In The Supreme Court of Bermuda

Civil JURISDICTION

2005: No. 270

BETWEEN:

NAME

Sonya Darrell **Plaintiff**

-and-

NAME

Lynda Sharon Peets-Swan **Defendant**

Dates of Hearing: 31 March, 1-8 April and 27 June 2008

Date of Judgment: 3 September 2008

Ms. Juliana Snelling of Mello, Jones and Martin for the Plaintiff
Mr. Rick Woolridge of Phoenix Law Chambers for the Defendant.

JUDGMENT

1. This dispute concerns the beneficial ownership of No. 1 Lemon Grove at 74 Northshore Road, Hamilton Parish (the "Property") held by Lynda Sharon Peets-Swan ("Mrs. Peets-Swan"), the Defendant and Aunt of the Plaintiff, Sonya Penelope Darrell ("Ms. Darrell").

2. The Defendant, Mrs. Peets-Swan, bought No. 1 Lemon Grove with proceeds from her divorce settlement and entered into an agreement/understanding (a common intention) with the Plaintiff, Ms. Darrell, to form a joint venture to build four (4) dwelling units on the property. The Plaintiff was to pay one half the costs of the development plus one half the costs of the land, and each would have equal share in the four dwelling units and the land.

3. The development of the units was funded by a mortgage and a further charge of $1.4m borrowed from the Bank of N. T. Butterfield Ltd. (BNTB). The parties listed their joint income and assets in order to secure the funding. The Defendant was listed as the mortgagor as the property was in her sole name and the Plaintiff was listed as the guarantor. The Plaintiff and the Defendant were jointly and severally liable for the repayment of this debt.

4. Ms. Keren Lomas (Ms. Lomas), the Attorney–at–Law recalls in August 1999 she took instructions from the parties who wished to enter into a joint venture whereby they would build a four unit dwelling on the property with each owning two units.

5. The Plaintiff and the Defendant continued to act together in securing a builder, construction materials et cetera for the project. They fired and re-hired contractors and eventually completion certificates for the four units were issued. From time to time throughout the project and after completion the Plaintiff kept requesting transfer of her portion of the property into her name. It is clear that at some point the Defendant had misgivings about the joint venture, but this was never communicated to the Plaintiff.

6. The Plaintiff initiated transfer proceedings once it became clear to her that the Defendant was not going to honour the agreement and pleadings passed between the parties.

7. The Plaintiff contends that she has changed her position and acted to her detriment in the belief that she would obtain her half shares in the property and seeks inter alia: (i) a declaration that the Defendant holds the property on constructive trust for her and the Defendant as tenants-in-common in equal shares subject to the mortgage debt and equitable accounting; alternatively, (ii) the Defendant is estopped by the doctrine of proprietary estoppel from denying the Plaintiff's half share ownership in the property.

8. The Defendant contends that the agreement included a condition precedent namely, that she would convey the property to both of them as tenants-in-common in equal shares if the Plaintiff paid one half of the development costs plus one half of the cost of the land. She further contends that by the time of completion the Plaintiff had not performed the condition precedent and, therefore, she is entitled to treat the agreement as at an end.

9. The Defendant seeks: (i) Rescission of the said oral agreement or (ii) Damages in lieu of or in addition to specific performance together with interest thereon.

10. The oral agreement did not specify what was to happen in the event that there was a dispute between the parties.

Held:

11. It would be inequitable to allow the Defendant to treat, as her own, the four dwelling units that had been acquired in furtherance of the arrangement or understanding (common intention) with the Plaintiff.

12. On the evidence, before the first nail was struck, the parties had formed a common intention that the four (4) dwelling units should be held in trust for themselves in equal shares. The Plaintiff acted to her detriment in reliance on this agreement.

13. The Defendant, whatever her private reservations, had failed to inform the Plaintiff, before it was too late for the Defendant and the Plaintiff to be restored to a position of no advantage/no detriment that she no longer intended to honour the arrangement or understanding.

14. On the 1st day of September 2005 Sonya Penelope Darrell issued a Generally Endorsed Writ of Summons against Lynda Sharon Peets-Swan seeking the following relief:

i. a declaration that The Defendant holds the land at 74 Northshore Road, Hamilton Parish and the four (4) dwelling units situated thereon ("the property") on constructive trust for the Plaintiff and the Defendant as tenants-in-common in equal shares, alternatively in such shares as the Court may determine subject to the mortgage debt thereon (to be shared equally between the parties) and subject to the application of appropriate equitable principles of accounting.

a. A declaration that the Plaintiff shall credit the Defendant with half the agreed total cost of purchasing the land in 1998, namely half of $260,043.74, that is $130,021.87;

b. The rents for Units 1 and 2 from date of initial rental shall be credited to the Defendant and the rents for Units 3 and 4 from date of initial rental shall be credited to the Plaintiff; alternatively the total rents for all four units from date of renting shall be credited equally to the parties;

c. The Defendant shall credit the Plaintiff with an occupation rent that equals the sum total of rents paid by the Plaintiff to her landlord from February 2007 to present, namely ($14 months x $1000 per month.)

ii. Further or alternatively that the Defendant is estopped by the doctrine of proprietary estoppel from denying the Plaintiff's ownership in the property;

iii. A declaration that the Plaintiff is entitled to and be granted possession of dwelling units 3 and 4 at the property, subject to the tenancies now in place in respect of those units and that the Defendant do transfer the rental deposits for Units 3 and 4 to the Plaintiff forthwith;

iv. Additionally, orders are sought that subject to the Bank's approval, the mortgage shall be split whereby the existing mortgage will be replaced by two separate mortgages (with a mortgage for Units 1 and 2 to be granted to the Defendant and a mortgage for Units 3 and 4 to be granted to the Plaintiff) in amounts reflecting such portion of indebtedness as is found attributable to either party by Arthur Morris Christensen "so as to equalize the parties' payments" [so that each party makes the same payment] (with proven sources of funds) in respect of mortgage, land tax, insurance, the cost to the Defendant of purchasing the land in 1998 as aforesaid and construction costs, from inception through to the date of the final account.

v. An order that all necessary trusts and transfers be executed and, without prejudice to the generality of the foregoing, that the Defendant do transfer a half share in the land to the Plaintiff or for the benefit of the Plaintiff as well as the legal title to dwelling units 3 and 4. The Registrar of the Supreme Court shall be empowered to sign any deeds or documents on behalf of the parties as necessary in order to bring the parties into compliance with this Order.

vi. An Order that each of the four dwelling (four) units be valued by a reputable firm of real estate agents to be agreed between the parties, alternatively to be appointed by the Court.

vii. An Order that all necessary final accounts and inquiries take place which shall take into consideration the equitable right of contribution as between the parties. For the purpose of the final account, the parties shall be at liberty to

provide Arthur Morris Christensen with such further information as they wish to provide on or before Friday April 18th, 2008 and shall request Arthur Morris Christensen to provide their updated, final account on or before Friday May 2nd, 2008. All communications by or on behalf of either party with Arthur Morris Christensen shall be in writing and shall be simultaneously copied to the other party's attorneys. The costs of the final account shall be shared equally between the parties.

viii. An Order for payment by the Plaintiff to the Defendant or by the Defendant to the Plaintiff (as determined) by way of reallocation of the parties' respective debts in the split mortgage or, alternatively, by way of distribution of the net proceeds of sale, the amount found due upon the taking of all necessary accounts and inquiries.

ix. Further, or alternatively, in the event that the remedy sought in paragraph iv of this Prayer is not, for whatever reason, possible, an Order that the property be sold and the net proceeds of the equity of redemption in the property be distributed to the parties in accordance with the ascertained beneficial interest, subject to the application of equitable principles of accounting as aforesaid;

x. Further or alternatively, damages; alternatively compensation in equity;

xi. Further or other relief;

xii. Costs on an indemnity basis, alternatively, on a taxation basis, to be taxed if not agreed.

15. In her counterclaim, the Defendant asserts that an oral agreement was made between the parties and that at all material times the Plaintiff knew the particulars of the oral agreement; namely, that the Plaintiff accepted and agreed to the conditions of the agreement. Further, the Plaintiff, with full knowledge of the terms and conditions of the

agreement and by the Plaintiff's continuous silence and conduct, had full knowledge that the Defendant would and did proceed with the construction. Despite the Defendant's will to continue with the development, the Plaintiff failed to pay an equal contribution to construction costs and the mortgage. This is in breach of the contract and the Plaintiff is to date in substantial arrears.

16. Further, or in the alternative, notwithstanding the repeated demands by the Defendant, the Plaintiff has wrongfully and in breach of the agreement failed and refused to pay any further sums.

The Defendant Counterclaims:

a. *Rescission of the said oral agreement.*

b. Damages in lieu of or in addition to specific performance together with interest thereon.

c. All necessary accounts, directions and inquiries.

d. Alternatively, damages for breach of contract together with interest thereon.

e. An Order that the Plaintiff do deliver up possession of unit "one" to the Defendant forthwith.

f. Further relief.

g. Costs.

This action was heard over a period of 8 days on March 31, April 1, 2, 3, 4, 7, 8 and June 27. There were 6 witnesses whose witness statements stood as the evidence in chief, each witness was cross-examined. The parties produced 9 lever arch folders of documents.

Background

17. From the agreed facts and the evidence before the Court I find the following:

18. Mrs. Peets-Swan is the maternal aunt of Ms. Darrell. Before this dispute arose the parties were very close akin to "mother and daughter". They implicitly trusted each other and enjoyed a close loving relationship, evidenced by the number of joint bank accounts which they opened together; for example, accounts at the Bank of Bermuda, the Bank of Butterfield, First Bermuda Securities Limited and Paine Webber - they pooled their assets and had approximately 8 such joint accounts.

19. In or about the winter of 1995, the Plaintiff and the Defendant started talking about owning property together. At that time the Plaintiff was living at the home of her cousin, Ernest Peets Jr., the Defendant's son.

20. Initially, the Plaintiff and the Defendant discussed owning property together with Ernest and all three (3) of them went about viewing various properties to see what was on the market.

21. In 1996, Ernest left Bermuda to attend a seminary college and there was no further discussion of his involvement in any joint property venture.

22. By 1996 the Defendant knew that the Plaintiff planned to move to Canada (in or around 1999), and that she intended to take out a mortgage and purchase a home in Canada.

23. The Plaintiff through an application from Bermuda had acquired a right of residence in Canada with the right to work and she did not want to lose this.

24. In 1997, the Plaintiff and her son moved into the Defendant's home at Verdmont Valley, which the Defendant shared with her other son, Eric. There was some discussion of Eric becoming involved in their idea of a joint property venture, but that too did not materialize.

25. In July 1997, the Defendant accompanied the Plaintiff to Canada for a visit and during this time together they viewed model homes.

26. In 1997, the Defendant's divorce settlement concluded. The Defendant had to move out of the Verdmont Valley former matrimonial home. The Plaintiff moved from the Verdmont Valley property and took up residence with her aunt, Silvia Caines. Because of the lack of storage facility at her aunt's residence, the Defendant shipped some of her belongings to Canada and placed them in storage to await her move to Canada.

27. In February, 1998, the Defendant purchased the land in her sole name at 1 Lemon Grove, 74 North Shore Road, the subject of this dispute, for $225,000 with funds from her matrimonial settlement.

28. The Plaintiff overheard the Defendant discussing plans with her son, Eric, to develop the property without her and asked her if she was intending to develop the property just with Eric, to which the Defendant assented. The Plaintiff indicated that she understood this decision since Eric was an employee of BNTB, (he would be offered a discounted mortgage rate). The Defendant continued to pursue her plans to move to Canada.

29. About November 1998, the Defendant informed the Plaintiff that she and Eric were no longer pursuing the project together. She suggested to the Plaintiff that they develop No. 1 Lemon Grove on a 50-50 joint venture basis. The Plaintiff told the Defendant that she was willing to participate in the joint venture but did not want to lose her visa status in Canada. Consequently, she would still have to leave for Canada but would return to Bermuda once she had become a citizen of Canada. Additionally, she would try to get as much done on the project with her before leaving. The Defendant agreed with this arrangement.

30. The Defendant postponed her departure to Canada until after the joint mortgage was finalized and as many arrangements put in place with respect to the property.

31. They agreed that they would share the cost of the project on a 50-50 basis including construction costs, land tax, home insurance and construction insurance (which was in their joint names), architect fees, et cetera.

32. **They agreed that at the end they would each own half of the development.**

33. In late November 1998, the Plaintiff contacted a friend Juan Smith ("Mr. Smith"), an architectural draftsman, to discuss the development and to prepare plans.

34. Mr. Smith's evidence, which is supported by his contemporaneous notes shows that they agreed to build four units – 2 two-bedroom units and 2 three-bedroom units which he designed. Mr Smith said that he understood that the parties were good friends and relatives who entered into the project on a joint and equal basis. All the documents exhibited in his witness statement confirm the 50–50 joint ownership arrangement.

35. Following the drawing and approval of the plans, the parties applied jointly to the BNTB for a loan to cover the construction cost. Both promised to repay the bank. On July 23, 1999, they filled out a joint personal credit application form with the Bank of Butterfield for the purpose of their application to build the four (4) units.

36. In August, 1999, the parties jointly instructed Ms. Keren Lomas, Attorney-at-Law (Ms. Lomas), and informed her of their agreement to develop the property into four separate dwelling apartments with each owning two apartments and requested her assistance with the preparation of the documentation for the mortgage and further charge.

37. Ms. Lomas does not recall specifically that there was an agreement, between the parties, that transfer of title should take place upon completion of the tanks; but Ms. Lomas recalls that in August 1999 she took instructions from the parties, who wished to

enter into a joint venture, whereby they would build a four unit dwelling on the property with each owning two units. She cannot recall what was agreed as to the timing of the transfer of the title of the units, but she recalls advising them that they should execute the transfer of the property into their joint names before the property was completely developed, as significant stamp duty saving could be made if transfers were made prior to completion of the development. Ms. Lomas recalls advising them that they would need four separate tanks in order to have four separate leasehold titles to the units. She recalls at the same point telling them that they could form a condominium company that would own the freehold for the property, and then grant 999 years leases to each of the parties for each of the two units.

38. On September 3, 1999, the bank granted both parties a mortgage of $890,000 repayable in monthly instalments of $7,167.00 over 25 years. They were to share the construction costs 50-50 which would be paid out of the joint mortgage account with the Bank of Butterfield.

39. The project was under resourced and in December 2000, by a Deed of Further Charge, the parties borrowed an additional $530,000 bringing the total borrowing to $1,401,512. The total amount was to be repaid by monthly instalments of $12,489.00 by debiting the parties' joint savings account, which was set up for this purpose.

40. The Defendant met her current husband, Edward Swan, in January 1999, and they began dating in February 1999, and were married a year later.

41. The parties agreed that the Plaintiff would pay off a larger portion of the mortgage they obtained in order to offset the monies paid for the cost of the land.

42. In 1999, after Mr. Smith informed them that the Department of Planning had granted final approval both parties began to secure estimates for the construction. They did everything together: visited contractors, secured estimates and all building supplies. At one point they shopped together in Newark, New Jersey, to purchase supplies. The

Defendant travelled from Bermuda with two (2) individuals whilst the Plaintiff travelled from Canada by bus with her son.

43. They approached a builder and agreed that the Defendant was to oversee the project, as she was the partner on the ground, although she had never undertaken a project like this before.

44. During the last week of August 1999, the Plaintiff left for Canada.

45. Ms. Lomas drew up the mortgage and invoiced both parties for her services. The mortgage document was sent to the Plaintiff in Canada for execution. After executing the mortgage, the Plaintiff questioned the Defendant as to why she was listed only as guarantor. The Defendant told her that Ms. Lomas advised that the documents had to be prepared this way because the Defendant was the sole owner of the land. The Defendant confirmed that once the tanks were built the Condo Company and the lease would be prepared so that each would be able to have separate titles to their units and she could be listed as the co-owner.

46. The bank advanced the money, which was placed in a joint interest bearing account from which draw downs were taken when required to pay the construction costs. The Plaintiff and the Defendant opened a joint investment account into which their pension monies were placed to be used as security for the mortgage. The Defendant's investment to this joint account was her pension of $40,000 and the Plaintiff's initial investment was $105,000, which comprised her entire pension.

47. In October 1999, the Defendant began working for a firm in Canada as a Controller until August 2003, when she returned home to Bermuda.

48. In November 1999 construction of the new development began and was completed in the fall of 2001.

49.. The project suffered significant cost overruns. In one of the Plaintiff's visits to Bermuda from Canada (about the time of the Cup Match 2000), she went to the site, accompanied by the Defendant and Mr. Smith to see how the project was progressing and was very unhappy with the progress of the job. That morning the Defendant told her that she would like them to dismiss Sinclair Caines and hire Gary DeCosta and his crew, who was recommended by Ernest the Defendant's son, to complete the project. The Plaintiff concurred.

50. The Defendant and the Plaintiff contacted Gary DeCosta who agreed to take on the job and commence work. Gary DeCosta was unable to finish the project because they eventually ran out of money. Other contractors completed the job.

51. In 2000, the Plaintiff and the Defendant had to apply to the Bank of Butterfield for further funds to complete the project. Once again Ms. Lomas was hired to assist with the documentation. The BNTB bank agreed to loan the parties a further $530,000 and Ms. Lomas prepared the Deed of Further Charge. This $530,000 was to be re-paid along with the outstanding mortgage debt of $871,512 (a total debt of $1,401,512 in monthly instalments of $12,489 over 25 years at an interest rate of 9.75% per annum). Again, the Defendant was named as the mortgagor and the Plaintiff named as a guarantor, as the Defendant was still the sole owner of the land.

52. During discussion of additional financing by way of the further charge, the Plaintiff reminded the Defendant that the title should have been transferred on completion of the tanks. The Defendant told her that she wanted to delay transferring the title until after completion, as she wanted to ensure that there were sufficient funds to finish the construction. Initially, the Plaintiff disagreed with this delay but later agreed to the postponement as the Defendant agreed to cover the costs of the transfer of all the title deeds after completion.

53. After the property was completed in 2001, the Defendant and her husband moved into Unit 1 in that year. The Plaintiff moved into the unit with the Defendant and her husband "Eddie" from 2003 until January 2007. The other three units were rented.

54. Mrs. DeSousa, an officer at the Bank of BNTB, file note, dated March 19, 2003, of a telephone conversation with the Defendant which shows the Defendant describing the Plaintiff as her niece, "the co-owner of the mortgage" and that she was away until August 2003, at which point she will return to the island "and will be able to assist with the catching up of the payments."

55. Construction and home insurance, as previously mentioned, were taken out in the joint names of the Plaintiff and the Defendant. Both of them made premium payments on these insurance policies as well as land tax payments on the four (4) units.

56. Relations completely broke down between the Plaintiff and the Defendant, and in May 2005, the Defendant wrote to the Plaintiff requesting that she vacate the property. In September 2005, the Plaintiff successfully applied for an injunction restraining the Defendant from evicting her. Eventually pleadings passed between the parties which have brought us to this point.

57. The Defendant acknowledged the fifty/fifty agreement that they were to share equally in the ownership of the development.

a) She said in her affidavit, dated December 5, 2006: -

"I confirm our agreement was fifty/fifty and I reiterate that the Plaintiff was to pay for half the costs of construction and half the mortgage."

b) In paragraph four of her affidavit dated 17th October 2006, the Defendant accepted that the Plaintiff "may have to a limited extent a beneficial interest in the property."

c) In exhibit "LSP9" to her affidavit the Defendant's husband in a letter dated 28th November 2006 formally acknowledged the agreement: "Although I did

not know the details who contributed what to this agreement, I understood this agreement was a 50/50 arrangement."

d) When the Plaintiff returned from Canada the Defendant introduced her to the tenants in units 3 and 4 as the joint owner.

(e) In November 2003 when the lease on Unit 4 expired the Plaintiff suggested to the Defendant to change the lease into her name and secure the rents directly from the tenant which the Defendant did.

58. The Plaintiff acknowledged that there were periods when she could not send any money due to her financial situation in Canada.

59. The Accountant report shows the level of contribution made by each party; up until 2001 the parties were making equal contributions.

60. The Court attaches no weight to the evidence of Reverend Ernest Peets which is complete hearsay.

The Issue

61. In Paragraph 8 of her amended Defence, the Defendant contends that the parties' common intention was subject to a condition precedent. The Defendant maintains that it is an "express term" of the agreement that the Plaintiff would contribute equally to the costs of the construction and the mortgage, and "upon that condition being complied with" the Plaintiff would be entitled to her two units.

The Law

62. I will now deal with the principles concerning constructive trust and promissory estoppel.

63. The Court was referred to number of authorities on the circumstances in which equity will impose a constructive trust on property acquired by a person in furtherance of a common intention or understanding/arrangement with another.

64. In *Dawn Victoria Lathan and Davis Lathan* Civil Jurisdiction 1977: No.199 Meerabux J held that a constructive trust had been established after considering a helpful overview of the underlying principles upon which equity will act to impose a constructive trust enunciated by Millet L.J. In *Paragon Finance plc v D B Thakerar & Co. (a firm); Paragon Finance plc and another v Thimbleby & Co. (firm)* [1999] 1 All ER 400 at page 409 Millet LJ said:

"A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of the property (usually but not necessarily the legal estate) to assert his own beneficial interest in the property and deny the beneficial interest of another. In the first class of case, however, the constructive trustee really is a trustee. He does not receive the trust property in his own right but by a transaction by which both parties intend to create a trust from the outset and which is not impugned by the plaintiff. His possession of the property is coloured from the first by the trust and confidence by means of which he obtained it, and his subsequent appropriation of the property to his own use is a breach of that trust. Well-known examples of such a constructive trust are McCormick v Grogan (1896) LR 4 HL 82 (a case of secret trust) and Rochefoucald v Boustead [1897] 1 Ch 196 (where the defendant agreed to buy property for the plaintiff but the trust was imperfectly recorded). Pallant v Morgan [1952] 2 All ER 951, [1953] Ch 43 (where the defendant sought to keep for himself property which the plaintiff trusted him to buy for both parties) is another. In these cases the plaintiff does not impugn the transaction by which the defendant obtained control of the property. He alleges that the circumstances in which the defendant obtained control make it unconscionable for him thereafter to assert a beneficial interest in the property".

In Land Law (Fourth Edition 2006) by Kevin Gray and Susan Francis Gray, page 295 at p. 297 the authors indicate that constructive trusts are intimately concerned with *"expressly or implicitly bargained commitments respecting equitable entitlement."*

"A constructive trust arises where it would be fraudulent for the owner of a legal title to assert his sole beneficial ownership in derogation of equitable rights which have already been bargained away informally to another. The existence of the prior bargain, once relied on by the claimant party, now renders it unconscionable for the legal owner to assert his beneficial title to the exclusion of that claimant. To prevent such inequitable outcomes, equity imposes or 'constructs' a trust to give effect to the parties' earlier understanding as to their respective equitable rights…".

[At page 324-325] "Chadwick LJ indicated (at [68]) that an affirmative answer to the 'threshold' question of intention to share beneficially will 'readily be inferred' from the fact that each party has made some kind of financial contribution to the purchase of the home. Thus even minimal financial contribution can afford evidence of the implied bargain or common intention which is required in order to trigger the creation of a constructive trust. It is no bar that the parties are honest enough to admit that they never actually gave ownership a thought (see e. g Midland Bank plc v Cooke (1995)); nor is it problematical that the inferred common intention involves no precise quantification of the parties' shares. Once the gateway has been opened to a finding of some constructive trust, the 'secondary' issue of quantum can be left to be determined later by the court against the background of the parties' 'whole course of dealing…in relation to the property …'

"… ***Quantification of constructive trust entitlements***

10.16 *It is one thing to establish the existence of a constructive trust; it may be an entirely different matter to quantify the beneficial entitlements which emerge from that finding of trust. The court does not sit 'as under a palm tree, to exercise a general discretion to do what the man in the street, on a general overview of the case, might regard as fair' (Springette v Defoe (1992) per Dillon LJ). Nor can the maxim 'equality is equity' be applied 'unthinkingly' (Hammond v Mitchell (1991) per Waite J). In all cases*

the extent of the claimant's interest is 'prima facie… that which the parties intended' (Grant v Edwards (1986) per Browne-Wilkinson V-C). Each case 'must depend upon its own facts' (Gissing v Gissing (1971) per Lord Diplock). (Emphasis added)

"— 'Express bargain' constructive trusts Here the shares or interests which the parties have agreed are normally definitive unless it can be shown that there has been some 'subsequent renegotiation' or subsequent conduct 'so inconsistent with what was agreed' as to point unmistakably to a variation or cancellation of that agreement (Mortgage Corpn v Shaire (2001) per Neuberger J). If, however, the parties' express agreement did not specify the precise shares to be taken, the court must do so in their place using the yardstick of what is 'fair having regard to the whole course of dealing between them in relation to the property' (see Oxley v Hiscock (2005) at [69], [73] per Chadwick LJ, as applied, for example, in Cox v Jones (200) at [80])."

In Grant v Edwards and another [1986] 2 All ER page 426 the court held*:*
"Where an unmarried couple lived in a house which was registered or held in the name of only one of the parties, the other party could establish a beneficial interest in the property if he or she could establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. That in turn had to be demonstrated by a common intention that they should both have a beneficial interest (which was required to be proved by direct evidence or inferred from their actions, including indirect contributions to the purchase such as mortgage payments. housekeeping expenses etc) and also that the claimant had acted to his or her detriment on the basis of that common intention and in the belief that by so acting he or she would acquire a beneficial interest. Once it had been established that the claimant was entitled to a beneficial interest in the property the quantification of that right depended on the direct and indirect contributions made by the parties to the cost of acquiring the property. (Emphasis added)

At page 432 Nourse L.J. said: *"There is another and rarer class of case, of which the present may be one, where, although there has been no writing, the parties have orally declared themselves in such a way as to make their common intention plain. Here the court does not have to look for conduct from which the intention can be inferred, but only for conduct which amounts to an acting upon it by the claimant. And although that conduct can undoubtedly be the incurring of expenditure which is referable to the acquisition of the house, it need not necessarily be so." (Emphasis added)*

The clearest example of this rarer class of case is Eves v Eves [1975] 3 All ER 768, [1975] 1 WLR 1338. That was a case of an unmarried couple where the conveyance of the house was taken in the name of the man alone. At the time of the purchase he told the woman that if she had been 21 years of age, he would have put the house into their joint names, because it was to be their joint home. He admitted in evidence that that was an excuse for not putting the house into their joint names, and this court inferred that there was an understanding between them, or a common intention, that the woman was to have some sort of proprietary interest in it; otherwise no excuse would have been needed. After they had moved in, the woman did extensive decorative work to the downstairs rooms and generally cleaned the whole house. She painted the brickwork of the front of the house. She also broke up with a 14-lb sledge hammer the concrete surface which covered the whole of the front garden and disposed of the rubble into a skip, worked in the back garden and, together with the man, demolished a shed there and put up a new shed. She also prepared the front garden for turfing. Pennycuick V-C at first instance, being unable to find any link between the common intention and the woman's activities after the purchase, held that she had not acquired a beneficial interest in the house. On an appeal to this court the decision was unanimously reversed, by Lord Denning MR on a ground which I respectfully think was at variance with the principles stated in Gissing v Gissing and by Browne LJ and Brightman J on a ground which was stated by Brightman J, as follows: ([1975] 3 All ER 786 at 744, [1975] 1WLR 1388 at 1345)

'The defendant clearly led the plaintiff to believe that she was to have some undefined interest in the property, and that her name was only omitted from the conveyance because of her age. This, of course, is not enough by itself to create a beneficial interest

in her favour; there would at best be a mere 'voluntary declaration of trust which would be unenforceable for want of writing: Gissing v Gissing. If, however, it was part of the bargain between the parties , expressed or to be implied, that the plaintiff should contribute her labour toward the reparation of a house in which she was to have some beneficial interest, then I think that the arrangement becomes one to which the law can give effect. This seems to be consistent with the reasoning of the speeches in Gissing v Gissing [1970] 2 All ER 780 at 790, [1971] AC 886 at 905.'

At pages 437-439 ***SIR NICOLAS BROWNE-WILKINSON V-C.*** *I agree. "In my judgment, there has been a tendency over the years to distort the principles as laid down in the speech of Lord Diplock in Gissing v Gissing [1970] 2 All ER 780, [1971] AC 886 by concentrating on only part of his reasoning. For present purposes, his speech can he 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.*

1. The nature of the substantive right: (See [1970] 2 All ER 780 at 790,[1971]AC 886 at 905) 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.

2. The proof of the common intention:

(a) Direct evidence … It is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention…

(b) Inferred common intention…Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to infer such intention, viz contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. The quantification of the right …Once it has been established that the parties had a common intention that 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? This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important.

If this analysis is correct, contributions made by the claimant may be relevant for four different purposes, viz: (1) in the absence of direct evidence of intention, as evidence from which the parties' intentions can be inferred; (2) as corroboration of direct evidence of intention; (3) to show that the claimant has acted to his or her detriment in reliance on the common intention. Lord Diplock's speech does not deal directly with the nature of the detriment to be shown; (4) to quantify the extent of the beneficial interest.

I have sought to analyse Lord Diplock's speech for two reasons. First, it is clear that the necessary common intention can be proved otherwise than by reference to contributions by the claimant to the cost of acquisition. Second, the remarks of Lord Diplock as to the contributions made by the claimant must be read in their context.

In cases of this kind ***the first question must always be whether there is sufficient direct evidence of a common intention that both parties are to have a beneficial interest. Such***

direct evidence need have nothing to do with the contributions made to the cost of acquisition. *Thus in Eves v Eves (1975) 3 All ER 768, [1975] 1 WLR 1338 the common intention was proved by the fact that the claimant was told that her name would have been on the title deeds but for her being under age. Again, in Midland Bank plc v Dobson and Dobson [1986]1 FLR 171, this court held that the trial judge was entitled to find the necessary common intention from evidence which he accepted that the parties treated the house as 'our house' and had a 'principle of sharing everything'. Although, as was said in the latter case, the trial judge has to approach such direct evidence with caution, if he does accept such evidence the necessary common intention is proved. One would expect that in a number of cases the court would be able to decide on the direct evidence before it whether there was such a common intention. It is only necessary to have recourse to inferences from other circumstances, (such as the way in which the parties contributed, directly or indirectly, to the cost of acquisition) in cases such as Gissing v Gissing and Burns v Burns [1984] 1 All ER 244[1984] Ch 317, where there is no direct evidence of intention.*

"Applying those principles to the present case, the representation made by the defendant to the plaintiff that the house would have been in the joint names but for the plaintiff's matrimonial disputes is clear direct evidence of a common intention that she was to have an interest in the house: Eves v Eves (supra). Such evidence was in my judgment sufficient by itself to establish the common intention: but in any event it is wholly consistent with the contributions made by the plaintiff to the joint household expenses and the fact that the surplus fire insurance monies were put into a joint account.

"But as Lord Diplock's speech ([1970] 2 All ER 780 at 790, [1971] AC 886 at 905) (at page 905D) and the decision in Midland Bank v Dobson (supra) make clear ***, mere common intention by itself is not enough: the claimant has also to prove that she has acted to her detriment in the reasonable belief by so acting she was acquiring a beneficial interest.***

"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, eg 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, eg contribution to the purchase or physical labour on the house?*

I do not think it is necessary to express any concluded view on these questions in order to decide this case. Eves v Eves indicates that there has to be some 'link' between the common intention and the acts relied on as a detriment. In that case the acts relied on did inherently relate to the house (viz the work the claimant did to the house) and from this the Court of Appeal felt able to infer that the acts were done in reliance on the common intention. So, in this case, as the analysis of Nourse LJ makes clear, the plaintiff's contributions to the household expenses were essentially linked to the payment of the mortgage instalments by the defendant: without the plaintiff's contributions, the defendant's means were insufficient to keep up the mortgage payments. In my judgment where the claimant has made payments which, whether directly or indirectly, have been used to discharge the mortgage instalments, this is a sufficient link between the detriment suffered by the claimant and the common intention. The court can infer that she would not have made such payments were it not for her belief that she had an interest in the house. On this ground therefore I find that the plaintiff has acted to her detriment in reliance on the common intention that she had a beneficial interest in the house and accordingly that she has established such beneficial interest." (Emphasis added)

As regards to the proprietary estoppel, at page 439 the court said:

I suggest that, in other cases of this kind, useful guidance may in the future be obtained from the principles underlying the law of proprietary estoppel which in my judgment are closely akin to those laid down in Gissing v Gissing. In both, the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment

in reliance on such belief. In both, equity acts on the conscience of the legal owner to prevent him from acting in an unconscionable manner by defeating the common intention. The two principles have been developed separately without cross-fertilisation between them: but they rest on the same foundation and have on all other matters reached the same conclusions.

In many cases of the present sort, it is impossible to say whether or not the claimant would have done the acts relied on as a detriment even if she thought she had no interest in the house. Setting up house together, having a baby, making payments to general housekeeping expenses (not strictly necessary to enable the mortgage to be paid) may all be referable to the mutual love and affection of the parties and not specifically referable to the claimant's belief that she has an interest in the house. As at present advised, once it has been shown that there was a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable to the house: see Jones v Jones [1977) 2 All ER 231, [1977] 1 WLR 438 and Pascoe v Turner [1979] 2 All ER 945, [1979] 1 WLR 431. The holding out to the claimant that she had a beneficial interest in the house is an act of such a nature as to be part of the inducement to her to do the acts relied on. Accordingly, in the absence of evidence to the contrary, the right inference is that the claimant acted in reliance on such holding out and the burden lies on the legal owner to show that she did not do so: see Greasley v Cooke [1980] 3 All ER 710,[1980] 1 WLR 1306.'

Summary

65. I am satisfied that the Plaintiff's version of events is to be preferred over that of the Defendant's and whenever there is a conflict between the testimonies of the parties I accept the evidence of the Plaintiff who gave her evidence with clarity and in a credible and forthright manner.

66. There is clear evidence which the court finds as fact that in 1998 the Defendant and the Plaintiff entered into an express agreement (common intention) that:

- They would develop four dwelling units on No. 1 Lemon Grove owned by the Defendant; the Plaintiff would own units 3 and 4 and the Defendant would own units 1 and 2.

- They would share the beneficial interest in the land and the dwelling units in equal share (50/50). In order to compensate the Defendant for the land, the Plaintiff would assume a higher percentage of the mortgage. It was agreed that the Plaintiff's share of the joint debt owed to BNTB would be increased by $130,000 and the Defendant's would decrease by the same amount which is equivalent to ½ of the purchase price for the land.
- The Defendant does not dispute that there was this agreement/understanding. However, according to paragraph 8 of her amended defence, she claims that the agreement is now null and void because the Plaintiff did not fulfil the condition precedent; namely, the Plaintiff failed to comply with the agreement "that once [the Plaintiff] had paid half of the development costs of the project as well as offset half of the cost of the land that she [the Defendant] would convey the property to both of them as tenants-in-common.

- I can find absolutely no agreement or arrangement pursuant to paragraph 8 of the Defendant's Amended Defence stipulating a condition precedent namely, that the Defendant would convey the property to both of them as tenants-in-common in equal shares [after] the Plaintiff paid one half of the development costs plus one half of the cost of the land.

- It must be borne in mind that the construction was estimated to take 7-10 months with the mortgage being repaid at $7,167.00 monthly or $70,167.00 for the 10 months. Immediately when the property was completed, it was anticipated that there would be rental income. Because of the cost overruns, the parties had to pay

out funds well above the initial estimate. Additionally, the project took 2-3 years to complete plus an additional $530,000 had to be borrowed by way of a further charge approximately 1 year after construction began. Consequently, the parties had to pay out funds well above their initial joint investment of $ 145,000.00.

- On a number of occasions the Plaintiff raised the issue of transfer of the title deeds and was placated by the Defendant. This continued to induce a course of conduct on the Plaintiff's part.

- On February 10, 2004, whilst discussing outstanding bills with the Plaintiff, the Defendant indicated that she would be ready to proceed, "I guess in another 2 or 3 weeks I should be ready to proceed based on the agreement". (See Documents Vol. 1 page 129)

- On September 21, 2005, in her letter to the Plaintiff the Defendant indicated that "I have not forgotten about the equity in the property". (Documents Vol, 1 page 185.)

- The Plaintiff has acted on the faith of the Defendant's assurance to her detriment and altered her position in reliance on the assurance given to her that she would receive an equal share in the property.

67. In reliance on the Defendant's promise that this was to be a joint venture the Plaintiff altered her position and acted to her detriment by for example:

1. **Crediting all her pension funds to a joint account which was used to make mortgage payments without which the mortgage would not have been secured.**
2. **Not entering the property market in 1998/1999 and purchasing property.**

3. **Undertaking a substantial obligation by signing as the guarantor of 1.4 million dollar BNTB loan used to develop No 1 Lemon Grove.**
4. **Making other financial contributions**
5. **Securing an architect**
6. **Assisting with securing bids for the project**

68. The burden of proof is on the Defendant to show that the Plaintiff did not act to her detriment or her prejudice by entering into the joint venture with her. On the facts the Defendant did not discharge this burden.

69. Given all these factors it would be inequitable for the Defendant to hold No. 1 Lemon Grove entirely for her benefit and to repay the Plaintiff, as the Defendant suggested, what the Plaintiff has contributed to the development of the project plus interest only.

70. Equity having been raised in the Plaintiff's favour it is for this Court of Equity to decide in what way that equity should be satisfied.

71. In my judgment, equity will be satisfied by granting the Plaintiff the relief sought in her Re-Amended Generally Endorsed Writ of Summons. I hereby declare that the Defendant holds the property on constructive trust for the benefit of herself and the Plaintiff as tenants-in-common in equal shares. The parties had agreed that the Plaintiff would own apartments 3 and 4 and the Defendant apartments 1and 2. It is so declared.

72 This Court will not deal with the alternate claim of proprietary estoppel as it is clearly established that before the acquisition of the four dwelling units the parties reached an agreement (common intention) that the property was to be owned by them in equal shares; nor will the court elaborate on the principle of proprietary estoppel dealt

with at page 23 supra, except to reiterate that in both constructive trust and proprietary estoppel the claimant must to the knowledge of the legal owner have acted in the belief that the claimant has or will obtain an interest in the property. In both, the claimant must have acted to his or her detriment in reliance on such belief. In each case equity acts on the conscience of the legal owner to prevent the owner from acting in an unconscionable manner by defeating the common intention.

73. It is for this Court exercising its equitable jurisdiction to now decide what if anything is owed to the Defendant.

74. The parties' expressed agreement specified the precise shares to be taken. However the Plaintiff said in her witness statement (which stands as her evidence in chief) "I have paid just under half of what Sharon has paid. Had Sharon transferred my titles when agreed and shared all of the relevant accounting information with me when asked, I could have refinanced on the equity of my two units and paid to her what was owed to her a long time ago. I have stated from the beginning any sums which I owe to Sharon in order to equalize our payments I am happy to pay back by way of reallocation of the mortgage once it is split following a transfer of title to my two units."

75. Having regard to the facts and the law this Court makes an order in terms of the Plaintiff's claim in the prayer for relief except that paragraphs i (c) and ii are denied.

76. Chartered accountants Arthur Morris Christensen & Company (Arthur Morris) analysed the documents provided to it, to obtain accounting information on the construction of No. 1 Lemon Grove. The cut off date was April 30, 2008.

78. The fifty/fifty beneficial interest has been declared. In order to determine any outstanding amounts which has to be paid in order to equalize the payments between the parties the Court gets some assistance from the accounting report dated

June 26, 2008. However, the report has left the Court in doubt as to the exact amount to be paid by either party to equalize the payments. If the parties are unable to agree, the amounts to equalize the payments, I hereby order an assessment by Arthur Morris, to determine the specific sums if any, due as a result of the inequality in payments. Once that is ascertained the mortgage will be adjusted accordingly. The costs of any further report to be borne equally between the parties. The parties have liberty to apply in respect of this aspect of the Court's decision only.

79. I invite the parties to draw up an order reflecting the terms of this decision.

80. Having regard to the above finding the Defendant's Counterclaim is dismissed.

81. The Plaintiff shall have her cost of this matter to be taxed if not agreed.

Dated day of 2008

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Justice Norma Wade-Miller
Acting Chief Justice