demonstrate that the Claimant has acted to his detriment on reliance on the common intention as also to quantify the extent of the beneficial interest? It's the same evidence that is capable of eliciting the queries raised under these various heads. The interest of the parties will be what they intended. It has to be borne in consideration that the Claimant had been in this business prior to the arrival of the Claimant, and had managed on her own to purchase her own home, and certainly of the two, appear to this court to be possessed of more business acumen. The Claimant's counsel had submitted that the Claimant's reading ability was less than that of the Defendant. I find that the Claimant is entitled to 40% of the beneficial interest in the properties.

(36) I hereby grant the following Orders:-

1. The Claimant is entitled to a beneficial interest of 40% and the 1st Defendant is entitled to a beneficial interest of 60% in the store "Jus 4 You" formerly situated at Ocho Rios in the parish of Saint Ann.
2. That the Claimant is entitled to a beneficial interest of 40% and the 1st Defendant is entitled to a beneficial interest of 60% in the store "Selections Boutique" situated at May Pen in the parish of Clarendon.

2. That the Claimant is entitled to a beneficial interest of 40% and the 1st Defendant is entitled to a beneficial interest of 60% in the store "Selections Boutique" situated at May Pen in the parish of Clarendon.

3. That the Claimant is entitled to a beneficial interest of 40% and the 1st Defendant is entitled to a beneficial interest of 60% in the premises situated at Shop 10, Brown's Plaza, Ocho Rios in the parish of Saint Ann and comprised in Certificate of Title registered at Volume 1265 folio 464 of the Register Book of Titles.

4. That the Claimant and the 1st Defendant are each entitled to a beneficial interest in the following motor vehicles:-

    (i) 1993 Honda Accord

    (ii) NPR Isuzu motor truck licensed 8199DA

    (iii) Toyota Hiace panel bus licensed CC826Q

5. That the Claimant is entitled to a beneficial interest of 40% and the Defendant is entitled to a beneficial interest of 60% of the net proceeds of sale of the aforementioned motor vehicles.

6. That an account be rendered and taken of all monies received and/or collected by the Defendants for all dealings including but not limited to the earnings and net proceeds of sale of the aforementioned stores, motor vehicles and property registered at Volume 1265 Folio 464 of the Registered Book of Titles.

7. In the event the Defendant refuses to sign any transfers, sale agreements and/or documents necessary to give effect to the above Orders, that the Registrar of the Supreme Court be empowered to sign same.

8. Cost of the Application to the Claimant to be taxed, if not agreed.