IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

FAMILY DIVISION

CLAIM NO. 2010M01771

BETWEEN	**GREGORY ONEIL GORDON**	**PETITIONER/ RESPONDENT**
AND	**PAULINE VICTORIA GORDON**	**RESPONDENT/ APPLICANT**

Miss Marjorie Shaw and Miss Terry-Joy Stephenson instructed by Brown & Shaw for the petitioner

Mrs. Verleta V. Green for the respondent

Heard: December 17, 2013, April 7, 8, May 14 and June 19, 2014

PROPERTY (RIGHTS OF SPOUSES) ACT – JURISDICTION – CLAIM FILED MORE THAN TWELVE MONTHS AFTER SEPARATION

MATRIMONIAL HOME - ENTITLEMENT TO INTEREST

EQUITY – CONSTRUCTIVE TRUST

SIMMONS, J

[1] By way of a Notice of Application for Court Orders filed on the 14th February 2011, the respondent Pauline Victoria Gordon seeks the following remedies:

i.) A declaration that the petitioner and the respondent are equally entitled to the beneficial interest in all that parcel of land part of

Molynes in the parish of Saint Andrew being the lot numbered one hundred and thirty nine on the plan of Molynes (No 107-109 Red Hills Road) being the land known as 76 Sunrise Crescent registered at Volume 1323 Folio 382 of the Register Book of Titles (the Sunrise property);

ii.) A declaration that the Petitioner and the respondent are each entitled to one half interest in the business known as Greg's Restaurant and Lounge situated at 591/2 Constant Spring Road, Kingston 10 in the parish of St. Andrew (the business);

[2] There was also a claim for an account and certain other consequential orders.

Background

[3] The parties in this matter were married on the 9th August 2000. At the time the petitioner resided at 564 Queens Park, Greater Portmore in the parish of St. Catherine (the Portmore house). The respondent resided in the United States of America with her three children from a previous relationship.

[4] During the subsistence of the marriage the petitioner would go to visit the respondent in the United States and she would come to Jamaica about three times per year. Her evidence is that she would stay for up to two weeks.

[5] It is undisputed that she furnished the Portmore house and would stay there when she came to visit. In fact, she had stayed there on two occasions before the marriage.

[6] Their relationship was far from smooth and in or about 2002 she removed her furniture from the Portmore house having been told by the petitioner to do so.

[7] In October 1999, the petitioner purchased the Sunrise property which was a vacant lot of land. There is no dispute that the respondent did not contribute to its acquisition. The respondent had also purchased property prior to the marriage. That property was situated in the parish of St. Thomas and she is registered as its sole proprietor (the St. Thomas property).

[8] In 2008, the respondent filed a Petition for Dissolution of Marriage but did not pursue it as she was in the process of filing for Mr. Gordon's daughter, Kamille. Mr. Gordon subsequently filed the Petition in this matter. The respondent has not contested the Petition but has sought a declaration for an interest in the Sunrise property and the petitioner's business known as Greg's Restaurant & Lounge (the business).

[9] A preliminary objection was taken in relation to the respondent's claim being made by way of a Notice of Application for Court Orders. That Notice which grounds Mrs. Gordon's claim for a division of property was filed in the same suit as Mr. Gordon's Petition for Dissolution of Marriage.

[10] Part 8.1 of the ***Civil Procedure Code 2002*** states that a claimant who wishes to commence proceedings in this court must do so by filing a Claim Form or a Fixed Date Claim Form, depending on the relief being sought and the circumstances of the case. Rattray J ruled in her favour and the matter was allowed to proceed.

Does the court have the jurisdiction to hear the application under section 13 of the Property (Rights of Spouses) Act?

[11] Section 13 of the ***Property (Rights of Spouses) Act*** (***PROSA***) states:-

> *"(1) A spouse shall be entitled to apply to the Court for a division of property –*
>
> *(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or*
>
> *(b) on the grant of a decree of nullity of marriage; or*
>
> *(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or*
>
> *(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.*
>
> *(2) An application under subsection (1)(a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.*
>
> *(3) For the purposes of subsection (1)(a) and (b) and section 14 the definition of 'spouse' shall include a former spouse."*

[12] Section 14 (1) sets out the basis on which the court may make an order under section 13. It states as follows:-

> *"Where under section 13 a spouse applies to the Court for a division of property the Court may-*
>
> *(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
>
> *(b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),*
>
> *or, where the circumstances so warrant, take action under both paragraphs (a) and (b)".*

[13] Section 6 establishes the equal share rule in respect of the family home and section 7 provides for its variation in circumstances where its application would be unreasonable or unjust.

[14] At the conclusion of the evidence in this matter the issue of jurisdiction was raised by counsel for Mr. Gordon. The Petition in this matter states that the parties separated in 2006. Mrs. Gordon said that this occurred in 2007. There is however, no need to resolve that issue as on the account of both parties, it was more than twelve months prior to the filing of this application. Miss Shaw submitted that the court did not have the jurisdiction to hear this matter on the ground that the application was filed out of time. In other words, a limitation defence was raised.

[15] The issue of jurisdiction is one of law and may be raised at any time. This was acknowledged by Phillips JA in ***Brown v. Brown*** **[2010] JMCA**

Civ 12 at paragraph 94. In ***Bryant-Saddler v. Saddler; Hoilette v. Hoilette*** (***Saddler and Hoilette***) [2013] JMCA Civ 11 the Court of Appeal in its consideration of the effect of the applicant's failure to apply for an extension of time conducted an extensive examination of the provisions of section 13 of ***PROSA***.

[16] In that case, the court pointed out that section 13 (2) sets out the time line in which applications for a division of property under ***PROSA*** may be made. It was also confirmed that time begins to run against an applicant upon the occurrence of the events listed in section 13 (1) (a) – (c). It was also noted that the section gives the court the discretion to extend the time for the filing of such applications where the circumstances of the case warrant such action.

[17] This discretion is to be exercised bearing in mind such factors as the length of the delay, the reasons for the delay and its likely effect on the court's ability to deal with the case justly. Such evidence is required to be presented to the court by way of an affidavit (see ***Allen v. Mesquita*** [2011] JMCA CIV 36).

[18] Mrs. Gordon has not applied for an extension of time within which to make this application and as such there is no material basis on which the court's discretion could be invoked. The limitation period having expired, it is my ruling that this matter cannot be considered under section 13 of ***PROSA.***

[19] This does not in my view signify the end of the matter. In ***Chang v. Chang*** 2010/HCV 03675 Edwards J made the following observation with which I agree:-

> *"It is quite possible for instance that a claimant may be time barred from proceeding under section 13 (1) (c) but could validly proceed under section 11 for which there is no limitation period as long as the marriage subsists. A married spouse could also proceed under section 13 (1) (d) for which there is also no limitation as to time. So a claim filed under the Act might not be able to proceed on an action for division of property, if the time limit has passed and no extension is given; but a claimant may validly proceed (if applicable) under section 11 or 13 (1) (d) using the same claim form".*[1]

[20] This approach was described by Phillips JA in ***Saddler and Hoilette*** as *"compelling".* Section 11 of ***PROSA*** which is similar to the now repealed section 16 of the ***Married Women's Property Act*** states:

> *"(1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides.*

[1] Paragraph 91

(2) The Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property".

[21] Under the above section there is no presumption that the parties are equally entitled to the property concerned and its ambit is not restricted to the family home. There is therefore no need for the court to make a ruling in respect of that vexed issue.

Does Mrs. Gordon have an equitable interest in the Sunrise property?

[22] The main thrust of the submissions made on behalf of the applicant was in respect of whether the Sunrise property was the family home. Mrs. Green did however indicate that in the event that the court either found that it was not, or that the court lacked the jurisdiction to consider the application under section 13 of ***PROSA*** reliance was being placed on the law of trusts.

[23] It was argued that based on the applicant's contribution to the development of the Sunrise property a constructive trust had been established in her favour. In this regard, counsel referred to Mrs. Gordon's evidence that Mr. Gordon had told her that the Sunrise property was where they would start their life together. Reference was also made to her evidence that he had told her that what belongs to him is also hers and vice versa. Mrs. Green submitted that the applicant relied on those statements and acted to her detriment.

[24] Mrs. Green further submitted that based on the principles in ***Grant v. Edwards*** [1986] 2 All ER 426, ***Gissing v. Gissing*** [1970] 2 All ER 780

and ***Pettit v. Pettit*** [1969] 2 All ER 385, the applicant was entitled to an equitable interest in the Sunrise property.

[25] Miss Shaw on the other hand, argued that Mrs. Gordon had not made any significant contribution if any, to the development of the Sunrise property. It was also submitted that in order to determine whether there was any common intention between the parties regarding their interest in the Sunrise property their words and conduct at the time of its acquisition are to be considered.

[26] Counsel also directed the court's attention to the applicant's evidence that she did not expect to be repaid by Mr. Jackson and had made this application to secure the interest of her daughter. It was submitted that any money that she may have given to Mr. Jackson was not with a view to her obtaining an interest but was an act of generosity.

[27] A purchaser of land, having paid the purchase price and taken a conveyance in his name is presumed to have acquired both the legal and beneficial interest in that land. In order to rebut that presumption, a person claiming an interest must prove that the beneficial interest is held by the legal owner on trust for the benefit of the applicant as *cestui que trust.*

[28] Therefore, where property is in the name of one party to a marriage, the party claiming a beneficial interest must, in the absence of any express agreement, resort to the law of trusts to establish such an interest. This principle was stated by Lord Diplock in ***Gissing v. Gissing*** (supra at 790) in the following terms:-

> *"Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in*

the land is not vested must be based on the proposition that the person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts'. Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to constitute a valid declaration of trust by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by s 53(1) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application.

A resulting, implied or constructive trust—and it is unnecessary for present purposes to distinguish between these three classes of trust—is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words

or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land".

[29] The basic principle is that the legal and equitable interests in property vest at the time of its acquisition unless they are subsequently changed by a conscious act of the parties. In order to determine whether the applicant has a beneficial interest in the property the intention of the parties at the time of its acquisition is the primary consideration. However, evidence of what the parties said or did after its acquisition is relevant in so far as it assists the court to ascertain their intentions regarding the property (see ***Gissing v. Gissing*** supra at page 791). This exercise has been acknowledged by various courts as one which is particularly difficult due to the nature of the relationship of husband and wife.

[30] A constructive trust arises where it would be unconscionable or inequitable for the legal owner of property to claim to be solely entitled to its beneficial ownership (see ***Grant v. Edwards*** [1986] 2 All ER 426 at 436). In order to prove the existence of such a trust it must be established that there was a common intention between the parties that the respondent should have a beneficial interest in the property and that she acted to her detriment in reliance on that intention.

[31] The elements of a constructive trust was explained in ***Azan v. Azan*** SCCA No. 53/87 (delivered on the 22nd July 1988), where Forte JA adopted the following principle from Sir Nicolas Browne-Wilkinson V-C in the case of ***Grant v. Edwards*** (supra at 437):

> *"If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention".*

[32] Nourse LJ expressed a similar view at page 432 of ***Grant*** where he stated-

> *"In order to decide whether the plaintiff has a beneficial interest … we must climb again the familiar ground which slopes down from the twin peaks of Pettitt v Pettitt [1969] 2 All ER 385, [1970] AC 777 and Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886. In a case such as the present, where there has been no written declaration or agreement, nor any direct provision by the plaintiff of part of the purchase price so as to give rise to a resulting trust in her favour, she must establish a common intention between her and the defendant, acted on by her, that she should have a beneficial interest in the property. If she can do that, equity will not allow the defendant to deny that interest and will construct a trust to give effect to it.*

In most of these cases the fundamental, and invariably the most difficult, question is to decide whether there was the necessary common intention, being something which can only be inferred from the conduct of the parties, almost always from the expenditure incurred by them respectively. In this regard the court has to look for expenditure which is referable to the acquisition of the house: see Burns v Burns [1984] 1 All ER 244 at 252–253, [1984] Ch 317 at 328–329 per Fox LJ. If it is found to have been incurred, such expenditure will perform the twofold function of establishing the common intention and showing that the claimant has acted on it".

[33] This principle was adopted by the Court of Appeal in ***McCalla v. McCalla*** [2012] JMCA Civ 31 by McIntosh JA who said:-

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

evidencing the requisite common intention, it may be inferred from the conduct of the parties".

[34] The learned Judge of Appeal also made the point that although most cases involved the matrimonial home and parties whose relationships were broken*, "…the principles are equally applicable where the property in question is not the matrimonial home and the issue to be determined is not as between parties to a marriage".*

[35] Where there is no express agreement between the parties as to whether they were to share the beneficial interest in the property, it is their conduct as a whole which must be scrutinized in order to determine if the requisite common intention existed at the time of its acquisition. See ***Azan v. Azan*** (supra) and ***Plummer v. Plummer C***laim No. 2006HCV00864 (delivered on the 15th June 2009).

[36] In this case there is no evidence of any express agreement between the parties as to their respective interests in the Sunrise property. It must therefore be determined whether it can be reasonably inferred from the words and conduct of the parties that there was an intention for Mrs. Gordon to enjoy a beneficial interest.

[37] There is however a caveat. In ***Stack v. Dowden*** [2007] 2 All ER 929 Lord Neuberger of Abbotsbury was careful to point out that whilst an intention may be inferred it may not be imputed. He defined an inferred intention as *"…one which is objectively deduced to be the subjective actual intention of the parties, in the light of their actions and statements".*

[38] An imputed intention, on the other hand, was said to be *"…one which is attributed to the parties, even though no such actual intention can*

be deduced from their actions and statements, and even though they had no such intention". His Lordship further explained that:

> *"Imputation involves concluding what the parties would have intended, whereas inference involves concluding what they did intend.*
>
> *To impute an intention would not only be wrong in principle and a departure from two decisions of your Lordships' House in this very area, but it also would involve a judge in an exercise which was difficult, subjective and uncertain...It would be difficult because the judge would be constructing an intention where none existed at the time, and where the parties may well not have been able to agree. It would be subjective for obvious reasons. It would be uncertain because it is unclear whether one considers a hypothetical negotiation between the actual parties, or what reasonable parties would have agreed. The former is more logical, but would redound to the advantage of an unreasonable party. The latter is more attractive, but is inconsistent with the principle, identified by Baroness Hale (at [61], above), that the court's view of fairness is not the correct yardstick for determining the parties' shares (and see Pettitt v Pettitt [1969] 2 All ER 385 at 395, 402, 416, [1970] AC 777 at 801, 809, 826)[2].*

[2] Paragraph 127

[39] Baroness Hale at paragraph 61 had referred to the following passage from the Law Commission's publication entitled ***Sharing Homes, A Discussion Paper*** (2002) Law Com No 278, in which the principle was stated in the following terms:

> *'If the question really is one of the parties' "common intention", we believe that there is much to be said for adopting what has been called a "holistic approach" to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.'*

[40] She then went on to state that the court in its quest to determine the common intention of the parties is concerned with achieving a result which reflects what the parties may, from their conduct, be taken to have intended. She was however careful to point out that the court was not at liberty to *"…abandon that search in favour of the result which the court considers fair".*

[41] In the judgment of the Privy Council in ***Abbott v. Abbott*** (2007) WIR 183 at 187 the following passage from ***Stack v. Dowden*** (supra) was cited with approval:

> *"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual and*

inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it".[3]

[42] This statement of the law at first blush, appears to be inconsistent with the views expressed by Lord Neuberger at paragraphs 125 and 126 of that judgment. However, when the judgments of the court in ***Gissing v. Gissing*** to which he referred are examined, it is clear that he was dealing with the criteria required to establish a common intention regarding the beneficial interests of the parties. Baroness Hale on the other hand, appears to have been dealing with the proportion of their respective interests.

[43] In order to illustrate the point, I will refer to three of the judgments in the above case. Lord Reid in dealing with the issue said:

"Returning to the crucial question there is a wide gulf between inferring from the whole conduct of the parties that there probably was an agreement, and imputing to the parties an intention to agree to share even where the evidence gives no ground for such an inference. If the evidence shows that there was no agreement in fact then that excludes an inference that there was such an agreement".

[44] Lord Morris of Borth-Y-Gest expressed a similar view in the following words:-

"When the full facts are discovered the court must say what is their effect in law. The court does not decide how

[3] Paragraph 60

> *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 never had".*

The same point was made by Viscount Dilhorne who said:

> *"One cannot counteract the absence of any common intention at the time of acquisition by conclusions as to what the parties would have done if they had thought about the matter. If such a common intention is absent, in my opinion the law does not permit the courts to ascribe to the parties an intention they never had and to hold that property subject to a trust on the ground that it would be fair in all the circumstances".*

[45] Baroness Hale in ***Stack v. Dowden*** (supra) had prefaced her comments by stating that the issue which was being considered was whether a conveyance into joints names was indicative of an intention that each party should be equally entitled to a beneficial interest in the property. She was not, in my view, saying that an intention may be imputed to the parties in cases where the court is seeking to determine whether there was a common intention between them that the non-owner should enjoy a beneficial interest in the property in dispute.

[46] Mrs. Gordon, like any other litigant in a civil action, bears the burden of proving her case to the court. In the words of R Anderson J in ***Plummer v. Plummer*** claim no. 2006 HCV 00864:

"The onus therefore remains upon the non-owner to show she has any interest at all. In this case, this is to assert no more than the normal civil burden of proof that he who asserts must prove."

[47] This point was also made in the case of ***Stack v. Dowden*** (supra) where Baroness Hale of Richmond stated the principle in the following terms:-

"Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all".[4]

[48] It was however stated by lord Diplock in ***Gissing v. Gissing*** (supra) that a party is not bound by the inference of the other party unless it was one that could be reasonably drawn. He said:-

"…the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any

[4] Paragraph 56

> *inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself".*

[49] Mrs. Gordon is seeking to establish she is beneficially entitled to a share of the Sunrise property by virtue of her having made monetary contributions towards its development. She has led evidence that she contributed substantial sums at the request of the Petitioner. In other words, she is saying that a constructive trust has been established in her favour.

[50] In ***Pettit v. Pettit*** (supra) Lord Reid stated that where a person who is not the legal owner of property makes improvements that person in the absence of an agreement between the parties does not acquire any interest in that property or have any claim against the owner. His Lordship did however state that:-

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

[51] It seems therefore that a spouse who makes capital improvements to the other spouse's property may acquire a legal interest in that property where there has been acquiescence to those improvements. In this particular case, Mrs. Gordon has stated that she contributed to the construction of the roof of one of the buildings on the Sunrise property. This to my mind would fall into the category of capital expenditure.

[52] However, it must be borne in mind that in order for that expenditure to be attributed to a common intention for her to enjoy a beneficial interest, it must be exclusively referable that intention. In ***Gissing v. Gissing*** (supra at 793) Lord Diplock stated:

> *"Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a*

separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift".

[53] I will now proceed to examine the evidence that has been presented by Mrs. Gordon's in support of her claim. As stated previously there is no dispute that she did not contribute to the acquisition of the Sunrise property. That property was acquired by Mr. Gordon in October 1999 which was approximately ten (10) months prior to their marriage.

[54] In seeking to establish a common intention for her to enjoy a beneficial interest in the Sunrise property, Mrs. Gordon has asserted that Mr. Gordon on one of his visits to her home in the United States showed her some documents pertaining to that property and told her that it was where they were going to start their lives together. She also stated that on more than one occasion he told her that whatever is his is hers and whatever is her is his. Mr. Gordon has denied making these statements. Mrs. Gordon also said that in reliance on those statements she sent various sums of money to her husband to assist with the construction of the buildings on the Sunrise property.

[55] The applicant also gave evidence that Mr. Gordon had asked her to sell the St. Thomas property which she had acquired prior to the marriage and to use those funds to assist with the construction of the buildings on the Sunrise property. Her evidence is that he had told her that they would be able to collect the rental from the latter property later in life. Mrs. Gordon did not accede to Mr. Gordon's request.

[56] Evidence was also led that Mrs. Gordon sent United States three thousand one hundred and forty one dollars (US$3,141.00) after she was

told by Mr. Gordon that he needed Jamaican two hundred thousand dollars (J$200,000.00) towards the construction of the roof of one of the buildings. This money was sent on the 18th November 2005 through JN Money Transfers. She exhibited transaction slips totaling United States three thousand dollars (US$3,000.00) in support of that assertion.

[57] Mr. Gordon has denied this and has asserted that he used Jamaican five hundred thousand dollars (J$500,000.00) from a policy of insurance and a loan from the Bank of Nova Scotia (Jamaica) Limited to finance that project. He also stated that he had obtained a mortgage in the sum of Jamaican one million dollars (J$1,000,000.00) which sums he utilized whenever it was necessary. He insisted that Mrs. Gordon was not entitled to a share in the Sunrise property as she had not made any contributions towards its acquisition or the construction of any of the five buildings.

[58] Mrs. Gordon also gave evidence that she closed a Fixed Deposit account at the Bank of Nova Scotia, Half Way Tree branch at the request of her husband and gave the entire proceeds of four hundred and three thousand one hundred and sixty dollars and twenty eight cents ($403,160.28) to him. That sum was paid directly into an account which Mr. Gordon admitted was operated by him.

[59] Mr. Gordon disputed his wife's claim that the sum in the Fixed Deposit Account belonged to her and asserted that it was proceeds from a 'round robbin' event that was staged by him. The statements pertaining to this account which were addressed to both parties lists Mrs. Gordon's name first, and were sent to her address in the United States. Mr. Gordon sought to explain this by stating that he did this in order to keep it's

existence hidden from his daughter's mother with whom he had been residing for eight years.

[60] Mrs. Gordon for her part said that she had placed Mr. Gordon's name on the account at his request. She said that he asked her to do so in case anything happened to her. Mr. Gordon's evidence regarding the circumstances in which this account was closed was challenged extensively in cross examination. When asked what he meant by the words: *'She operated on my instructions when I expressed a desire to encash the CD"* he maintained that Mrs. Gordon was not in Jamaica at the time and said that the words meant that he told her about it. Yet when he was asked what it would mean if he was said to be operating on instructions he said that meant that was doing what he was told to do.

[61] Mrs. Gordon said that the money that was in the account was given to Mr. Gordon to assist with bills connected to the meat shop which he was operating. She later said that it was for expenses associated with the meat shop as well as the construction on the Sunrise property. She was however unable to state how much money was put towards the construction. Mr. Gordon denied asking her to assist with any bills pertaining to the meat shop and asserted that he could have obtained meat on credit.

[62] Mrs. Gordon also gave evidence that she had sent other sums of money by money transfer, family and friends. She also stated that she gave money to her husband on some occasions when he visited her in the United States. Specific reference was made to the sum of United States eight thousand dollars (US$8,000.00) which she said was given to Mr.

Gordon towards the construction of the first building and the sum of Jamaican two hundred thousand dollars (J$200,000.00) which represented her contribution to the construction of the roof of another building.

[63] Mr. Gordon's evidence is that on one occasion he received the sum of two hundred and fifty thousand dollars (J$250,000.00) from his wife which was paid to Mr. Watson who had prepared the blueprints for the St. Thomas property. However, he could not recall which of the sums sent through the remittance services corresponded with that sum. He also gave evidence of his frequent visits to the United States to visit Mrs. Gordon, largely at her expense so much so that he was known by the immigration officials.

[64] He had difficulty recalling the details of various transactions and was very evasive whilst giving his evidence. He did however maintain that he was never in any financial difficulties with the persons who supplied meat to his shop. He also gave evidence that Mrs. Gordon had furnished the house in which they had lived in Portmore, St. Catherine. He stated the house had everything but she told him that they were old and that he was to give them away. His said that the furniture that Mrs. Gordon bought was made of bagasse board but were pretty.

[65] He also refuted Mrs. Gordon's claim that she participated in his restaurant business when she came to Jamaica.

[66] The evidence of the parties in relation to whether the parties shared a home in Jamaica is relevant to the resolution of the issue of their intention. Mrs. Gordon has stated that she first stayed at the Sunrise

property in 2004 and subsequently visited in 2006. The latter visit was stated to have been for about one or two weeks. However, it was revealed in cross examination that she had not kept any of clothing there and in 2006 had actually used a portable closet and a suitcase to store her clothes. In addition, the applicant did not receive any mail at that address.

[67] Mrs. Gordon also gave evidence of a visit in February 2007 sometime close to Valentine's Day. Mr. Gordon stated that his wife did not stay at the Sunrise property although she visited. He indicated that there was a difference between a visit and a stay and maintained that she did not stay at the premises on that occasion. Specifically he stated a *"… visit is when you look for someone and you don't stay. You go. A stay is when you come and sleep there overnight and spend time with them. if you stay overnight and don't spend time I would call that stay for awhile".*

[68] Where the business is concerned, Mrs. Gordon has stated that she bought a facsimile machine, microwave oven and an electric kettle. She also bought what she described as *"little knick- knacks"*. She also stated that the funds from the fixed deposit were partially used to defray expenses associated with the business. She was however unable to say what portion of it was used for that purpose.

[69] Mrs. Gordon also gave evidence that she had on occasion helped with the cooking and had also laid off one of the workers. This was denied by Mr. Gordon who asserted that she could not manage the big pots that were used.

[70] Miss Shaw submitted that Mrs. Gordon's contribution was insignificant and the items which were bought by her were gifts to her husband and not intended as an investment in the business.

[71] Having assessed the evidence of the parties and observed their demeanor I am of the view that Mrs. Gordon is generally a more credible witness. I accept her evidence that she sent and also gave money to her husband on various occasions. I also accept her testimony that the money in the fixed deposit account belonged to her.

[72] However, whilst she may have participated in some way in the activities at the business, those acts were at best minimal. Where her financial contribution is concerned, she said that she did not expect to be repaid and had never made any request of Mr. Gordon that he should do so.

[73] In seeking to determine the common intention of the parties the conduct from which its existence may be inferred must be distinguished from that which may establish that Mrs. Gordon acted to her detriment. Mrs. Gordon has stated that Mr. Gordon told her that they were to start life together at the Sunrise property. Is this statement sufficient to establish a common intention that she was to enjoy a beneficial interest in the property? Based on the views expressed by Lord Bridge of Harwich in the case of ***Lloyds Bank plc v. Rosset*** [1990] 1 All ER 1111 at 1117- 1118 they are not. His Lordship said:-

> *"…**neither a common intention by spouses that a house is to be renovated as a joint venture nor a common intention that the house is to be shared by***

parents and children as the family home throws any light on their common intention with respect to the beneficial ownership of the property…

The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has been at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been".

[Emphasis mine]

[74] Mrs. Gordon's evidence that Mr. Gordon had told her that whatever is his is hers and whatever is hers is his, must also be considered. In ***Azan v. Azan*** SCCA No. 53/87 (delivered on the 22nd July 1988) Forte JA considered whether the use of similar words was sufficient to establish an express agreement between them regarding certain property. The learned Judge of Appeal stated that those words were too general to constitute an express agreement that there was a common intention that the respondent

was to enjoy a beneficial interest in shares which were held by the appellant in his family's business.

[75] I have however noted that Forte JA also stated that those words would be relevant in determining the common intention of the parties if the respondent relied on them and acted to her detriment to facilitate the acquisition of the shares. In his review of the matters which the learned trial Judge had taken into account in his consideration of whether the respondent had acted to her detriment, the learned Judge of Appeal referred to the following passage from ***Grant v. Edwards*** (supra):-

> *"There is little guidance in the authorities on constructive trusts as to what is necessary to prove that the claimant so acted to her detriment. What "link" has to be shown between the common intention and the actions relied on? Does there have to be positive evidence that the claimant did the acts in conscious reliance on the common intention? Does the court have to be satisfied that she would not have done the acts relied on but for the common intention, e.g. would not the claimant have contributed to household expenses out of affection for the legal owner and as part of their joint life together even if she had no interest in the house? Do the acts relied on as a detriment have to be inherently referable to the house, e.g. contribution to the purchase or physical labour on the house?"*[5]

[5] Page 438

[76] Nourse LJ in the above case shed light on the matter when he said:-

> *"Was the conduct of the plaintiff in making substantial indirect contributions to the instalments 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 mortgages 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".*[6]

[77] In ***Gissing v. Gissing*** (supra) Lord Diplock a similar view. His Lordship was clearly of the opinion that the conduct from which the court may properly infer a common intention that the non-owner was to enjoy a beneficial interest must be, in the words of Forte JA, *"exclusively consistent"* with such an intention. Lord Diplock stated:-

> *"Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the*

[6] Page 434

house, there is in the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift".[7]

[78] In ***Grant v. Edwards*** (supra) the type of conduct necessary to establish a common intention was described by Nourse LJ in the following words:-

"So what sort of conduct is required? ***In my judgment it must be conduct on which the woman could not reasonably have been expected to embark unless she was to have an interest in the house.*** *If she was not to have such an interest, she could reasonably be expected to go and live with her lover, but not, for example, to wield a 14-lb sledge hammer in the front garden. In adopting the latter kind of conduct she is seen to act to her detriment on the faith of the common intention".*

[Emphasis mine]

[7] Page 793

[79] It was also pointed out in the above case as well as in ***Henry v. Reid*** [2012] JMSC Civ 109, that in dealing with situations in which the applicant had not made any initial contribution to the acquisition of the property, a distinction is to be made between evidence which is directly referable to establish common intention and that which may be interpreted as acting to one's detriment. It has been established that evidence of the contributions made by the non-owner may be utilized for the following purposes:-

i. As evidence from which the parties intentions can be inferred;
ii. To corroborate the direct evidence of intention;
iii. To show that the claimant has relied on the common intention and has acted to his detriment;
iv. To quantify the interest of the parties.

[80] Before embarking on an assessment of the evidence which has been adduced I have noted that the submissions of counsel in this matter were primarily focused on whether the respondent was entitled to relief under section 13 of ***PROSA*** and did not address the position of the parties under section 11 in great detail.

[81] Counsel for Mrs. Gordon's has submitted that various sums given to Mr. Gordon by her client were direct contributions towards the development of the Sunrise property. It was argued that based on the principles in ***Grant v. Edwards, Gissing v. Gissing*** and ***Azan v. Azan*** she was therefore entitled to an equitable interest in that property.

[82] Miss Shaw, on the other hand, argued that those sums were gifts to her client and were borne out of Mrs. Gordon's generous nature in relation

to her husband. She said that based on Mrs. Gordon's own evidence those sums were not intended by her to be a contribution towards the acquisition of an interest in the Sunrise property.

[83] Mrs. Gordon stated in evidence that she is naturally a kind and generous person who tries to help those in need. Her husband, she said, is one such person. Mrs. Gordon also stated that she gave money to him because they were in a relationship and working together. She also indicated that at no time did she tell him that he was required to repay her.

[84] Her evidence is that she continued to fund Mr. Gordon's numerous trips to the United States to visit her even after he had told her to remove her property from the Portmore house and she had suspected him of infidelity. She also stated that even after a woman repeatedly answered the telephone at the Portmore house she was of the view that the marriage was a happy and healthy one. Mrs. Gordon expressed the view that even after Mr. Gordon had requested that she remove her possessions from that house the marriage was "a bit broken" but not at an end. Miss Shaw's submissions described her actions as a demonstration of *"a propensity to shower unrestrained generousity"* on the petitioner. I agree with that assessment.

[85] I have also noted that whilst Mrs. Gordon was actively involved in the development of the St. Thomas property and had commissioned blueprints in respect of that property she did not participate in the design of any of the buildings on the Sunrise property. It was also her evidence that there was no discussion between herself and her husband pertaining to the budget for the construction on the Sunrise property.

[86] Mrs. Gordon was also unaware of the amount of the purchase price for the Sunrise property or how much money her husband had borrowed from the Bank for its purchase. Mrs. Gordon who also owns property abroad, for which she pays mortgage, had no idea how much her husband was obliged to pay each month towards the repayment of the mortgage.

[87] The evidence, in my opinion demonstrates that she took very little interest in the development of the Sunrise property. Her actions or lack thereof are indicative of her state of mind and inconsistent with the approach which may be reasonably expected from someone who has invested in a property in the belief that they have a beneficial interest.

[88] In fact, when Mrs. Gordon was asked in cross-examination to state the reason for this application said that it was to secure the interest of their daughter. She expressed concern that the parties' only child may have to compete with Mr. Gordon's other five children for a share in her father's property.

[89] Having assessed the evidence and the demeanor of both parties, I make the following findings of fact:-

i. The petitioner told the respondent that they were going to start their lives together at the Sunrise property;
ii. The petitioner told the respondent that whatever belongs to him belongs to her and vice versa;
iii. Mrs. Gordon contributed the sum of two hundred thousand dollars towards the construction of the roof on one of the five buildings;

iv. Mrs. Gordon contributed various other sums towards the construction and the payment of bills associated with Mr. Gordon's meat business;

v. Mrs. Gordon has not proved that she made any substantial financial contribution to the business;

vi. Mrs. Gordon did not participate in the running of the business;

[90] Having assessed the evidence, I am of the view that Mrs. Gordon has not discharged the burden of proving that sums given to Mr. Gordon are exclusively referable to a common intention between them that she was to enjoy a beneficial interest in the Sunrise property or the business. Her actions as submitted by Miss Shaw appear to be part and parcel of her very generous nature. Based on the totality of the evidence she has not proved that her actions *"…could only be explained by reference to a person acting on the basis of having a beneficial interest in that property".*

[91] In the circumstances, the application is refused.