2020 JMSC Civ 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2014 HCV 05212

BETWEEN	**SHARON PINDLING**	**CLAIMANT**
AND	**DERRICK SPENCE**	**DEFENDANT**

IN CHAMBERS

Ms. Lilieth Deacon instructed by Taylor Deacon and James representing the claimant.

Mrs. Alicia Rhoden-Jones instructed by Stewart-Harrisingh Williams & Rhoden for the defendant.

Heard: October 9 and 10, 2019 and February 20, 2020.

Whether the provisions of the Property Rights of Spouses Act are applicable – Whether the disputed property is the family home – Whether provisions of section 14(2) of the PROSA relevant – Whether the principles of constructive and/or resulting trust are applicable.

PETTIGREW-COLLINS, J

[1] The claim was brought by way of a Fixed Date Claim Form (AFDCF) and affidavit in support filed on the 3rd of November, 2014. On the 16th of June 2015, the claimant filed a Notice of Application for Court Orders seeking inter alia, an extension of time within which to file the claim under the Property Rights of Spouses Act (hereinafter referred to as the PROSA), as well as permission to amend her statement of case.

Those orders were granted on the 2nd of July, 2015. The orders sought by Miss Pindling in the amended Fixed Date Claim Form are as follows:

1. An Order that the claimant is entitled to a half share of the legal and beneficial interest in the dwelling house located on part of Church Pen, Old Harbour in the parish of Saint Catherine.

2. That is the alternative, a declaration that the defendant holds a half share (50%) of the legal and beneficial interest in the dwelling house on constructive trust and/or resulting trust for the claimant.

3. That the dwelling house be valued by a reputable evaluator at the expense of both the claimant and the defendant equally.

4. That should the parties be unable to agree on a valuator one is appointed by the Court.

5. That the defendant purchases the claimant's interest in the said dwelling house within ninety days of an order being made by the Honourable Court.

6. That there be such further and other relief as this Honourable Court deems fit.

7. Costs to be costs in the claim.

THE ISSUES

[2] The decision, in this case, will turn primarily on the facts accepted by this court. The court must nevertheless consider a number of issues, to include whether the disputed property is the family home. Consideration must also be given to whether the factors enumerated in section 14(2) of the PROSA are relevant to this claim or whether the equitable principles of constructive and/or resulting trust are applicable.

CLAIMANT'S CASE

[3] The claimant's evidence in chief is contained in two affidavits; that filed with the Fixed Date Claim Form on the 3rd of November 2014 and a second affidavit filed

on the 29th of June 2015. In her first affidavit the claimant deponed that she and the defendant got married on the 29th day of October 1995, but that they were living together as a couple since 1990. She stated that construction of the disputed house began in June 1998. It was built on a parcel of land that was given to the defendant when they got married. The claimant further stated that their marriage was dissolved on the 27th day of June 2002. However, according to the claimant, even after their marriage came to an end, they maintained their relationship and had planned to remarry. Her account is that the relationship finally ended in April 2014 when she visited the disputed property and discovered items of female clothing in the house.

[4] The claimant stated that the disputed house is unfinished, but she believes the completed portion to be worth approximately six million dollars. In her further affidavit filed on the 29th of June 2015, the claimant denied that the relationship between herself and the defendant was estranged in 1998. She also said that when she travelled overseas, presumably prior to migrating in 1998, she had to work part-time to support her family as the defendant's income was not sufficient to do so. She did so from 1996 to 1997. She said further, that she and the defendant had agreed that she should continue to travel to the USA to work in order to build the disputed house. She then left for New York in February 1998, and in March 1998 she found a job.

[5] The claimant also stated that whilst she was working in the USA, she started sending money on a weekly basis to assist with the construction of the house. This weekly remittance started after she had visited Jamaica in July and returned to the United States in August of 1998. She said that the defendant and their children moved into the house in February 1999 but the house was still incomplete. She gave evidence that she continued to visit Jamaica regularly, sometimes as frequently as three times annually and she would stay freely at the disputed property and that it was not with the defendant's permission.

DEFENDANT'S CASE

[6] In defence to the claimant's claim, Mr. Derrick Spence asserted that the claimant is not entitled to an interest in the property as she did not contribute to its construction in any way.

[7] In an affidavit filed on March 10, 2015, he responded to the claimant's first affidavit and stated that his relationship with the claimant became estranged when she started travelling in 1998, immediately after they got married. Shortly after, the claimant sent him divorce documents. He indicated that he began a new common-law relationship that produced a child in 2006 and he said that that child still lives with him at the disputed property.

[8] He said in essence, consistent with the claimant's assertion, that the construction of the house was an ongoing process. He also stated that the greater portion of the construction was done after their divorce.

[9] It was the defendant's evidence that since he and the claimant divorced, she has never visited the property without his express permission. He further denied that the claimant returned three times yearly to maintain a relationship. He said that after the divorce, that was the end of their relationship as spouses.

[10] According to the defendant, the claimant had indicated to him that she had bought some furniture and had no place to put them, and she asked him to keep the items and he did so as a favour to her. He alleged that when the claimant visited Jamaica in April of 2014, she broke the windows of the house, told the police he had her furniture, and the police allowed her to retrieve the furniture.

[11] He said he and the claimant have been leading separate lives for thirteen years and that time has run both under the Limitations of Action Act and the Property (Rights of Spouses) Act.

[12] In his affidavit filed on the 7th of January 2016, the defendant denied that they had a relationship since she was young as they had broken up, and it was closer to their wedding date that they rekindled their relationship.

[13] He said that after they got married, the claimant indicated that she was going away on vacation for two weeks, and to his surprise, she called and advised him that she would not return, but that she would resign her job in Jamaica and remain in the United States. According to the defendant, the claimant did not send any money to assist with the care of the children. He also asserted that, years later, she took the children with her and he would send sums of money for their maintenance.

[14] The defendant denied that the claimant visited for their wedding anniversary in 1999 and that she purchased galvanized zinc to be utilized on the property. He requested that in the event that the claimant is awarded any interest in the property, he be refunded half of all the sums that he has had to borrow to use towards the construction of the property. He explained that the bank deducts $22,000.00 monthly from his account in order to repay his loan and that those deductions will continue for four years.

[15] According to the defendant, the claimant was aware that he was living with a woman and a child at the disputed property and as such she would not have been sending him money towards building the said house. He further alleged that the travel documents the claimant produced to show her intended address is misleading, as that is the address for the general area where the disputed property as well as the claimant's mother's home are located, and that the claimant would visit her mother. In essence, he is saying that the fact that the claimant is able to produce proof that she repeatedly visited Church Pen during the relevant period, is not proof that the claimant was visiting him at the subject property.

WHETHER THE PROPERTY IS THE FAMILY HOME

[16] The claimant's Attorney- at- Law has submitted that the property in question is the family home within the meaning of the PROSA. The defendant has of course vehemently denied this.

> "The dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit."

[17] Sykes J (as he then was) in **Peaches Stewart v Rupert Stewart HCV 0327/2007** very helpfully dissected the meaning of the term 'family home'. In paragraphs 22 and 23 of his judgment, he said:

> *22. "It is well known that when words are used in a statute and those words are ordinary words used in everyday discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended…"*
>
> *23. "It should be noted that, the adjectives **only** and **principal** are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. **Only** means sole or one. **Principal** means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression **family residence.** Indeed even if the noun residence is qualified by the noun, family which functioning as an adjective in the expression **family residence.** Thus it is not any kind of residence but the property must be the **family residence.** The noun residence means one's*

*permanent or usual abode. Thus **family residence** means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses. The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself this question, 'Is this the dwelling house where the parties lived?' In answering this question, which is clearly a fact sensitive one, the court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items; (c) if there are children, where do they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of toting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items."(emphasis in the original)*

[18] In the same definition section of the PROSA, it is stated that a "spouse" includes-

(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years.

(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years.

[19] The provisions of section 12 of the PROSA are also relevant to this matter. Section 12 (2) provides:

"*A spouse's share in property shall, subject to subsection 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the court."*

[20] It is the claimant's submission that in accordance with the decision in **Pansy O'Connor Reid v Evan Reid** [2014] JMSC Civ. 110 (Para 30-31), a house may still be the family home in circumstances where one party resides overseas. While I accept this proposition, the circumstances of this case do not allow for a finding that the subject property is the family home. It was also the submission that having regard to the decision in **Dalfel Weir v Beverly Tree** [2014] JMCA] Civ 12, that there is no necessity for the parties to reside continuously at the property. This assertion I also readily accept, as the definition of a family home in the PROSA itself allows for such an arrangement. Again the fact that this is so is not helpful to the claimant in this particular case.

[21] Section 12 of the act speaks to the time at which the parties ceased to live together as man and wife, as the date on which each party's share in the property is determined. In the ordinary course of things, parties cease to live together as man and wife when the relationship comes to an end. In this instance, the two incidents did not necessarily coincide. I say this on the basis that although I am clear that the relationship did not last until 2014 as the claimant stated, neither do I think it ended abruptly in 1998 as the defendant asserted. I advert to the claimant's evidence that she moved to the United States to live in March of 1998. (Paragraph 7 of affidavit filed 3rd of November 2014). This is against the background of the undisputed evidence that the construction of the house commenced in June of 1998 and that the defendant and the children moved to the disputed house sometime in 1998 or in 1999.

[22] In 1998 when the parties ceased to live together, the subject property was not in existence. The parties did not thereafter live together as man and wife. It is not clear from the Judgment of Divorce exhibited by the claimant whether there is any requirement in the state of New York where the divorce was granted, for there to be a particular period of separation before a motion for a divorce can be made, but the service upon the defendant of proceedings for divorce in the circumstances undoubtedly marked the time of separation of the parties as being

no later than 2001. It is as at the date of separation that the parties' interests as far as matrimonial property goes, would have crystallized.

[23] I accept the claimant's evidence that she would visit Jamaica and spend time at the property. I also accept that those occasions included periods prior to the filing of the divorce. It must be borne in mind however, that the claimant's children resided at the property and that that fact would have formed a reason and basis for her to do so. It is clear from her evidence that these visits did not last over an extended period, as she was living and working in the United States. In fact, she stated that she would spend two weeks on each visit. In cross-examination the claimant sought to say that she did not move to live abroad, but that she was travelling back and forth and that her status in the United States between 1998 and 2003 was that of a visitor. However, even if for legal and immigration purposes she was a visitor, defacto, she resided in the United States. She had resigned from her job in the Jamaica Constabulary Force and apparently left with a view to regularizing her status in the United States which she ultimately did. Her own affidavit evidence (paragraphs 7 and 8 of her affidavit filed November 3, 2014) was that she went to the United States to live.

[24] This is not a situation where the claimant had ever lived at the disputed property. Her circumstances are quite distinct from an arrangement for example, whereby an individual maintained his/her residence on the island but went overseas simply to work. Although I accept that the relationship between the parties may have subsisted for a period after the claimant migrated, the time she spent at the property subsequent to her migration in 1998 would in my view accord with her being an occasional visitor to that house. The property could not be said to be the family's place of residence or main place of residence; rather it was the residence of Mr. Spence and the children of the parties after June of 1999 by which time, the claimant had already migrated.

[25] Ms. Pingling faces a further difficulty. She agreed in cross-examination that she sent Mr. Spence divorce papers in 2001. The evidence is that she was divorced

from Mr. Spence in June of 2002. She agreed that by 2003, she was married to someone else. Even if the claimant's marriage was a marriage of convenience, her status of being a married woman rendered her incapable of being in a common-law relationship with Mr. Spence during the subsistence of that marriage.

[26] Even if in fact this court should accept that the parties maintained a relationship after their legal separation in 2001, the claimant was not a spouse to Mr. Spence as defined by section 2 (1) of the PROSA after 2001 and certainly not after that second marriage. Therefore, the claimant could not qualify as a spouse as required by section 13 of the PROSA, in order to apply for a division of property, even if at that time she was no longer married to her second husband. Even though by virtue of section 13 (3) of the PROSA, a spouse includes a former spouse, it does not change my viewpoint. She mounted her claim on the premise that she was the defendant's spouse up to 2014 when she filed her claim.

[27] It is the claimant's account in cross-examination that she stopped staying at the disputed property since 2006 during her visits to Jamaica. It is also noteworthy that the claimant said in cross-examination that she found out about Mr. Spence's child with his present wife in December 2006. Whilst he didn't expressly say that the mother of the child who is his present wife was residing at the property since 2006, it was my distinct impression that that is what he was seeking to convey. In fact, that direct suggestion was put to the claimant but her response was that she was not aware of that. Although the claimant stated that the relationship came to an end in 2014, she was never asked, and she offered no explanation as to why she would have ceased to stay at the property during her visits after 2006. Her account that she stopped staying there since 2006 renders the defendant's account that he had formed a new common-law relationship by then, that a child was born of that union, that that child resided at the premises, and that the claimant was well aware of those circumstances quite believable.

[28] It is difficult to say when the intimate relationship between the parties ended but I am fully satisfied that any relationship outside a mere friendship which, existed between Miss Pindling and Mr. Spence after their divorce came to an end certainly by 2006, athough I am rather doubtful that it lasted until then.

[29] Ms. Pindling did not say whether she is now divorced. In an affidavit filed in support of the claimant's Notice of Application for Court Orders in this matter, Ms. Trisian Robinson of Taylor Deacon and James deponed that she was informed by the claimant and verily believe that she is now divorced. That information is hearsay and not admissible as to that fact in these proceedings and in any event, there is no indication as to when. Even if the claimant is now divorced from her second husband, she did not subsequently cohabit with the defendant. Ultimately nothing in my view turns on the date of her divorce since as I already indicated, I accept that Mr. Spence formed a new relationship with someone to whom he is now married.

[30] It is not clear to me on what basis the order for an extension of time to bring the claim under the PROSA was granted, but I am mindful that that order was made at a time when not all relevant facts would have been put before the court. It is my finding that the spousal relationship (as defined in section 2 of the PROSA) between the parties have come to an end, no spousal relationship which accords with that definition was resumed between the parties, surely not after 2006.

WHETHER SECTION 14 (1)(b) OF THE PROSA IS APPLICABLE TO THESE PROCEEDINGS

[31] As indicated before, there was no relationship between husband and wife or evidence of any common law spousal relationship between Ms. Pindling and Mr. Spence after their separation in 2001. Section 14(b) of the PROSA addresses division of property other than the family home between spouses or former spouses. Section 13 (3) so stipulates. It is not disputed that the construction of the house in question began at a time when the parties were still married. Based on the claimant's evidence as to the time period over which the contributions

were made, it is beyond dispute that there was no spousal relationship between the parties for the greater portion of that time.

[32] For the main reason, I have determined that the house in question is not the family home, that is that the parties were not spouses at the relevant time, it precludes me from considering the applicability of the provisions of section 14(2) of the PROSA.

[33] Thus notwithstanding the provisions of section 4 of the PROSA, which states that:

> "*The provisions of this Act shall have effect in place of the rules and presumptions of the common law and equity,"* I do take the view that the provisions of the act are not applicable in the circumstances of this case. It is necessary to consider the alternative claim on account of the further qualification that the provisions of the act are relevant only "*to the extent that they apply to transactions between* ***spouses*** *in respect of property."*

[34] As adverted to earlier, in her AFDCF the claimant sought as an alternative, an order that she is entitled to a share in the property based on the principles of constructive and/or resulting trust. In ***Halsbury Laws of England***, ***4th edition, Volume 16 (2)*** at 853 the principle of resulting trust was explained as follows:

> "*A resulting trust may arise solely by the operation of law, as where, upon a purchase of land, one person provides the purchase money and the conveyance is taken in the name of another; there is then a presumption of a resulting trust in favour of the person providing the money unless from the relationship between the two, or from other circumstances, it appears that a gift was intended*".

Gibbs C.J., in **Muschinski v Dodd** 160 (CLR) 583, restated the equitable rules that created a resulting trust in this way: -

> *"Where, on a purchase, a property is conveyed to two persons, whether as joint tenants or as tenants in common, and one of those persons has provided the whole of the purchase money, the property is presumed to be held in trust for that person, to whom I shall, for convenience, refer as "the*

real purchaser." However, a resulting trust will not arise if the relationship between the real purchaser and the other transferee is such as to raise a presumption that the transfer was intended as an advancement, or in other words a presumption that the transferee who had not contributed any of the purchase money was intended to take a beneficial interest...

However, the presumption that there is a resulting trust may be rebutted by evidence that in fact the real purchaser intended that the other transferee should take a beneficial interest. Where both transferees have contributed the purchase money, the intentions of both are material, but where only one has provided the purchase money it is his or her intention alone that has to be ascertained. The evidence admissible to establish the intention of the real purchaser will comprise "the acts and declarations of the parties before or at the time of the purchase ... or so immediately thereafter as to constitute a part of the transaction.

[35] In **Halsburys Laws of England**, (2019), Volume 98, paragraph 114, it is stated as follows:

"*A constructive trust attaches by law to specific property which is neither expressly subject to any trusts nor subject to a resulting trust but which is held by a person in circumstances where it would be inequitable to allow him to assert full beneficial ownership of the property."*

[36] **In Lloyds Bank PLC V Rosset and Another** [1991] AC 107**.** Lord Bridge of Harwick at page 22 of the judgment, in expounding the principle of the constructive trust said:

"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal interest to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."

[37] He went on to say that:

> *"In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation, direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments, will readily justify the inference necessary to the creation of a constructive trust. But as I read the authorities, it is at least very doubtful whether anything less will do. "*

[38] In **Dean Hinds v Janet Wilmott 2009 HCV 00519** Edwards J. as she then was, at paragraph 25 usefully summarized the relevant principles which are applicable in circumstances where a person in whom the legal title to property is not vested claims a beneficial interest in same on the basis that the one who holds the legal title holds it as trustee on trust for the beneficial interest of the claimant. She said the following:

> I. *"Evidence of a common intention can either be expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.*
>
> II. *Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See Nourse, L.J. in* ***Turton v Turton (1987)*** *2 ALL ER 641 at p. 684.*
>
> III. *In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property maybe evidence from which the court could infer the parties' intention:* ***Grant v Edwards [1986] 3 WLR 120,*** *per Lord Brown-Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and/ or show that the claimant has acted to his detriment on reliance on the common intention.*

IV. The claimant must have acted to his detriment indirect reliance on the common intention."

[39] It is the evidence that the disputed house was constructed on land owned by the defendant's grandmother which was given to him by her. The defendant claims to have built this house without the claimant's input. It is now occupied by him. The claimant has been careful in crafting her claim. She seeks an interest in the house. It is her Attorney – at- Law's submission that while the defendant does not hold legal title to the property, he has been in undisturbed possession and occupation since 1998 and would be entitled to obtain a possessory title to the property, thus the defendant is in effect the sole owner of the property.

[40] This submission was made in the context that from an ownership perspective, the disputed house was not precluded from being the family home as it is "wholly owned by either" spouse. I accept in the circumstances of this case that the defendant is in effect the sole owner of the area of land upon which the house is constructed and on the face of it, has acquired rights to a possessory title. Strictly speaking, he is not a legal owner but is in no worse position than a legal owner vis a vis the claimant, for the purposes of the claim, as it relates to the land on which the house is constructed.

[41] Based on the evidence, the house is such that it is attached to the land and cannot be considered separately and distinctly from the land. I recognize that there is no evidence that the land was gifted other than by way of an imperfect gift or perhaps more accurately, by word of mouth. There is no evidence that the land upon which the house is built is capable of being subdivided from the rest of the land for the purposes of the defendant obtaining separate title to the property. It was borne out in cross-examination of the claimant that other family members occupy portions of the land. However, for the purposes of the claim, the defendant will be treated as if he is a legal owner.

[42] The claimant in her affidavit evidence (paragraph 9 of her affidavit filed November 3, 2014) said that the land was given to the defendant by his

grandmother when she and the defendant got married. She did not in any way suggest that the land was given to both of them.

[43] In **Abbott v Abbott**, where land had been given to the husband by his mother for the construction of the matrimonial home, the trial judge found that there was no reason to believe that the land was meant to be a gift to the husband only, as there was every reason to believe it was meant as a gift to him and his wife in the early stages of marriage, to assist in the building of their home. In that case, the wife was responsible for the repayment of the mortgage loan taken out to partly finance the construction of the house on the land. The security for the mortgage included insurance policies over both their lives. The wife worked and both of their incomes were deposited in a joint account. At first instance the judge determined that both husband and wife had an equal joint interest in the house and this decision was overturned by the Court of Appeal. On appeal to the Privy Council, Baroness Hale at paragraphs [17] and [18] in delivering the advice of the Board said:

> *"...if a parent gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them rather than to one alone: see* ***McHardy and Sons (A firm) v Warren*** *[1994] 2 FLR 338, at 340....Furthermore, it was supported by the behaviour of both parties throughout the marriage until it broke down."*

[44] It is to be noted however, that Mr. Spence strongly denied that the land was gifted at the time the claimant is saying that it was. The defendant explained that he grew up on land owned by his family, and before he met the claimant, his grandmother indicated that the land was there if he wished to build on it, as other members of his family had done.

[45] In this case, the claimant relies firstly upon the fact of a gift of the land made to the defendant by his grandmother. It is particularly difficult to come to a finding of fact one way or another on certain matters in this case but after much reflection and careful consideration of the evidence, I prefer the defendant's account in this regard. This conclusion is in part due to the evidence which the claimant did not

deny which is that she did not have a good relationship with members of the defendant's family. In fact, when asked if she had ever taken out court proceedings against members of the defendant's family prior to their marriage, she responded that she had had a fight and she was taken to court by members of his family. I am mindful that the claimant made sure to point out at that stage that it was not the defendant's family who gave the land to him, but his grandmother.

[46] I also consider the defendant's evidence that the claimant moved to live with another man for whom she bore a child in 1994 and that the parties would have recently rekindled their relationship when they got married in 1995. The claimant admitted that this was indeed what transpired. It was the defendant's evidence on this point in cross-examination that it was his cousin Calvin Wilson who went back to his grandmother in relation to the land because he the defendant felt ashamed because he had gone back to live with the claimant after she bore a child for someone else and that because of this fact, his family members were upset with him. There is every reason to believe that the defendant's grandmother would have been aware of the circumstances. Even if I were to accept that that the land was given to the defendant when they got married, those circumstances to my mind detract from the probability that the defendant's grandmother gave the land to the defendant with the expectation that he would build his family home whether by himself or with the claimant on that land.

[47] I acknowledge, however, that even if the land was gifted solely to the defendant, that fact would not preclude the claimant from acquiring a beneficial interest in the property if the court finds that the claimant made a significant contribution to the construction of the house in question. The claimant must, therefore, demonstrate a balance of the probabilities that she contributed to the cost of construction, thereby establishing that there is a resulting trust in her favour.

[48] The claimant also relies on the existence of a common intention that she and the defendant would together construct their family home on the land in question.

Consequently, she would, of course, have acquired a beneficial interest in the property. This intention she said was expressed; it was based on discussion and agreement prior to the commencement of construction of the disputed house. Having ruled out the contention that the house was the family home, it nevertheless remains open to the claimant to rely on any such discussion and agreement in establishing the existence of a trust in her favour. The claimant would have to further establish that she acted to her detriment in reliance on that common intention.

[49] By either route, the claimant could have the same outcome. In the instant case, the acts that the claimant relies on to say that she acted to her detriment are the making of monetary contributions over an extended period towards the construction of the property. Where there is evidence of an agreement between the parties that would clearly be sufficient proof of the existence of a common intention that they were both entitled to a beneficial interest in the property. Even if the court were to find in this case that there was no express agreement, the common intention could be inferred from the conduct of the parties.

[50] The relevant conduct, the claimant asserts, is sending monies and the defendant accepting those sums and utilizing same, as also sums withdrawn from her bank account towards the construction of the house, as well as expenditures made by her on construction materials and labour during her visits to Jamaica. The claimant would have acted to her detriment if it is determined that she sent monies in conscious reliance on the expressed common intention. In essence, the court would be required to find that she would not have sent those sums of money were it not for the expectation that she would derive an interest in the property.

[51] It may be stated at this point that if the claimant's assertions are borne out, then there is sufficient evidence, whether on the basis of an expressed intention or on the basis of inference based on conduct or on the basis of her contribution to the construction of the disputed house, on which a court could find that the defendant

holds upon a trust, whether it be a resulting or a constructive trust in favour of the claimant, an interest in the property, commensurate with the value of the claimant's contribution towards its construction.

[52] It is now necessary to embark upon an examination of the evidence as it relates to the claimant's contribution towards the construction of the house. In paragraphs 7 and 8 of her affidavit filed November 3, 2014, the claimant stated that she migrated to the United States of America in March 1998, but before she migrated, herself and the defendant agreed that they were going to build a house in Jamaica and that as a result of that agreement, they started construction of the disputed house in 1998. She states in essence that it was pursuant to that agreement that the property was constructed from the joint funds of herself and the defendant.

[53] It was her evidence that from 1998 to around 2013 she sent monies to the defendant to contribute towards the construction of the house, and that in addition to those sums, the defendant also withdrew monies from her bank account. She stated that she was unable to produce the receipts establishing that she had sent money to the defendant because they were destroyed in a flood in 2011; however, she stated that she was able to get a record of her Western Union transactions for the last five years. The Western Union record was exhibited.

[54] She said she returned to Jamaica in July 1998 and until she left on August 15, 1998, she assisted with the construction of the house. The claimant also said that she returned to Jamaica on October 29, 1999, for their anniversary and stayed at the house, and at that time, she purchased some galvanized zinc to make a kitchen. She returned to the USA in November 1999 and continued to send money to the defendant for the construction of the house, and for their children's expenses.

[55] The claimant said when she visited Jamaica in 2011, she purchased tiles for the living room and verandah and paid for the installation of the tiles. She said that a

significant portion of the house was constructed before January 2003. According to the claimant, the defendant did not inform her of any loan he received that was utilized towards the construction of the house, or that he was given building supplies by any relative of his.

[56] A review of certain items of documentary evidence indicates some quite telling information. The print out from Jamaica National Building Society sets out a history of transactions over the period 2008 to 2013, in relation to an account held by the claimant at that institution. The defendant admittedly had in his possession an ATM card in relation to that account over a period. He stated that he would use the card when the claimant called him and asked him to do things. He explained that at one point, she had asked him to do repairs to her mother's house. He claimed that he could not recall over what period of time he had access to the account.

[57] It is noted that the withdrawals were usually of sums of money ranging from between $100 JMD to $15000 JMD over the period July 2008 to July 2011. During that period, a grand total of approximately $295,000.00JMD was taken from the claimant's account. I accept that these sums could have been withdrawn or taken by the defendant although there is no evidence or anything on the face of the records that indicate that the claimant never did any of the transactions during that period. I will nevertheless assume that the entire $295,000 was accessed by the defendant. These sums represent withdrawals, point of sale transactions and certain transactions that were not explained and are not self-explanatory but are transactions with which the defendant's name is associated.

[58] From the western Union print out, it was discerned that the claimant remitted to the defendant a total of $5280.00 USD over the period November 2009 to October 2013. During that period the exchange rate would have been between a low of approximately $72JMD to $1US and a high of approximately $96JMD to $1US. The critical question is, for what purpose were the monies sent through

Western Union, and sums from the JN Bank account withdrawn or otherwise utilized by the defendant. The claimant claims that other sums were also sent to the defendant through friends. I am completely mindful that during the period of all of these transactions, the children had already left the defendant's care and therefore none of those sums could be said to have been sent on account of the children. The evidence of the claimant in cross-examination which was not refuted is that she had filed for the children and they migrated in 2005.

[59] The defendant's explanation for the sums he received from the claimant is that the claimant's mother had fallen ill and monies were sent to him to assist the claimant's mother, as there had been disagreements between the claimant and her sister to whom the claimant initially sent the monies. It is borne out from the claimant's evidence that her mother fell ill in 2003. The defendant stated that the claimant would send him US$100-US$200 monthly to care for her mother and pay for an insurance policy for her amounting to JM$5,821.25 presumably monthly, which was sometimes rounded off to JM$6,000.00. He said besides those monthly payments, the only other money would be $40,000.00 which he took from the claimant's bank account on her instructions to pay for tests and medical bills for her mother.

[60] According to him, the claimant was not sending monies to him before her mother's illness. He asserted that he felt a duty to assist his children's grandmother as he lived in the same district with her. The claimant admitted that sums were sent to pay her mother's medical insurance, but not to the defendant. She admitted that those sums were over $5000.00 (presumably monthly) but that she would, in fact, send $6000.00 JMD. Ms. Pingling also admitted that she had asked Mr. Spence to carry out repairs to her mother's house in the same district but she stated that she had never sent money to him to do so. As was adverted to earlier, the defendant evidently withdrew more than 40,000.00 from the claimant's JN Bank account.

[61] Mr. Spence said the small sums the claimant would send by Western Union were not sufficient to be used towards the construction of a house. He said while the claimant was abroad, he worked with his cousin in exchange for materials to build his own house. He stated that he and his brother dug the foundation, and his friend who did the roof gave him a discount on the charge for labour.

[62] According to the defendant, he was the beneficiary of two loans totalling over $500,000.00, and he maximized his credit limit on a credit card which he held. This credit card provided $400,000.00 and he utilized these sums to further build up the property while living there with his new spouse. He provided proof of the loans taken.

[63] Counsel for the claimant observed that the defendant sought to overinflate his earnings. The testimony regarding the defendant's earnings was in relation to the year 1998. Counsel pointed out that the minimum wage then was $JMD800 per week; therefore it is highly unlikely that the defendant could have been earning $JMD8000 weekly. The defendant's explanation is that he was employed in a bauxite company. The inference from that bit of evidence is that the bauxite company paid him well. I did not understand him, in the final analysis, to be saying as Counsel for the claimant suggested, that the defendant was saying that he worked mostly on weekends. The evidence as I recorded it, was as follows:

> S. She was earning more than you.
>
> A. No, in my job we work mostly on weekend in the bauxite place. Port Esquivel is a bauxite. I didn't work like two weeks on, two weeks off.
>
> Q. four or five weekends in a month?
>
> A. Yes
>
> Q What days did you work?
>
> A. Sometimes I work for two or three months straight.

Q What days did you work

S. Based on what you said, you work mostly weekends.

A. I work most weekends but we work regularly during the week.

Q. You work every day.

A. Sometimes we work like two months and we get a two-week break.

[64] The claimant maintained that the defendant was not a person of means and could therefore not have afforded to construct the house without her input. She gave evidence that his resources during their marriage were meagre. There was no evidence regarding the defendant's earnings after 1998. Even if the defendant was not being completely truthful about his earnings in 1998, it does not mean that the claimant's version is reliable.

[65] The house in question was constructed on the evidence of both parties, over an extended period and is said to be still under construction. It is not at all unknown for individuals to undertake construction on a piecemeal basis as funds become available. It is therefore not inconceivable that monies sent by the claimant over time, could have been intended for use towards the construction of the disputed house, but for reasons I will explain shortly, I simply do not accept that this was what transpired in this instance.

[66] As indicated before, neither party was completely candid. However, I prefer the defendant's evidence on a number of matters. My overall impression of the defendant is that he is a man of far less sophistication than the claimant. My impression of the claimant especially in relation to certain matters she said that she discussed with the defendant and they agreed, is that if anything, she told him what she intended to do. In other words, she struck me as being someone who would take control and make decisions rather than someone who would have arrived at a position by consensus.

[67] I accept the defendant's evidence that monies were being sent to him by the claimant in order for him to do things on behalf of the claimant's mother. The defendant's explanation as to why the monies were being sent seems more consistent with the amount of money sent periodically. It is not conceivable that the claimant asked him to carry out repairs to her mother's house yet she did not send him monies in order to do so. Evidently, the defendant was someone with whom the claimant maintained a reasonably good relationship, so much so that he had access to her ATM card. Ms. Spence's evidence was not that she did not send money to anyone for the repairs of her mother's house; it is that she did not send monies to Mr. Spence. My finding is that money was in fact sent to Mr. Spence for the purposes of working on the claimant's mother's house.

[68] Further and more significantly, as indicated before, the claimant stated in cross-examination that she had not stayed at the disputed property since 2006. Whereas she did not specifically say that she had stayed at the property in 2013, she explained in cross-examination that when she came in 2014, the house was not in the same manner in which she had left it the year before. She explained that she found things in her drawer belonging to another woman and the baby that the defendant said was not his, was sleeping in the bed. This apparent conflict was not resolved. In any event, the claimant also said in cross-examination as indicated before, that she knew about the baby from the defendant's union with his present wife since 2006.

[69] I note that she had previously said otherwise. It was her affidavit evidence that when she visited Jamaica, the defendant was the only one at the house and she was not aware until 2014 that the defendant was having a relationship with another woman and had parented a child with that other woman. (See paragraph 26 of her affidavit filed 29th June 2015). I accept that the claimant had been aware of the defendant's new relationship as well as the child. It is difficult for me to accept that the claimant would have known of the defendant's subsequent union resulting in the birth of a child who, along with her mother, was living in the

defendant's household and yet be sending monies towards the construction of the house.

[70] Although I reject the defendant's evidence on a number of matters, including his evidence that the claimant was not sending money before her mother fell ill,(this was during a period when the children still resided with the defendant), my finding regarding the claimant's knowledge of the defendant's union with his present wife which is based on the claimant's own evidence in cross-examination, has proven critical to the outcome of this case. The claimant had sought to mislead the court on that matter in her affidavit but during the course of her viva voce evidence, the truth was revealed. That revelation has caused me to entertain grave doubts about other aspects of her evidence.

[71] The claimant proclaimed in cross-examination that she provided approximately 75% of the sums expended on the construction of the house. She did not indicate in any way the amount of money sent to the defendant through friends and other means apart from Western Union and the sums that came from the JN account. My distinct impression is that if monies were in fact transmitted by other methods, the sums were insignificant and the occasions were few and far between and were for purposes other than the construction of the house. Even if I had formed the view that the sums in respect of which the claimant provided proof through the JN statement and the Western Union records were sent for the purpose of constructing the house in question, those sums would not amount to a significant percentage of the money expended to construct the house the claimant says is now valued $6,000,000.00.

[72] It is accepted that the sums of $USD1000 and $USD1500 and US$600, which were sent on the 7th of January 2011, 21st March 2011 and on the 28th of March 2011 respectively, may not necessarily be considered small sums in the scheme of things, as Counsel for the claimant has pointed out. This observation was made by Counsel in the context of the defendant saying that the claimant only sent small sums. Counsel for the claimant adverted to the defendant's evidence

that only small sums of $US200 or $US300 were being sent by the claimant. In paragraph 12 of his affidavit filed on the 7th of January 2016, the defendant stated as follows:

> *"…. And in fact in around 2010 to early 2011 she had even asked me and a family member of mine to do repairs to her mother's house. This period is the only break that can be seen in her minimal payments of approximately $5000 towards insurance and is because I had to buy plyboard to cast the bottom of the grandmother's house as the floor boarding was caving in. The said house is a big house, but is a board house, and so the board had gotten rotten."*

[73] I understood the defendant there to be offering an explanation for the larger sums of money sent to him by the claimant. It would, therefore, be an inaccurate representation of the defendant's evidence in its totality, to say that his evidence is that the claimant only sent small sums of money.

[74] There is nothing on the face of it that clearly makes the transmission of any of those sums referable to the construction of the disputed property. As indicated before, the defendant said, and the claimant agreed that the defendant had been asked to carry out work to the claimant's mother's house. On a balance of probabilities I find that those sums were sent to the defendant in order for him to carry out work on the claimant's mother's house.

[75] It is not particularly clear to the court what triggered the claimant to have made her application when she did. I do not find that the sums utilized by the defendant from the JN account as evidenced by the printout or those sums sent through Western Union overtime were for the purpose of constructing the house in question. Even if the claimant in some way contributed to the construction of the house, that contribution was insubstantial and I find that that contribution would have been made during the time when the parties' children resided at the property and certainly, before the claimant became aware of the defendant's new relationship and child. I make specific reference to the contribution the claimant said she made during a visit in 1999 October. There was a ring of truth to that

aspect of her evidence. My acceptance of her evidence in that regard is in part based and the defendant's demeanour and mannerism when he responded to a suggestion in that regard. It would in the circumstances be difficult to quantify that contribution. Further, I do not accept that any contributions were made pursuant to or as a consequence of any discussion and agreement. In light of my findings, the reliefs sought by the claimant are refused.

[76] The costs of these proceedings are awarded to the defendant and are to be taxed if not sooner agreed.