IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CIVIL DIVISION
CLAIM NO. 2005 HCV 2335

IN THE MATTER OF A CLAIM BY THE CLAIMANT GRACE McCALLA FOR A DECLARATION THAT SHE IS BENEFICIALLY ENTITLED TO PROPERTY KNOWN AS LOT 245 6 WEST GREATER PORTMORE, ST. CATHERINE AND REGISTERED AT VOLUME 1267 FOLIO 840 OF THE REGISTER BOOK OF TITLES

BETWEEN	GRACE	McCALLA	CLAIMANT
AND	ERIC	McCALLA	FIRST DEFENDANT
AND	JENICE	McCALLA	SECOND DEFENDANT
AND	JEFFREY	McCALLA	THIRD DEFENDANT

IN CHAMBERS
Mrs. Valerie Neita-Robertson instructed by Robertson and Company for the claimant
Miss Carol Davis for all the defendants

January 10, 29, 30, February 1, May 2, 7, and August 3, 2007

DECLARATION OF BENEFICIAL INTEREST IN PROPERTY, EXPRESS, RESULTING AND CONSTRUCTIVE TRUSTS, PROPRIETARY ESTOPPEL, SECTIONS 7 AND 8 OF THE STATUTE OF FRAUDS

SYKES J.

1. There stands a house at Lot 245 6 West, Greater Portmore in the parish of St. Catherine. The legal owners are Mr. Eric McCalla and Miss Jenice McCalla. It was the home of Mr. Jeffrey McCalla, his wife Mrs. Grace McCalla, and their two children. They moved to the house in 1993. They occupied the house until 2004.

2. This litigation involves four members of the McCalla family. I have opted for the expedient of calling them by first names. I hope they don't mind and I wish that they do not think that I have little regard for them. Eric is the father of Jeffrey and Jenice and the father-in-law of Grace. Grace's claim is quite simple. She says that there was an agreement arrived at between her, Jeffrey, Eric and Jenice, to the effect that should

Grace and Jeffrey pay off the mortgage, pay the escalation costs and agree to use her points (Grace's points from the National Housing Trust) for Jenice's benefit, then she and her husband would get full title to the property. All three defendants deny any such agreement. They say that Jeffrey was a tenant of Eric and Jenice, with Grace and her children living in the house as spouse and children of the tenant.

3. Extensive additions were made to the house by Jeffrey and Grace. Jeffrey and Grace paid for these additions with proceeds from a business they operated. The mortgage on the property has been paid off. The marriage has collapsed. The court is being asked to declare the beneficial interest in the property. The end of the marriage is simply the occasion that has made it necessary to determine the beneficial interest in the property. The fact of the collapse cannot alter the beneficial interests. The court is being asked to say what the interests are and who holds them. Grace claims a 50% interest in the entire property. Eric, Jeffrey and Jenice, say that Grace is not entitled to any share of the property. Jeffrey supports this position and is not claiming any interest in the property. These are the two vital questions: who now holds the beneficial interest? And what is the quantum of the beneficial interest held by the holders of the beneficial interest?

4. In answering the two ultimate questions posed in the immediately preceding paragraph, there is the need to analyse three important areas of the evidence. These are the circumstances (i) of the acquisition of the house by Eric and Jenice; (ii) that led to Grace and Jeffrey living in the house, and (iii) that led to the additions to the house.

5. I shall examine the evidence before stating the relevant law and then applying it to the facts.

The evidence

6. Baroness Hale in ***Stack v Dowden*** [2007] 2 W.L.R. 831 (H.L.) warned that in family disputes over property, strong feelings are aroused. There is the temptation to remember the past in either exculpatory or vengeful terms, depending on one's perspective (see para. 68 of ***Stack***). This warning applies to this case. The stories in this case are polls apart. Both cannot be true. There may be errors in recollection, deliberate half truths or even outright lies. I shall have to do the best I can.

How did Eric and Jenice acquire the property?

7. The joint affidavit of Eric, Jenice and Jeffrey, states that Eric and Jenice submitted separate applications for houses in the Greater Portmore Housing Scheme. The selection for the houses was done by the National Housing Trust. The evidence is that Eric's name was published in January 1993 in the Sunday Gleaner, a newspaper of

island wide circulation. After this publication he was called to an interview. He was also asked to submit letters from his employer showing his National Housing Trust contribution. He had to deposit $62,122.00.

8. Eric was interviewed on March 16, 1993. This interview was preceded by a letter dated February 25, 1993, addressed to Eric. The letter confirmed what was published in the newspaper in January 1993. It said that he was invited to an interview which might lead to the possible award of a mortgage loan from the Caribbean Housing Finance Corporation provided that he met the requirements. This letter is exhibit one.

9. At the interview, Eric was advised that he required another family member to be the co-applicant because the mortgage payback period would go into his retirement years. Eric selected Jenice to join him. Documentation showing Jenice's ability to pay was submitted. The consequence was that Eric and Jenice were selected and approved to take the house. The house was taken on a mortgage. The deposit was duly paid.

10. Grace on the other hand says that in or about 1992, Eric and Jenice offered to sell the house to her and Jeffrey because they (Eric and Jenice) could not pay the closing and escalation costs.

11. While making due allowance for fading memories because of the passage of time, the letter of February 25, 1993 to Eric inviting him to an interview after the January 1993 publication in the newspaper of the fact he was selected for the house, makes it unlikely that any such conversation as alleged by Grace could have taken place in 1992. In that regard Grace is inaccurate if she is really saying that the conversation took place in 1992.

12. Grace said that the arrangement by which the house be would hers and her husband's was concluded at a family meeting (my words not hers) at which Eric, Eric's wife, Jenice, Jeffrey and she were present.

13. Grace said it was she and not Eric who paid the deposit. According to her, she raised the money for the deposit on the house in the following circumstances. She testified that one Mr. Cox, a family friend, was offering to sell a car to Eric. The car cost approximately $60,000.00. The deal was that Eric would give the money to Grace and Jeffrey to make the down payment and they would repay Mr. Cox. The effect of this was that Mr. Cox, instead of receiving the money from Eric, caused or permitted it to be given to Grace and Jeffrey who would then repay Mr. Cox over time. There is no affidavit from Mr. Cox or any documentary evidence supporting this version of events. The need to borrow this money from Mr. Cox arose because, according to Grace, financial

institutions did not want to lend just $60,000.00 but the entire purchase price (see para. 12 of Grace's affidavit dated August 10, 2005).

14. This aspect of Grace's evidence is unlikely to be true and I do not accept it for the following reasons. As I have already said, Eric and Jenice were the ones in dialogue with the providers of the house. Eric was told that there would need to be a deposit and up to the time when this was being done, there is no reliable evidence that Grace and Jeffrey had entered into the contemplation of either Eric or Jenice.

15. In her further affidavit of May 19, 2006, Grace said that Jenice's name was added for mere convenience because Eric could not qualify on his own. This was an attempt to suggest that Jenice, at the time of the acquisition of the house, had no beneficial interest in the property. This evidence is unlikely to be true. I have examined the registered title. The title shows that the property was conveyed to Eric and Jenice as tenants in common and not joint tenants. This, prima facie, shows that Eric and Jenice excluded the right of survivorship. This fact strongly suggests that each had an undivided share in the property. The date on the title is February 24, 1994. The receipt from the National Housing Trust evidencing the down payment of $62,122.00 is date stamped March 16, 1993 and issued in the name of Eric McCalla. I have already said that Grace is not accurate about the date of the family meeting being in 1992 since the house was not yet allocated to Eric. There is no clear evidence when this family meeting was held but, if it was held, it would be more probable to have been held after the house was allocated to Eric. This would make it more likely that Eric paid the $62,122.00 and not Grace. I therefore find that the down payment was paid by Eric and not Grace. Thus I do not accept Grace's evidence that she borrowed any money from Mr. Cox.

16. By all accounts Eric and Jenice qualified for the mortgage. This would mean that the mortgagee was satisfied that Eric and Jenice together could carry the mortgage. There is no evidence that Grace and Jeffrey ever met the National Housing Trust officials or the mortgagee. Also from what Eric said in the joint affidavit, it was the fact that he was close to retirement why it was suggested that he find another person and not because his then salary was unable to carry the mortgage.

17. Grace admitted under cross examination that she was not qualified to apply for any National Housing Trust benefit. This led Miss Davis, in her written submission, to advance the argument that it is unlikely that Jenice would have given away her National Housing Trust entitlement in this way. The argument being that she would have difficulty in securing another benefit at a later date. I don't claim to know much about how these housing benefits work. It is not necessarily irrational if, as Grace said, the understanding was that when Jenice was ready to secure a house, Grace would place herself in a

position to take advantage of the benefits and allow Jenice to benefit using Grace's name in the same manner as Eric and Jenice have done in the instant case. Even if the rules concerning benefits from the National Housing Trust say that the benefits are not transferable there is no evidence that the law prohibits a National Housing Trust beneficiary from transferring the property acquired under the benefits to a third person. I say no more about this because it is quite possible that there well be an action brought to enforce this aspect of the agreement.

18. On the other hand we have the circumstances under which Grace and her family moved into the house - an event which will be examined in greater detail below. Having regard to all the evidence in the case (which is examined in detail later but I am stating part of my conclusion this early), it is extremely unlikely that Grace and her family would have removed from Eltham View to the disputed property unless there was some discussion as alleged by her. I find that a discussion took place between the parties. The discussion took place somewhere between March 1993 and October 1993 when Grace and her family moved into the house. I also find that it was agreed that Grace and Jeffrey would become owners of the house if they paid the mortgage and escalation costs. Even though they did not know it, all the participants at the meeting agreed that Eric and Jenice would be trustees for Grace and Jeffrey provided they paid the mortgage and the escalation costs.

How did Grace and Jeffrey come to be living in the house?

19. There is a sharp point of departure on this issue. The three defendants say, in their joint affidavit, that Jeffrey asked Eric and Jenice to allow them (Grace, Jeffrey and children) to live in the property because they had received notice from the landlord of the property where they were living. At the time of this alleged notice, Jeffrey and his family were living at Lot 282 Eltham View, Spanish Town in the parish of St. Catherine.

20. I begin by noting that Eric's and Jenice's evidence on this point must necessarily be what they were told by Jeffrey or some other person. There is no evidence that either Eric or Jenice saw any written notice purportedly issued by the landlord to Grace and Jeffrey. There is no evidence that either Eric or Jenice was present when the landlord gave notice to Grace and Jeffrey. The question then, is whether Jeffrey is credible on this point? I hold that he is not for the following reasons.

21. Jeffrey stated, in the joint affidavit, that he was given notice to quit by the land lord. I contrast the affidavit with his evidence during cross examination. On cross examination, Jeffrey said that he and his family were living in Eltham View, Spanish Town, St. Catherine. They removed from there to the disputed property. He said that he agreed to go and live in the house after his father showed him the house. He added that

his sister was to have gone there but she was not ready to do so because she was doing examinations and so Eric invited him to live there. The reason he accepted this offer was that he could live there at a lower rent. Added to that, he said even if he were in arrears with the rent his father would not throw him out. In this narrative there is nary a word about notice from the landlord. There is no evidence that the landlord was owed rent or would have reason to give Jeffrey and his family notice to quit. This narrative is in such stark contrast to his affidavit evidence that it raises serious doubts about his credibility generally. Grace has always insisted that she did not receive notice from the landlord. I accept her testimony that when she and her family moved into the disputed property, it was not the result of a notice given to Jeffrey or her by the landlord. I conclude that Grace is more reliable when she said that they had not received notice from their previous landlord.

Was Jeffrey a tenant of Eric and Jenice?

22. It is being said by Eric, Jenice and Jeffrey that Grace and her family were in the house as spouse and dependents of the tenant who was Jeffrey. There is a lease agreement in evidence. It appears that Grace did not know about the lease. The agreement was executed by Jeffrey on the one part, and Eric and Jenice on the other part. According to the defendants, the lease was executed on or about October 1993, within a very short time after Jeffrey and his wife took possession of the disputed property. From the time the family moved into the house to the breakdown of the marriage and departure of Jeffrey from the house in 2004 he did not tell Grace about the lease. He never told her that they were tenants. Eric testified that he did not tell Grace about the lease. According to Eric, he said that he told his son to tell Grace about it. There is no evidence that Jenice told Grace of this lease agreement.

23. There is no evidence that before Grace and her family left Eltham View and went to the disputed house that she was told the circumstances of the move as alleged by Jeffrey. This is remarkable in light of the absence of evidence that at the time of the move the relationship between Jeffrey and Grace had deteriorated to the point where such communication would have been unlikely. There is no evidence that the relationship between Eric and Grace, at the time of this alleged lease, was such that he was not speaking to her. This non-disclosure is inconsistent with the sense conveyed to the court of how the couple conducted the garage business. It will be shown below that Grace it was who did the paper work of the business while Jeffrey did the repairs on the cars. The sense I got was that Grace looked after paper work as well as general matters relating to the welfare of the family. If I am correct in this, it does seem odd that Grace would not have been told that there was this agreement. Also the move to the disputed property took place two years after the marriage in 1991 and there is no evidence of serious marital discord between 1991 and 1993.

24. There is evidence that an action for possession was commenced against Grace in the Resident Magistrate's Court for St. Catherine. This was after Jeffrey moved out of the house. However, there is no clear evidence that during that action the lease agreement was used for any purpose whatsoever. Grace testified in these proceedings that she first heard about and saw the lease when the current proceedings were commenced. I have to ask myself why this silence? Is it as Mrs. Neita Robertson has suggested, that is, that the lease agreement is a recent invention designed to defeat the claim of Grace? Why didn't either Eric, Jenice or Jeffrey tell Grace that she was the spouse of the tenant and produce the lease agreement to her? The most reasonable explanation, based on the totality of the evidence, is that there was no lease agreement. I find that when Grace and her family moved into the property, it was not under a lease agreement. I do not think that the lease agreement is a genuine document that was in existence at the time of the move to the disputed property.

The mortgage payments and escalation costs

25. I shall deal with the mortgage payments at this point. It is agreed that a monthly sum was paid which was the equivalent of the monthly mortgage payments. Grace has insisted that she was not paying rent and never understood the payment to be a monthly rental. She was of the view that the monthly payments were in keeping with the arrangement, namely, that if she and Jeffrey undertook the mortgage payments the property would be theirs on completion of the payments. The payments have been completed and the property free of the mortgage since 2004.

26. At first Eric attempted to say that he made all the mortgage payments but eventually he seemed to have accepted that the physical handing over of the payments were done by either Grace or Jeffrey. He maintained, however that the monthly payments were rent payments used to meet the mortgage payments. On the totality of the evidence I find Grace's evidence more satisfactory on this point and I hold that the payments were indeed mortgage payments made pursuant to the agreement which was that if Grace and Jeffrey paid the mortgage the property would be theirs.

27. Part of the agreement reached was that Grace and Jeffrey would pay the escalation costs. Grace's first affidavit of August 10, 2005, suggests that the escalation costs were paid. The defendants on the other hand deny that that ever occurred because there was no agreement as alleged by Grace. On a balance of probability although I have not accepted Grace's evidence on a particular aspect of the case, I conclude that she paid those costs, because I found that her account satisfactorily accounted for (i) the move to the disputed property from Eltham View and (ii) the additions to the house.

The additions

28. The additions were of a substantial nature. The couple added (a) a double car port; (b) an additional bedroom; (c) an extension was done to the kitchen; (d) the bathroom was remodelled and (e) a back patio and washroom were added.

29. One of the points of contention is the date these additions commenced. Grace said that the additions commenced in 1995 and were done over a period of time with the final part completed in 2004. Jeffrey said that other than the perimeter wall which was done in 1995, no other addition was done until January 2003. Eric said that he was not aware of any addition until August 2004 and by that time all the additions were finished, meaning rendered and painted. There is no clear evidence showing when Jenice became aware of the additions.

30. The source of funding for the additions is not disputed. Eric and Jenice did not pay for them. All the money came from the business operated by Grace and Jeffrey. Jeffrey was a mechanic. He repaired the cars and she did the paper work. Jeffrey agreed that Grace did not work anywhere else until they separated some time around 2003/2004. They were married in 1991. Thus for at least ten years both worked in the garage business which generated income to pay for the additions. There was no differentiated contribution from either Grace or Jeffrey. Based on the totality of the evidence, neither party made any attempt to (and one doubts whether they could) point to any specific sum which they contributed individually.

31. I need to digress here to deal with the question of Grace's contribution to the garage business operated by Jeffrey and Grace. The purpose of this digression is to show that Grace contributed significantly to the operation of the business such that the income generated from the business which was used to fund the additions cannot be said to be due solely to Jeffrey's efforts. This evidence also grounds the constructive trust that arises in favour of Grace and Jeffrey.

32. Jeffrey eventually accepted that his wife had no other job during the course of their marriage. He conceded that she worked in the business. This concession is inconsistent with the picture he tried to portray in the affidavit when he said that "she spent most of her time talking to her friends on the phone and sleeping" (see para. 33 of joint affidavit). Grace's testimony and Jeffrey's concessions are incongruous with his image of a wife who refused to wash because "it made her hands get callouses" (see para. 33 of joint affidavit).

33. The garage business began, Grace said, without refutation from any of the defendants, in the backyard of their rented home in Franklyn Town and then it removed

to Retirement Road and then to Collins Green Avenue. It was at Collins Green that the container was acquired. She personally did the work to secure the container. She refurbished the container. While this was going on, she was pregnant with the second child. She returned to work shortly after giving birth to her second daughter. In all this, she said that she washed, ironed, cooked, cleaned, read bed time stories to the children while attended to her husband's needs, wifely and business (her words not mine), including financial problems. She said that she got home in the nights around 8:00 p.m. - 8:30 p.m. There is no evidence of a domestic assistant.

34. Grace's testimony is that until the container was acquired, she was directly involved in the physical work done to "set up" the garage. She dug holes, laid posts, nailed the roof when the garage was at Retirement Road and at Collins Green Avenue.

35. Grace added that when she went to school to learn practical nursing she would return from school at approximately 2:30pm. She went to work for the business at nights and at times she missed school for a day or two to keep up with the work of the business. Eric and Jenice cannot assist with Grace's contribution to the business. They readily acknowledge in the joint affidavit that they did not have any knowledge of Grace's and Jeffrey's financial arrangements (see para. 31 of the joint affidavit).

36. There can be no doubt that Grace contributed to the earning of money to fund the additions. The effort was a joint one and the contribution made by each was significant and at this point it is not possible to separate them. There is no evidence that either party took a salary. From this it is too plain that both Jeffrey and Grace regarded the business as a joint enterprise and the income as belonging to them both.

37. She said that she was the cashier, receptionist and secretary. There is no evidence that during the union she did not perform these functions. There can be no doubt that Grace was an integral part of the garage business and contributed significantly to its growth and development.

38. If Jeffrey and Grace were so integrally involved in operating the business and providing for the family, it is extremely unlikely that he would not have mentioned to her that he was leasing the disputed property from his father and sister, had there been really such a lease. While there is evidence that Grace and Jeffrey were largely responsible for some areas of their lives the evidence does not suggest that the division was rigid and impervious. The evidence suggests that, until the break down there was the free flow of information, discussion and ideas. I am not saying that the marriage was perfect but there is nothing to suggest that Jeffrey would not have told his wife about the lease had a lease really existed.

Jeffrey's reason for making the additions

39. On Jeffrey's testimony, he kept his wife in the dark about her true status in the house despite, to use his words, her constant nagging. She was concerned that if anything should happen to him, her name would not be on the title. His response to this was simply to say to her that he could not rectify the problem because they were only there for a certain time. Jeffrey also said that she constantly raised these concerns because of the rift between Grace and Eric. Is it reasonable to accept that a nagging wife could drive a husband to agree to expend significant sums of money on property which to his certain knowledge was occupied under a lease and not disclose the true position to his wife?

40. Despite Jeffrey's assertion that he knew that he had no interest in the property, he gives an answer in cross examination that should be examined. He says that he kept the bills for the additions "in case of anything". In Jamaica, when this expression is used, it usually means that the person is preparing for some eventuality that may arise. In this particular case, what is the eventuality that may arise? It could hardly have been a dispute with the workmen or suppliers since there is no evidence that there were problems with them. The only other thing that could reasonably happen would be a dispute over property or a claim to be reimbursed. Jeffrey's keeping of the bills "in case of anything" is inconsistent with his assertion that he knew he had no interest in the property and more consistent with a person expending money on the property on the understanding that he would have an interest and "in case of anything" he would have the bills to prove his claim.

41. I find it difficult to accept that a tenant albeit the son of the landlord, as a reasonable and rational person, would make these extensive additions to a house with no expectation of any reimbursement or any expectation of a proprietary interest. Jeffrey has eschewed any semblance of reasonableness. If Jeffrey is accepted he was "gifting" his father and sister with the construction with funds from his primary and quite likely his sole source of income, based on the evidence, without any hope of an interest or hope of a benefit of some kind. His conduct, not his words, is more consistent with his wife's version of events than that of a husband who wished to appease his wife.

Jeffrey's view of his wife

42. There is a further aspect of the evidence that can be dealt with conveniently at this point. Jeffrey, in the joint affidavit, tried to make out that Grace did little housework, refused to cook and did not wash. This was in an attempt to suggest that Grace did not contribute much to the business they were involved in and that she did not care for her children. I have already examined the evidence of Grace's contribution to the business. I

shall look at Jeffrey's evidence regarding Grace as a wife and mother. It is agreed that there were two children produced by the union after the couple were married. There is no evidence that there was a household helper or that any family member assisted with the care of the obviously young children. In the absence of this kind of evidence then they must have been cared for by either Jeffrey or Grace or both. Grace testified that she was involved in the lives of the children. She even said that at point she established a sort of play area inside the container that was used as an office for the business. The children would be in that play area while she worked. She added that it is true that food was bought from time to time but this was the result of working at the business and getting home quite tired. It was in these circumstances she said that food was bought.

43. If Jeffrey was prepared to deny that his wife made such a significant contribution to the business, to the rearing of his children, why wouldn't he deny her story about the house? If he was prepared to malign her as a lazy no-account woman why would he not attempt to portray her as being untruthful on the vital issue?

Jenice's evidence

44. Jenice was not cross examined, however, her account is identical to that of Eric on the material issues. According to Jenice it was only in August 2004 she knew about the construction at the premises. Miss Davis submitted that her account stands unchallenged and therefore should be accepted. This is not necessarily true. I accept that it would have been helpful if she had been cross examined. Jenice has agreed with what Jeffrey said about the circumstances that led to Grace going to the disputed property. This account I have found to be untrue. Jenice's assertion that Grace and Jeffrey simply went ahead with the additions without her knowledge is against all the probabilities.

45. Other than saying that she was astounded to find that extensive alterations were made to the disputed property Jenice does not say in the affidavit when she made this discovery. Her father, however asserted, that Jenice visited the property from time to time, though he was not specific about these times. Grace has said that Jenice also visited the property. I find that Jenice did visit the property and would have seen the construction before August 2004. Before August 2004, there is no evidence that Grace raised objection to the additions. This is consistent with the understanding as alleged by Grace and since the mortgage was being paid for all intents and purposes the agreement was on track.

Eric's evidence

46. I suppose this is as good a point as any to deal with Eric's evidence on the alterations. Eric says that he did not know of the alterations until August 2004 (see para. 36 of joint affidavit). He protested to Jeffrey who apologised. Eric testified that

when he visited the property from 1996 right through to 2004, he never saw additions being made. He only saw the completed product. Is he credible on this point?

47. I shall look at four areas of cross examination in order to say what I make of Eric's credibility. I shall begin with his visits to the house during the period Grace and Jeffrey lived at the disputed property between 1993 and 2004 . Eric testified that he visited the house once per year in accordance with the guidance given to him by Caribbean Housing Finance Corporation. He said that he did not have much time to visit because he had children to look after and work to attend. This evidence has to be put in perspective. Eric said that he worked as a senior warehouse supervisor at J. Wray and Nephew until 1995 (two years after Grace and Jeffrey moved into the house) when he was laid off. There is no evidence that he had any other employment between 1995 and 2004. If so, then by 1995 one of the reasons for visiting only once per year visit no longer existed and cannot be relied on as reason for not visiting the property more than once per year since 1995. 1995/1996 is the year given by Grace as the year the additions commenced. I accept Grace's evidence that the additions began in 1995/96 and therefore Eric would have seen the on going work on his visits.

48. Eric testified that his wife visited with him on his once-per-year visits. He added that Jenice also visited with him but he does not know if her visits with him were on his once-per-year visits. If Jenice visited with him but he is not sure whether she visited with him during the once per year visits, would this not suggest, implicitly, that he is accepting that he in fact visited more than once per year, if not every year but certainly in some years? If he was sure that his wife visited once per year with him, why is he not sure whether Jenice also visited with him, on that once-per-year visit? Logically, if he visited once per year and his wife with him only at that time, should it not follow that Jenice also visited on that same visit? Undoubtedly, it was this reasoning that led to the suggestion being made to him that he visited the property more than once per year, a suggestion he denied.

49. There is another area of cross examination relating to his visits to the house that must be examined. According to Eric, when he visited the property he did not go inside the house. He remained outside and spoke to his son. The reason advanced for not entering the house was that he being a man did not like to go inside the bedroom because they might think he was watching them. The reader may be perplexed by the response but that is what he said. In order to test this answer he was then immediately questioned about the living, kitchen and dining room, which he said were all in one. The purpose of this bit of evidence was to show that there were places other than the bedroom for him to be entertained.

50. I shall refer to a bit of cross examination that is crucial to my assessment of Eric. What I am about to refer to cannot be adequately captured on paper. It really had to be observed. Mrs. Neita Robertson suggested to Eric that he assisted Jeffrey to remove from the property. At first, Eric denied that he assisted Jeffrey to move from the disputed house. At this point, Mrs. Neita-Robertson disarmed him, by smiling and saying in a very endearing tone, that nothing was wrong with assisting his son. After this he admitted that he helped Jeffrey to remove. His recollection improved to the point where he recalled that Jeffrey left with a refrigerator, bed, wardrobe, settee, chair, and utensil. Indeed, when Mrs. Neita-Robertson suggested that all Jeffrey left in the house were a bed, a table and some utensils, Eric responded by saying that a wardrobe was left there too. He eventually accepted that Jeffrey took most of the furniture that was in the house.

51. The fourth area of cross examination is on the issue of the monthly payment of $4,872.00. Eric agreed that the figure remained the same for the entire period Grace and Jeffrey lived in the house as a couple. He agreed that the figure was identical to the mortgage payments. Eric said that the reason for making the rent the same as the mortgage was that he was making "the rent easy for him to pay the mortgage". When pressed on this Eric said that what he meant was that he wanted Jeffrey to get his own house and that Jeffrey was in financial difficulties. This was why he gave him a concessionary rent. On the face of it, Eric seems to be saying that the rent was initially set on the basis of granting a concession to Jeffrey and the rent remained at the initial level because of the concession and because of the financial difficulties of Jeffrey. In the joint affidavit, there is no mention of the fact that Jeffrey was experiencing financial difficulties and that fact had a role in the level of the rent.

52. This has left me unable to accept Eric's testimony, on a balance of probabilities, on the ultimate issue of whether Grace has acquired a proprietary interest in the house by virtue of acting on the agreement struck. Having completed the major examination of the evidence it is appropriate to examine the law to see the legal consequences of the evidence that I have accepted.

53. Before examining the law I should indicate that there has not been much by way of documentary evidence in this case. Grace said at paragraph 32 of her affidavit dated August 10, 2005, that her husband took "the briefcase which stores all the documentation which we have in relation to the business and/or the said property." In response to this direct accusation, Jeffrey states in the joint affidavit, at paragraph 44 that there "was a brief case that had some documents, but to my knowledge none support the Claimant's (sic) claim herein." From this I conclude that Jeffrey is accepting that there was indeed a brief case with documentation. He does not say whether it

contained the documents suggested by Grace. Rather he expresses an opinion on whether the documents support his wife's claim. I accept Grace's assertion that the documents do relate to the business and the home. I also find that Jeffrey took the documents. If my finding is correct, this goes a far way in explaining the relative lack of documentation put forward by her.

54. Grace also swore and I accept that because there was no certainty that the providers of the house would necessarily substitute Grace and Jeffrey even if they had put themselves in a position to qualify for the house, it was agreed by all the parties that the agreement with the housing providers and the mortgage company would continue as if Eric and Jenice were providing the money to repay the mortgage and escalation costs when in reality the money was coming from Grace and Jeffrey.

The law

55. This judgment deals solely with real property. However, it is not being said that what is said has no application whatsoever to personal property but I have restricted my self to the principles applicable to real property.

56. When a court in Jamaica is deciding where the equitable interest in real property lies it is always important to bear in mind the Statute of Frauds. Since its enactment in 1677 this statute has had an enduring and profound influence on the law, particularly on the law of trusts, which is the law applicable to division of property between spouses. The statute was designed to eliminate the risk of fraud by suppressing oral declarations of an express trust. The statute made express trusts utterly void unless they were "***manifested and proved by some writing*** *signed by the party who is by law enabled to declare such trust, or by his last will in writing*" (my emphasis) (see section 7 of the Statute of Frauds).

57. The statute, however, left untouched the ability of claimants to establish a proprietary interest using the vehicles of resulting and constructive trusts. These could be established by parol evidence.

58. On the facts of this case, there was no agreement in writing signed by Eric or Jenice. Thus the oral declaration of what was in effect a trust was not just unenforceable but void. Grace cannot succeed on the basis of an oral agreement alone, even if it were admitted by Eric and Jenice, the holders of the legal title to the property.

59. If Grace is to succeed there must be evidence of the cogency of that presented in ***Eves v Eves*** [1975] 1 W.L.R. 1338 and ***Grant v Edwards*** [1986] 3 W.L.R. 114 and not just

the oral agreement. The conduct must be such that despite the absence of writing it is sufficiently strong to ground the proprietary claim as if there were an agreement in writing.

Division of property - resulting trusts

60. A claim to an equitable interest in property by any person other that the legal title holder or a claim by a person who already had an equitable interest to a proportion of the beneficial interest greater than what he already has, inevitably involves the proposition that the legal title holder is holding all or some part of the property as trustee for the claimant.

61. If there are multiple purchasers of any disputed property the law concludes, in the same manner as it would in relation to a sole purchaser, that in the absence of evidence showing otherwise, the multiple purchasers hold the beneficial interest in proportion to each purchaser's contribution to the purchase price. This is so whether or not the purchaser's name appears on the title. The logical result of this principle is that if the claimant puts up the entire purchase price but the title is in the name of another, in the absence of some explanation, equity would (i) say that the claimant was the 100% beneficial owner and (ii) regard the legal title holder as a trustee for the claimant. These principles are uncontroversial and are nothing more than the legal consequence of the "natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather that for that of another; and that the conveyance in the name of the latter, is a matter of convenience and arrangement between the parties, for other collateral purposes" (see para. 1201, ***Commentaries on Equity Jurisprudence*** (1st English Ed) (1884); see also para. 1212 of ***Jacob's Law of Trusts in Australia*** (7th) (2006) (LexisNexis Butterworths)). These are conclusions of common sense.

62. As Gibbs C.J. said in ***Calverley v Green*** 155 CLR 242, 251:

> *Where one person alone has provided the purchase money it is her or his intention alone that has to be ascertained. ... Where there are two purchasers, who have contributed unequal proportions, but have taken the purchase in their joint names, the intentions of both are material. Even if the parties had no common intention, the intentions of each may be proved, for the purpose of proving or negating that one intended to make a gift to the other.*

63. This passage bolsters the proposition that those who do not contribute to the acquisition of property, generally, have no equitable interest in the property. This passage is consistent with the underlying theme in trust law that when one wishes to find out whether a trust exists it is the intention of the settlor that is important. The settlor in the case of a purchase money resulting trust is the person who provided the purchase money.

64. What I have said about resulting trusts is consistent with Lord UpJohn in ***Pettitt*** who said at page 813 - 814:

> *First, then, **in the absence of all other evidence**, if the property is conveyed into the name of one spouse at law that will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, i.e. with benefit of survivorship, but it is seldom that this will be determinative. **It is far more likely [not inevitably] to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided.***
>
> *My Lords, all this is trite law but I make no apology for citing the judgment of Eyre C.B. in 1788 in the leading case of Dyer v. Dyer (1788) 2 Cox, Eq.Cas. 92, 93, 94, set out in full in White and Tudor's Leading Cases in Equity, 9th ed. (1928), Vol. 2, 749 -*
>
> *"The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successive - results to the man who advances the purchase-money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration, the use results to the feoffor. It is the*

established doctrine of a court of equity, that this resulting trust may be rebutted by circumstances in evidence.

"The cases go one step further, and prove that the circumstance of one or more of the nominees being a child or children of the purchaser, is to operate by rebutting the resulting trust; and it has been determined in so many cases that the nominee being a child shall have such operation as a circumstance of evidence, that we should be disturbing land-marks if we suffered either of these propositions to be called in question, namely, that such circumstance shall rebut the resulting trust, and that it shall do so as a circumstance of evidence."

The remarks of Eyre C.B. in relation to a child being a nominee are equally applicable to the case where a wife is the nominee. ***Though normally referred to as a presumption of advancement, it is no more than a circumstance of evidence which may rebut the presumption of resulting trust****, and the learned editors of White and Tudor were careful to remind their readers at p. 763 that "****all resulting trusts which arise simply from equitable presumptions, may be rebutted by parol evidence****. ..." This doctrine applies equally to personality.*

These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence; (My emphasis)

65. Thus equity will not assist a volunteer. I shall refer to another important principle before applying them to the facts as found by me.

The importance of the time of acquisition

66. When real property is acquired, the equitable interest is not in a state of suspension waiting to descend at some future appointed time. The beneficial interest vests in some one at the time of acquisition. Lord UpJohn in ***Pettitt*** at page 816 highlighted the importance of the time of acquisition. He said:

Then in some of the recent cases, ... a number of judicial observations have been made to the effect that when a marriage is broken it is the function of the court to fill in the gap by doing what the parties as reasonable spouses would have agreed was to happen on the break-up had they thought about it. This cannot be

right; apart from the fact that an agreement as to the results of a future separation or divorce is void as being contrary to public policy, ***it is clear that the court can only ascertain the title to property by considering the circumstances at the time of acquisition and in the absence of positive evidence by applying the presumptions I have discussed above.*** *This decides the question of title for all time and in all circumstances and there is no gap to be filled. Nor can this matter be affected by the fact that looking backwards after many years it may seem to have been unfair (Cobb v. Cobb [1955] 1 W.L.R. 731). Evidence of facts and circumstances subsequent to the acquisition is relevant only where - (1) it is desired to prove title by reason of the subsequent conduct of the parties or (2) it is alleged that there has been some subsequent agreement affecting title to the property.* (My emphasis)

67. Lord Morris reinforces this point. He said in ***Pettitt*** at page 804:

> *The mere fact that parties have made arrangements or conducted their affairs without giving thought to questions as to where ownership of property lay does not mean that ownership was in suspense or did not lie anywhere. There will have been ownership somewhere and a court may have to decide where it lay.*

68. The importance of identifying the time of acquisition is still of vital importance. It marks the dividing line between pre-acquisition and post-acquisition conduct. I now state my understanding of the law regarding conduct at the time of the acquisition and after the acquisition of the property. The evidence that is examined to determine the intention of the real purchaser, whether such a purchase is sole or joint, in the case of a purchase money resulting trust is the conduct (including words and declarations) at during and shortly after the acquisition of the property. The reason for examining the intention of the purchaser is that it is that person who has provided the consideration and is therefore the settlor of the property. In trust law it is the intention of the settler that is critical, not the intention of the beneficiary who has not provided any consideration. In There may be conduct that as a matter of chronology takes place after the property is acquired but is so close to the acquisition, so immediate that it is part of the transaction in which the property is acquired. It is this post acquisition conduct and no other that is taken into account (see ***Charles Party Marshall Ltd v Grimsby*** 95 C.L.R. 353, 365) in order to determine the beneficial interest of the parties at the time of

acquisition. A necessary conclusion from this is that any post acquisition conduct that is not so connected so as to be part of the transaction in which the property was acquired would only be relevant to determining whether there was an alteration of holding the beneficial interest after the property has been acquired.

69. In the particular case before me, the property was registered in the name of Eric and Jenice as tenants in common. There is nothing in the title to suggest that at the time of acquisition another person held the beneficial interest. Therefore the fact that the title reflected tenants in common, the fact that the mortgage was granted by both Eric and Jenice - mortgage on which both appeared to have been equally liable (a conclusion I draw though there is no direct evidence on the point) would tend to suggest that Jenice's name was not placed as mere convenience but the intention as between Eric and Jenice was that Jenice would have an equitable interest in the property (see para. 7 of joint affidavit). The fact that the title was issued after 1993 does not affect my conclusion that at the time the property was acquired by Eric and Jenice it was they and they alone who had the beneficial interest. Even if the agreement spoken to by Grace was made before Eric and Jenice were allocated the property, at that time, it would have been just an oral agreement which would be void and unenforceable for want of writing. It is the performance by Grace and Jeffrey that grounds the equity which has eventually erected a constructive trust in their favour.

70. Up to the point of the granting of the mortgage Grace and Jeffrey were not parties to any agreement with the National Housing Trust or the mortgagees. The inference must be that legal and equitable interests were in Eric and Jenice at the time the property was acquired. On resulting trust principles, Eric and Jenice were both legal and equitable owners of the disputed property. The next issue is whether the agreement struck between Eric, Jenice on the one hand and Grace and Jeffrey on the other has the legal consequence of altering not only how the beneficial interest is held but also who now holds it. To state the matter in terms of post acquisition conduct, the issue now is whether there is any post acquisition conduct on the part of Eric and Jenice on the one hand and Grace and Jeffrey on the other that has the effect of altering the beneficial interest of the property. The law of constructive trusts is helpful and I now turn to that area of law.

Claiming an interest without contributing to the purchase price - the constructive trust

71. A constructive trust arises from the interpretation of the facts before the court. As the High Court of Australia pointed out in ***Giumelli v Giumelli*** 196 C.L.R. 101, the constructive trust is "*a remedial response to the claim to equitable intervention made out by the plaintiff. It obliges the holder of the legal title to surrender the property in question, thereby bringing about a determination of the rights and titles of the parties*"

(see page 112). It is not a trust 'constructed' by the court. The court after examining the facts construes (for this is where the word 'constructive' in the expression 'constructive trust' comes from) them to give rise to trust.

72. The cases that will be examined shortly establish the principle that a successful claim to a proprietary interest in property will succeed where the claimant is able to show that he has acted to his detriment in reliance on a promise made to him. There must be a connection between the promise or representation and the claimant acting to his detriment. A claimant cannot establish a unilateral constructive trust. He cannot generate an idea in his mind, act on it and then claim a beneficial interest.

73. The difficulty with the constructive trust is that it defies a comprehensive definition that adequately captures all the circumstances in which it is applied. What compounds the difficulty is that the whole body of equity jurisprudence itself was a remedial response to the rigours of the common law and within the body of equitable principles, the constructive has emerged as one of the prime remedial responses of equity. To that extent, to debate whether the constructive trust is institutional or remedial is artificial. The following extract from Deane J. in ***Muschinski v Dodds*** 160 C.L.R. 583, 612 - 614 makes the point:

> *The nature and function of the constructive trust have been the subject of considerable discussion throughout the common law world for several decades: ... At times, disputing factions have tended to polarize the discussion by reference to competing rallying points of "remedy" and "institution". The perceived dichotomy between those two catchwords has, however, largely been the consequence of lack of definition. In a broad sense, the constructive trust is both an institution and a remedy of the law of equity. As a remedy, it can only properly be understood in the context of the history and the persisting distinctness of the principles of equity that enlighten and control the common law. The use or trust of equity, like equity itself, was essentially remedial in its origins. In its basic form it was imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights. This was consistent with the traditional concern of equity with substance rather than form. In time, the relationships in which the trust was recognized and enforced to protect actual or presumed intention became standardized and were accepted into conveyancing practice (particularly in*

relation to settlements) and property law as the equitable institutions of the express and implied (including resulting) trust. Like express and implied trusts, the constructive trust developed as a remedial relationship superimposed upon common law rights by order of the Chancery Court. It differs from those other forms of trust, however, in that it arises regardless of intention. For that reason, it was not as well suited to development as a conveyancing device or as an instrument of property law. Indeed, whereas the rationale of the institutions of express and implied trust is now usually identified by reference to intention, the rationale of the constructive trust must still be found essentially in its remedial function which it has predominantly retained: cf. Waters, op. cit., pp. 37-39. The constructive trust shares, however, some of the institutionalized features of express and implied trust. It demands the staple ingredients of those trusts: subject-matter, trustee, beneficiary (or, conceivably, purpose), and personal obligation attaching to the property: cf. Sir Frederick Jordan, Chapters on Equity in New South Wales, 6th ed. (1947: Stephen ed.), pp. 17-18. When established or imposed, it is a relationship governed by a coherent body of traditional and statute law. Viewed in its modern context, the constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.

74. The legal principle that equity will not assist a volunteer applies to constructive trusts as well. When a person is claiming an equitable interest on constructive trust principles, such a person has already conceded that the settlor (i.e the holder of the legal estate) has not done what is necessary to properly constitute the trust, hence the efforts to persuade the court to construe the facts in such a manner that a constructive trust arises.

75. From what has been said about constructive trusts so far, it necessarily follows that the intention of the settlor is generally not determinative of the issue. Often times the person held to be a constructive trustee denies that he had any intention to give the claimant a beneficial interest in the property. The question is simply whether equity will come to aid of the claimant on the given facts. This does not mean, however, that the court is free to roam at large without any regard for established principle and simply conclude, based on an idiosyncratic notion of fairness and justice, that a constructive

trust ought to be imposed on any given set of facts. Any such idea was repudiated by Deane J. in ***Muschinski*** at pages 615 - 616:

> *Thus it is that there is no place in the law of this country for the notion of "a constructive trust of a new model" which, "[b]y whatever name it is described, ... is ... imposed by law whenever justice and good conscience" (in the sense of "fairness" or what "was fair") "require it": per Lord Denning M.R., Eves v. Eves; and Hussey v. Palmer. Under the law of this country - as, I venture to think, under the present law of England (cf. Burns v. Burns) - proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion (cf. Wirth v. Wirth), subjective views about which party "ought to win" (cf. Maudsley, Constructive Trusts, Northern Ireland Legal Quarterly, vol. 28 (1977), p. 123, esp. at pp. 123, 137, 139-140) and "the formless void of individual moral opinion": cf. Carly v. Farrelly; Avondale Printers & Stationers Ltd. v. Haggie. Long before John Selden's anachronism identifying the Chancellor's foot as the measure of Chancery relief, undefined notions of "justice" and what was "fair" had given way in the law of equity to the rule of ordered principle which is of the essence of any coherent system of rational law. The mere fact that it would be unjust or unfair in a situation of discord for the owner of a legal estate to assert his ownership against another provides, of itself, no mandate for a judicial declaration that the ownership in whole or in part lies, in equity, in that other: cf. Hepworth v. Hepworth. Such equitable relief by way of constructive trust will only properly be available if applicable principles of the law of equity require that the person in whom the ownership of property is vested should hold it to the use or for the benefit of another. That is not to say that general notions of fairness and justice have become irrelevant to the content and application of equity. They remain relevant to the traditional equitable notion of unconscionable conduct which persists as an operative component of some fundamental rules or principles of modern equity: cf., e.g., Legione v. Hateley; Commercial Bank of Australia Ltd. v. Amadio.*

76. Deane J. was not alone. Gibbs C.J. in ***Muschinski*** also rejected the notion of the court acting according to its ideas of fairness. He said at page 594:

> *Some of the judgments ..., particularly those of Lord Denning M.R., support the view that a constructive trust is "imposed by law whenever justice and good conscience require it": Hussey v. Palmer (a case between mother-in-law and son-in-law). However the view that the court can disregard legal and equitable rights and simply do what is fair is not supported in England by the decisions of the House of Lords in Pettitt v. Pettitt and Gissing v. Gissing (see per May L.J. in Burns v. Burns) and it is contrary to established doctrine in Australia: Wirth v. Wirth; Hepworth v. Hepworth; Bloch v. Bloch.*

77. When there is a claim based on solely on constructive trust principles, almost inevitably the claimant is admitting that he did not contribute to the acquisition of the property. He is asking equity to declare that the conduct of the legal title holder is unconscionable. It is not necessary for such a finding to be made that the defendant has engaged in a conscious act of dishonesty. A conclusion of unconscionability can be made simply on the basis that the defendant has not lived up to the demanding standards of equity. In such a situation it matters not that the holder of the legal estate is acting under a mistaken view of the law or that he is acting with the best of intentions.

78. The application of the constructive trust in property disputes between spouses and co-habiting couples has been compounded by the tendency of the English cases to speak of a 'common intention constructive trust'. This has led to judges embarking on an often time elusive quest to find a common intention. In cases where the constructive trust has been established, the evidence usually shows a promise or representation of some kind made by the holder of the property to the claimant who acts to her detriment. This does not depend on any finding of a common intention. In this situation the actual intention of the property holder is irrelevant. As Deane J. said above the '*constructive trust can properly be described as a remedial institution which equity imposes regardless of actual or presumed agreement or intention (and subsequently protects) to preclude the retention or assertion of beneficial ownership of property to the extent that such retention or assertion would be contrary to equitable principle.*' If this is correct, why speak of common intention constructive trusts?

Illustration of the constructive trust in the context of spouses or cohabiting couples

79. Examples of successful constructive trusts arising from a promise or representation and detrimental reliance are ***Eves*** and ***Grant***. In these two cases, the ladies could not

have acquired an equitable interest in the property in reliance on the promise alone because the absence of writing as required by section 53 (1) (b) of the Law of Property Act (UK) was an obstacle. In Jamaica, we arrive at the same result because of section 7 of the Statute of Frauds. The reason is that the ladies were saying that the legal title holder declared a trust in their favour but such a trust was utterly void because of the failure to comply with the statutory requirements. This precipitated the reliance on constructive trust principles in order to secure a proprietary interest.

80. If the ladies were going to be successful, as they eventually were, the court had to find that they acted to their detriment ***in reliance on the promise or representation.*** Nothing less would do. The problem in cases like ***Eves*** and ***Grant*** will always be to identify the kind of conduct that is sufficient to ground the constructive trust. At the very least, the conduct had to be unequivocally of a nature that went beyond ordinary domestic activities. The reason for this requirement is that unless the court could find such conduct, any decision in favour of the claimant would be tantamount to enforcing an oral declaration of a trust in land without compliance with the statutory formalities - a conclusion not possible in either England and Wales or Jamaica. The courts in England and Wales cannot ignore section 53 (1) (b) of the Law of Property Act, 1925, and the courts of Jamaica must give effect to section 7 of the Statute of Frauds. In other words, the detrimental reliance, evidenced by conduct, would act as a substitute for the requirement in writing. The conduct has to get to the point where it is difficult to explain other than on the basis of some promise being made to the person who acted to his or her detriment. The reliance cannot exist in the mind only of the claimant.

81. Thus, the husband in ***Pettitt v Pettitt*** [1969] 2 W.L.R. 966, and the wife in ***Gissing v Gissing*** [1970] 3 W.L.R. 255 failed as did the wife in ***Lloyd's Bank v Rossett*** [1991] 1 A.C. 107. As Professor J.E. Penner has so helpfully summarised in his ***The Law of Trusts*** (5th) at page 119: *the activities of a husband (doing odd jobs about the house to keep it in repair and minor renovations and improvements) and a wife (cooking, cleaning, and looking after the kids) doing what husbands and wives "normally" do were regarded as wholly insufficient evidence of a common intention to share the property beneficially.*

82. In ***Eves***, the act of becoming a "construction labourer" in the repair and renovation of the house coupled with the promise of a proprietary interest enable the claimant to secure a proprietary interest. Her work went beyond ordinary household activity. She was swinging a sledge hammer to knock down walls. As Lord Denning puts it at page 1340 as only he can: *She did a great deal of work to the house and garden. She did much more than many wives would do. She stripped the wall paper in the hall. She painted woodwork in the lounge and kitchen. She painted the kitchen cabinets. She painted the brickwork in the front of the house. She broke up the concrete in the front garden. She carried the*

pieces to a skip. She, with him, demolished a shed and put up a new shed. She prepared the front garden for turfing.

83. Brightman J., as he was at the time, although more orthodox in his reasoning than Lord Denning, held at page 1345:

> *If, however, it was part of the bargain between the parties, expressed or to be implied, that the plaintiff should contribute her labour towards 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.*
>
> *Pennycuick V.-C. was unable to find any such link in the evidence, and I respectfully agree with him that it is not expressly to be found there. But I do not for my own part find much difficulty in inferring that link. The house was found by them jointly. It was in poor condition. What needed to be done was plain for all to see, and must have been discussed. The plaintiff was to have some interest in the house, or so she was led to believe, although her name would not be on the deeds. They moved in. They both set to and put the house to rights. I find it difficult to suppose that she would have been wielding the 14 lb. sledge hammer, breaking up the large area of concrete, filling the skip and doing the other things which were carried out when they moved in, except in pursuance of some expressed or implied arrangement and on the understanding that she was helping to improve a house in which she was to all practical intents and purposes promised that she had an interest.*
>
> *I would therefore, for my own part, be willing to infer the link which Pennycuick V.-C. correctly stated did not appear from the evidence.*

84. The crucial point here is that Brightman J. was prepared to find and found that the best explanation for a young woman engaging in the kind of conduct he described was on the footing that she should have an interest in the property. He made his findings over the protestations of the male. His Lordship looked at the conduct of the young woman and asked, what is the best explanation for this conduct from the evidence presented? What was critical was the promise made and she acted on the promise. Brightman J. has shown that it is not necessary to ask, what would the parties have agreed had they thought about it? Let me say here that I do not agree with Lord Denning's reasoning regarding what he called a new model constructive trust developed by Lord Diplock in

Gissing. As I shall attempt to show, Lord Diplock's "new model constructive trust" has no legitimate ancestor. I prefer the approach of Brightman J. and Browne L.J. who took the necessary precaution of stating clearly that he agreed with the order of Lord Denning but with the reasoning of Brightman J.

85. In ***Grant*** the court found that the claimant's contribution to the household expenses was so substantial that it went beyond ordinary expenditures. Lord Justice Nourse held, at page 123, that it was "*an inevitable inference that the very substantial contribution which the plaintiff made out of her earnings after August 1972 to the housekeeping and to the feeding and to the bringing up of the children enabled the defendant to keep down the instalments payable under both mortgages out of his own income and, moreover, that he could not have done that if he had had to bear the whole of the other expenses as well*". From this, the court inferred a promise that the claimant was to have an interest in the property if she acted as she did. As in ***Eves***, the Court was confronted with the hard objective fact of the claimant engaging in conduct, that is to say taking on expenditures way over and above what would normally be expected of a person in her position. On the evidence, there was no other reasonable or rational explanation for her conduct other than an agreement arrived at between the parties - an agreement which the legal title holder wanted to scupper. Once again, like ***Eves*** the court was able to find a promise made by the legal title holder and the claimant acting on the promise to her detriment.

86. An example of a failed constructive trust claim is ***Lloyd's Bank v Rossett*** [1991] 1 A.C. 107. In that case, the wife did not contribute to the purchase price and her efforts such as they were, were not sufficient to ground a proprietary interest. Added to this there was no evidence of a promise made to her that she would have an interest in the property. The House of Lords held that the fact that the house was intended for the residence of the couple in and of itself did not have the capacity to generate a proprietary interest. Additionally, the acts done by Mrs. Rossett did not rise to the level of grounding such an interest even if there was such a promise. Bluntly stated, Mrs. Rossett did no more than was ordinarily expected of a wife in the circumstances.

Lord Diplock's 'insouciance'

87. I now come to a passage of Lord Diplock's in ***Gissing***. It is this passage that has formed the basis of most if not all the law in this area in England and Wales and Jamaica for the last three decades. The post-Gissing cases hardly refer to the judgments of Lords Morris and UpJohn in ***Pettitt***. Given Lord Diplock's erosion of the boundaries between resulting, implied and constructive trust, should we be surprised at the current state of the law? Lord Diplock's proposition is supported neither by judicial authority,

ancient or modern nor academic writings of antiquity or of more recent vintage. At page 905 his Lordship said:

> *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.*

88. At this stage in his judgment Lord Diplock was simply repeating the words of section 53 (1) (b) of the Law of Property Act, 1925. The Law of Property Act, 1925 used the taxonomy that existed before. It is clear that Lord Diplock's formulation does not sit easily the Lord UpJohn's exposition on resulting trusts in ***Pettitt***.

89. It is necessary to go back to the nineteenth century to see what was understood to be express, resulting, implied or constructive trusts. I shall refer to the works of text writers because, in my view, they accurately summarise the law. To descend to particular cases would unecessarily lengthen an already long judgment.

90. In orthodox trust law, it was unknown for a resulting trust to arise because of a person acting to their detriment. If we go back to Spence's ***The Equitable Jurisdiction of the Court of Chancery*** Vol. 1 (1846) pp 508 - 512, we find the author speaking of express, implied and resulting trusts on the one hand (which together comprised one class in Spence's taxonomy) and constructive trusts on the other. An express trust was the consequence of a deliberate dispositive act by the settlor. It does not arise by operation of law. Spence observes at page 508 that there are trusts that come into existence by operation of law. He noted that these trusts, that is those that come by operation of law, were not new but always existed and were founded on ancient doctrines of the court. He next states that trusts which arise by operation of law were of two types: implied and resulting trusts (one class) **and** constructive trusts (another class). Under implied trusts, Spence includes the vendor in a sale of land, after execution of the contract and before completion, being an implied trustee for the purchaser as far as the land is concerned. Also under implied trusts, Spencer includes the situation where a person by his will directs that some property be sold for discharge of his debts.

91. In the section dealing with resulting trusts, Spence makes the statement that 'resulting trusts are precisely the same in principle as resulting uses' (see page 510). He then quotes Lewin on Trusts which states: 'The general rule is, that wherever, upon any conveyance, devise, or bequest, it appears that the grantee, devisee, or legatee, was intended to take the legal estate merely, the equitable interest, or so much of it as is left undisposed of, will result, if arising out of the testator's realty, to himself, or his heir, or, out of personal estate to himself or his executor. Should the interest resulting to the heir be of a chattel nature, as a term of years, or a sum of money, it will on death of the heir devolve on his personal representative' (see page 510). Spence added these important words at page 511, 'Parol evidence may be admitted to repel a resulting trust arising by operation of law, but not where the resulting trust is collected from the terms of the instrument itself'.

92. According to Mr. Spence, a constructive trust may arise not only in cases of property acquired by fraud or improper means but also if the property was acquired in breach of some principle of equity. There is no suggestion in Spence's exposition that for a resulting or implied trust to arise there must be or there usually is evidence that the beneficiary acted to his detriment.

93. To the same effect is ***Commentaries on Equity Jurisprudence by Justice Story,*** 1920, (3rd English Ed) (see chapter 23 para. 1195, 1196, 1196a, 1197, 1261 - 1267). Also the important work of ***White & Tudor's Leading Cases in Equity (with notes)***, (9thed) (1928) (Sweet & Maxwell) does not reflect any trace of the idea that a resulting or implied trust arises out of a transaction between the trustee and beneficiary in which the trustee has so misconducted himself that it would be inequitable to allow him to deny the beneficiary the beneficial interest. It is significant that Lord Diplock did not site any authority for his proposition. The cases collected by writers of these three outstanding works when discussing express, implied/resulting and constructive trusts do not provide any support for Lord Diplock's analysis, namely, that implied, resulting and constructive trusts arise from the cestui qui trust acting to his detriment.

94. One of the most enduring features in this area of law is that subsequent cases in England and Wales as well as Jamaica picked upon the judgment of Lord Diplock in ***Gissing***, despite the lack of judicial or academic support for his major premise, and used it as the basis for developing the law in this area. As Lord Walker in ***Stack*** observed, only a judge of Lord Diplock's standing could have made such an 'insouciant approach' to legal taxonomy which was allowed to pass without much judicial comment despite the fact that it generated literally, a torrent of academic responses (see para. 23 of ***Stack***). It is pointless trying to reconcile all the cases. The best way forward is to return to orthodox principles and decide future cases accordingly - a hope that may be dashed if ***Stack***

represents the new view of the law in England.

Has Grace acquired a proprietary interest and if so on what legal basis?

95. Grace clearly believed that the house was going to be her family home. The evidence regarding the reasons for Grace and her family moving into the house is more consistent with Grace's account than with Jeffrey's.

96. Grace has acted to her detriment by expending the sums of money which came from the business jointly owned with Jeffrey. I cannot find any other reasonable and rational explanation for her to be running electrical wires, lifting building blocks, and handling tiles for the bathroom. Like the ladies in ***Eves*** and ***Grant***, this conduct far exceeds what would be expected of a wife or daughter-in-law. She expended great physical effort in the construction of the house. She expended significant sums of money on the house from the business jointly operated with her husband. Grace's acts are far removed from Mrs. Rossett's and I daresay exceed anything done by the ladies in ***Eves*** and ***Grant***.

97. On the face of it, why would she remove from property (Elthan View) where she was apparently comfortable (for there is no evidence that the family was inconvenienced in any way; no evidence that the rent at Eric's house was cheaper and no reliable evidence that the landlord gave the family notice), move into property owned by her father and sister in law and within two years commence this massive home improvement project without some inducement to do so? Unless Grace was promised some kind of proprietary interest in the property, it is difficult to explain her move from Eltham to Greater Portmore, now that I have rejected the alternative explanation advanced by Eric, Jenice and Jeffrey. There is no other reasonable possibility that arises from the evidence outside of the rival explanations for the move put forward by both parties.

98. Grace said under cross examination that she did not get permission from either Eric or Jenice to make the additions. This was suggested as evidence that even if Grace spent the money, she acted unilaterally and without any express permission from the legal title holders. Grace was therefore taking a serious risk. In my opinion, her omission to ask for permission is explicable on the basis that she understood from the family meeting that the house would belong to her and her husband, if they took up the mortgage payments.

99. There is another basis on which Grace can acquire her half share. Based on the facts that I have found, the acquisition of the house was a joint venture by Grace and Jeffrey. On the authority of ***Baumgartner v Baumgartner*** 164 C.L.R. 137 from the High Court of Australia, the following proposition can be stated. Where a couple embark on a joint venture to acquire property for any purpose and they have pooled their resources from which they have acquired the property, then it would be unconscionable for one person to

assert a greater interest in the property than the other. This principle is not at odds with the resulting trust principles stated earlier. The principle just stated appreciates that if the couple, as in the instant case, acquire property from a single pool of funds which both created or generated and it is not possible to distinguish any particular proportion created or generated by one party or both have contributed substantially to the creation or generation of the fund to the point where it is impossible to identify each contribution then a constructive trust would arise to prevent on party claiming more than the appropriate share.

100. In this particular case, Grace and Jeffrey created or generated the pool of funds from the garage business and it was those funds that were used to pay the mortgage and add to the property. Equity would not have been allowed Grace to claim more than 50% beneficial interest unless there was evidence that Jeffrey intended her to have a greater share. Therefore once Grace and Jeffrey acted on the agreement arrived between themselves and Eric and Jenice, there came into existence a joint venture to which both contributed substantially.

What is the quantum of Grace's share of the beneficial interest?

101. Grace has asked for a 50% share in the property. The evidence has established that the money to pay the mortgage and pay for the additions came from the business operated by Grace and Jeffrey. There is no doubt that substantial additions were made to the house.

102. I shall deal with absence of planning permission at this point. It is true that Grace did not receive planning permission from the relevant authorities. The failure to secure planning permission cannot prevent a proprietary interest from arising in Grace's favour. The absence of planning authority may affect the value of the property but cannot affect the proprietary interest.

103. On the facts of this particular case, there is nothing to suggest that Grace was to have less than 50% interest in the house. From start to finish it was a joint project by Grace and Jeffrey to do what they could to secure the house as their own. It follows that the other 50% must be for her husband. The fact that the husband says he does not wish any or is not claiming any is not sufficient to displace his interest. Both Grace and Jeffrey were part of the agreement outlined by Grace and acted accordingly. The disharmony between Grace and Jeffrey cannot affect the beneficial holding. The disharmony has only served to trigger the court action and it is now the court's duty to say where the beneficial interest lies. A person who has in fact acquired beneficial interest in real property cannot dispose of it by saying, "I don't want it. I am not entitled to it" (see ***Vandervell v Inland Revenue Commissioners*** [1967] 2 A.C. 291 per Lord

UpJohn at pages 312 - 314 and Lord Millett in ***Air Jamaica v Charlton*** [1999] 1 W.L.R. 1399). Jeffrey, therefore, at this stage cannot dispose of his interest by his declaration that he knew he did not have an interest. This position by Jeffrey is simply designed to undermine his wife's case.

104. Mrs. Neita-Robertson has asked that adjudicate on Grace's interest in the business. I have declined to do that for these reasons. First, such a claim was not made in her claim form. Second, the evidence before the court, was not directed to the business in the way that one would have expected had that been the intention of the claimant from the outset. Third, Jeffrey, did not address his affidavit to the business. The request to declare Grace's interest in the business seemed to be more of an after thought rather than the product of specific contemplation from the beginning. Indeed, the evidence in the case regarding the business was directed primarily to the issue of the extent Grace's involvement in the business and not to the extent of her beneficial interest.

Conclusion

105. The intention was that Grace and Jeffrey would acquire a proprietary interest in the disputed property if they acted in accordance with what was agreed at the family meeting. In reliance on this, Grace and her husband expended significant sums of money expanding the house. The evidence of Grace and her husband acting on the agreement is sufficiently cogent to overcome the absence of writing as required by section 7 of the Statute of Frauds.

106. The result is that Eric and Grace are holding the legal interest as trustees under a constructive trust for Grace and Jeffrey. Grace McCalla and Jeffrey McCalla are beneficially entitled to share equally in property known as Lot 245 6 West, Greater Portmore, in the parish of St. Catherine and comprised in certificate of title registered volume 1267 folio 840 of the Register Book of Titles. Grace is entitled to a 50% share in the property. Jeffrey is entitled to the other 50%

107. The current market value is determined by a reputable valuator agreed by the parties and should the parties fail to agree the valuator within thirty (30) days of the order drawn up. C.D. Alexander Realty Company shall be the valuator appointed by the court to determine the current market value of the property. The costs of the valuator are to be borne equally by the parties.

108. The parties are to agree, if possible, in writing for the purchase of the other's interest in the property within one hundred and twenty (120) days of the date on which the valuation report is delivered to the attorneys for the parties, with date of the last attorney being served being the date from which the 120 days begin. Should there be a

failure to agree within the 120 days or if the parties have decided before the expiration of the 120 days that the property should be sold, then the property is to be sold on the open market. The Registrar of the Supreme Court is authorised to execute all documents necessary to give effect to the decision of the court in the event that any of the parties declines to execute the necessary documents.

109. The counter claim is dismissed in its entirety. Costs to the claimant to be agreed or taxed.

110. Before closing it is appropriate that I explain the delay in completing this matter. It is to be regretted that a matter that commenced in January 2007, took such a long time to be completed but the delay was unavoidable, partly due to my absence from the Supreme Court in Kingston during the months March and June and partly due to the effort agree dates convenient to both counsel. This is a matter to be regretted and I apologise to the litigants for having them in a state of uncertainty for such a long time.

111. I wish to thank both counsel for the assistance and the manner in which the hearing was conducted. They displayed great skill in marshalling the evidence and the submissions on behalf of their clients. Counsel are asked to prepare an appropriate draft to give effect to the reasons for judgment.