

**EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS**

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2015/0259

BETWEEN:

JOY ANN LEWIS

Claimant/Appellant

-AND-

CALVIN JAMES

Defendant/Respondent

Appearances: Ms. Ruthilia Maximea, Counsel for the Claimant/Appellant
Ms. Elizabeth Ryan, Counsel for the Defendant/Respondent

2019: April 3rd

JUDGMENT

[1] **Ellis J:** In this Claim Joy Ann Lewis ("**the Claimant**") seeks the following relief against Calvin James ("**the Defendant**"):

- i. A declaration that she has a legal and beneficial interest in the land and or all edifices erected on property located in Sage Mountain more particularly described as Block 2536B Parcel 126 ("**the Property**").
- ii. A declaration that the Defendant holds the legal and beneficial interest of the Claimant whether by reason of constructive trusts or proprietary estoppel.
- iii. An order that her interest be determined and valued.
- iv. Damages for breach of a marital agreement concluded on 25th December 2009.
- v. Costs.
- vi. Further and other relief as the Court deems just.

- [2] It is common ground that the Parties were involved in an intimate relationship between 2002 and 2014. In or around 2004, the Defendant moved into the Claimant's apartment at Sophie Bay. At all material times the Claimant was employed at a local eating establishment and the Defendant was employed as a Police Officer. It is not disputed that the Defendant earned significantly more than the Claimant. However, when the Defendant moved in, it was agreed that the Claimant would pay the rent while the Defendant would contribute to the cost of utilities and food.
- [3] The Parties continued to reside together at the Sophie Bay apartment until the completion of the residence on the Property. During this time, the Defendant opened an account at the National Bank. He later added the Claimant's name to that account. The said account was used jointly by the Parties, but the Defendant contends that it was never associated with the mortgage payments or the development of the Property.
- [4] The Claimant asserts that she was financially independent when she met the Defendant. However after the Defendant moved in with her at Sophie Bay she asserts that they pooled their resources together and the Defendant was largely able to purchase the Property because she continued to pay the rent in full while he contributed towards food and utility bills enabling him to save towards the purchase of the Property. This contention was trenchantly disputed by the Defendant who denied that the fact that Claimant continued to pay the rent to her apartment enabled him to purchase or develop the Property. Instead, he argued that it is the Claimant who benefitted from their cohabitation because he significantly assisted with her household expenses.
- [5] In or about April 2007, the Defendant solely purchased the Property. The Defendant contends that he purchased the land exclusively with his personal savings and with the proceeds of loans obtained from local lending institutions. The Defendant states that he obtained a further loan by the National Bank of the Virgin Islands in order to construct the improvements on the land and between December 2008 and January 2009, the Defendant solely completed construction of the ground floor of the building. Eventually, the Defendant applied for and was successful in obtaining a further loan which refinanced the mortgage on the Property.
- [6] By 2011, the building on the Property consisted of two 2-bedroom self-contained apartments, one 1-bedroom self-contained apartment and a cistern. The Parties took up residence in one of the 2-bedroom apartments and they leased the others. The rent generated was used to pay the

mortgage for the Property. The Claimant claims that they agreed to a new arrangement to manage of the household finances - the Defendant would supplement the monthly mortgage payments and the Claimant would attend to the household bills. In order to meet these obligations, the Claimant states that she undertook additional part time employment as a baby sitter as well as participated in a "partner hand".

- [7] Eventually, the relationship between the Parties began to breakdown and in December 2013, the Defendant served the Claimant with a Notice to Quit. A second Notice to Quit was later served to quit the property by July 2015. On September 2015, after the expiration of the second Notice to Quit, the Defendant refused to allow the Claimant to re-enter the Property unless a police officer accompanied her to collect her personal belongings. The Claimant was only able to remove her personal belongings from the Sage Mountain Property pursuant to an order of the Court dated 15th October 2015.
- [8] The Claimant asserts that as a result of this summary eviction, she suffered distress, humiliation and hurt feelings.
- [9] In a collateral claim, the Claimant also contends that on 25th December 2009, the Defendant proposed marriage to her. She states that she accepted this offer and they both continued to work towards the completion of the Property eventually procuring furnishings and fixtures for the same. By this Claim, the Claimant also seeks damages for the Defendant's purported breach of this promise to marry when he evicted her from their home and terminated their relationship.

Breach of Promise to Marry

- [10] The Claimant's claim for the breach of contract of promise to marry was dismissed by the Court directly after the conclusion of the trial. At that time, the Court promised brief written reasons which are set out below.
- [11] This cause of action was abolished in the United Kingdom with the passage of the Law Reform (Miscellaneous Provisions) Act 1970, section 1(1) of which provides that:
- "[a]n agreement between two persons to marry one another shall not under the law of England and Wales have effect as a contract giving rise to legal rights and not action shall

be brought in England and Wales for breach of such an agreement, whatever the law applicable to such an agreement”.

- [12] However, this statute was not been received into the laws of this Territory and so under the law of the Virgin Islands, there remains the right of an individual to sue for breach of promise to marry. This right is said to be a common law hybrid of tort and contract. The elements of this cause of action are predicated on contract principles with the exception of the question of damages which is rooted in tort.
- [13] First, the promise to marry contract comes into existence by the mutual exchange of promises by the parties to marry each other. A mere convivial or romantic relationship is not enough for a court to found an agreement to marry. An offer and acceptance of the promise must be proven in order for an action to lie. In addition, the contract to marry must be free from fraud. Second, it must be shown that one party to the agreement, whether the man or the woman, has failed or refused to honour the obligation. Finally, when the contract to marry has been breached, the injured party must suffer some form of injury, loss or damage.
- [14] Any action or conduct which directly suggests a promise would constitute evidence and therefore proof of promise to marry. The Court considered the totality of the evidence advanced by the Claimant in support of this claim and the Court was not satisfied on a balance of probabilities that the Claimant has proven that Defendant made an offer of marriage which was accepted by her. It is clear that over the course of the Parties’ relationship, the Defendant had made several generous gifts of jewelry to the Claimant (at least 2 rings which according to the witness, Izone Jeffers she would wear on her wedding finger) which did not involve a marriage proposal. A purchase of a ring at Christmas time therefore could not *without more* provide sufficient proof of a promise to marry.
- [15] The Court considered the evidence of the several witnesses in this case. To the extent that they address this aspect of the Claim, it is clear that they all recount conversations and impressions and perceptions which were conveyed to them by the Claimant only and not the Defendant. The Court has taken into account the evidence of Izone Jeffers that during a cruise vacation in 2009, the Defendant told her he was going to purchase an engagement ring for the Claimant. However, in the absence of cogent corroborative evidence of an actual proposal or offer of marriage this expression of an intention alone could not tip the balance of probability.

- [16] In fact, none of the witnesses advanced by the Claimant, including Izzine Jeffers actually witnessed the marriage proposal and despite the Claimant's claim that over the course of their relationship the Defendant introduced her to various persons as his fiancée, no witness was produced who could actually recount a personal interaction with the Defendant in which he confirmed that he had in fact proposed marriage on 25th December 2009. Instead, the Court had to grapple with evidence of the Claimant's own witness, Melvin Jeffers who testified that prior to her being excluded from the residence; he was unaware that the Parties were engaged. Moreover, the Court also had to grapple with the persuasive testimony of the Defendant's witnesses Edwin Edwards and David James who, despite their closeness to the Defendant, strongly denied any knowledge of the Parties' engagement. In circumstances where the burden of proof rested on the Claimant, it is surprising that she could provide no cogent and independent corroboration of this alleged promise to marry.
- [17] Even if the Court were to accept the Claimant's evidence, it is abundantly clear and uncontroverted is that no wedding date was ever actually set. Where no date is fixed, the law implies that the promise is one to marry within a reasonable time or at the request of one party. The Court is guided by the reasoning in **Sim v Thomas**¹ a judgment from the Jersey Court which concluded that if a date for the marriage has not been set, the Claimant must prove that the marriage would have taken place within a reasonable time. A marriage proposal which is accepted and mutually binding on the parties and left without anything being done to either arrange for or implement the marriage, cannot result in an enforceable action by one party at a much later stage. The Court concluded that in such circumstances, the agreement would in the interim period be mutually rescinded.
- [18] In the case at bar, the Claimant seeks to have the court enforce a promise which she alleges occurred on Christmas Day in 2009 and yet it is apparent that no formal or informal plans were made to advance the nuptials over the next 6 years. In the Court's judgment, the Claimant did not affirmatively demonstrate the Parties' final and serious intent to enter into marriage. Moreover, on the Claimant's own evidence the relationship between the Parties had seriously deteriorated and essentially broken down some several years prior to the filing of this Claim. Having observed the Parties under oath, the Court has no doubt that this breakdown was attributable to conduct of both Parties. Even if the Court were to accept (which it does not) that a mutual promise to marry had in

¹ 2001 JLR 460

fact been formed in December 2009, in the Court's judgment these facts lead to the inevitable conclusion that in the interim period, the Parties had mutually rescinded such promise.

[19] In addition, a claim for damages for breach of promise to marry would typically fall under the following categories: general damages e.g. compensation for the loss of consortium of the other party; injured feelings, wounded pride, etc.; special damages affecting property e.g. for money spent or financial loss sustained by the claimant as a direct result of the defendant's breach of the promise to marry; recovery of the engagement ring and gifts etc.

[20] The Court has further noted that the Claimant has not advanced any claim for direct economic loss such as the normal expenses attendant to an impending wedding. It is also not surprising given the extensive lapse of time since the proposal and the intervening deterioration of the relationship that she has not alleged sufficient facts which could even begin to support or prove such a claim. Instead, the Claimant alleges emotional distress consequent upon her summary and ignoble ejection from the Property and the Defendant's attendant behavior.² Since such damages would not have flowed directly from the purported breach of the promise to marry, they could not in the Court's judgment support her claim.

[21] For these reasons, the Court is satisfied that this claim for relief should be dismissed.

Constructive Trust/Proprietary Estoppel

[22] The Court will now consider whether the Claimant has established on a balance of probabilities that she has an interest in the Property by way of constructive trust and or proprietary estoppel.

[23] The Claimant's case is first grounded in the law of constructive trusts and she seeks a declaration that the Defendant held the Property in trust for her benefit. Under common law, a constructive trust is one that arises by operation of law where it would be unfair for an individual who holds an asset to deny the beneficial interest of another person in that asset.

² Paragraph 57

- [24] The legal foundation for the doctrine of constructive trust arises from the case of **Gissing v Gissing**³. In that case, the English House of Lords held that a claimant must prove that the legal owner of the land induced him to believe they would be entitled to a share in the ownership. He may prove this by demonstrating an (i) express agreement or (ii) contribution to the acquisition. In addition, the claimant must have acted to his detriment. If these factors are demonstrated, the defendant will be considered to hold the property on a constructive trust for themselves and the claimant. The court will then calculate the respective shares in the property either by a 'holistic' examination of the whole course of dealing between the parties or, where no clear intention can be found, imputing what is fair in the context.⁴
- [25] In the case at bar, it is not disputed that the Property is registered solely in the name of the Defendant. It follows that the legal interest in the Property is vested solely in him. In **Stack v Dowden**,⁵ the House of Lords stated:
- “Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases, it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”
- [26] This dictum is also consistent with the finding of the Court of Appeal in the case of **Burns v Burns**⁶ where it was held that the *prima facie* inference of sole beneficial ownership in cases of sole legal interest may only be displaced if the Court could impute from the conduct of the couple down to the date of separation, a common intention that the non-owning party was to have a beneficial interest in the property. In that case, Lord Justice Fox concluded that even though they lived together and she carried out domestic duties, there was “*no indication at all that they thereby intended to alter the existing property rights of either of them*”.

³ [1971] AC 881

⁴ Jones v Kernott [2011]

⁵ [2007] UKHL 17

⁶ [1984] Ch 317, [1984] 1 ALL ER 244

[27] This approach was reaffirmed by the House of Lords in **Lloyds Bank Plc v Rosset**.⁷ As Lord Bridge 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 estate 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 a proprietary estoppel.

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 extremely doubtful whether anything less will do.”

[28] Lord Bridge also went on to state:

“We must also consider the principles set out in other authorities such as **Grant v Edwards** which say that where there has been no express or written declaration or agreement or any direct provision of part of the purchase price so as to give rise to a trust, the Claimant must establish a common intention between herself and the Defendant acted upon by her that she should have an interest in the property.”⁸

[29] The House of Lords went on to draw a distinction between an **express common intention** and an **inferred common intention**. An express common intention requires evidence of a written agreement or express discussions between the parties which demonstrate that the property is to be shared beneficially.⁹ In the absence of an express written or oral agreement, a common intention may be inferred from the conduct of the parties.¹⁰ This may involve a court considering

⁷ [1990] 2 WLR 867

⁸ Page 646 per Nourse LJ

⁹ In *HSBC Bank Plc v Dyche* Lord Bridge considered the earlier cases of *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch.638 as outstanding examples of constructive trust created through an express common intention.

¹⁰ Referred to in *Lloyds Bank v Rosset*, as the ‘implied bargain constructive trust

matters such as direct and indirect financial contributions to the purchase price or mortgage installments of the property, payment for repairs or improvements to the property or, in exceptional circumstances, non-financial contributions (such as raising children and looking after the household).¹¹ In such cases, it is critical that a claimant demonstrate that underlying such contributions is a common unspoken intention for the property to be shared.

- [30] The relevant case law demonstrates that a judge's aim should be to find an agreement that the parties made rather than to impute an agreement to them. The difference between inference and imputation is critical because in drawing an inference, the court is attempting to determine what the parties actually decided even if this is not expressly spelt out. In the case of imputation, the court determines what the parties should have taken to have decided having regard to all the circumstances and courts have repeatedly held that a judge cannot ascribe intentions which the parties never had.
- [31] The practical application of this legal principle has however presented some difficulties because a court is essentially called upon to devise an agreement from scraps of conversations between the parties and construing their words outside of context. This is particularly problematic because many couples 'deal with each other more by trust and collaboration than by organized thinking about their respective rights' and they rarely consider what will happen to their property if they split up.
- [32] Where the property was acquired before the relationship began, the cases disclose that it is much more difficult to establish an inferred common intention.¹² Where a claimant asks the court to infer an agreement from contributions to the acquisition or improvement of the property made after the date of purchase, courts have been increasingly more flexible, crediting indirect financial contributions to the payment of household expenses which have permitted the owner to make mortgage payments.¹³ However, it is also clear that the mere fact that a financial contribution has been made does not guarantee that a common intention will be inferred.

¹¹ Burns v Burns [1983]

¹² Morris v Morris [2008] EWCA Civ 257; Aspden v Elvy [2012] EWHC138

¹³ Le Foe v Le Foe [2001] FLR 970

[33] In the case at bar, the Claimant states that she was directly involved in the purchase and development of the land but that the title of the land could not be registered in her name because as a non-belonger she would require a land-holding licence. The Claimant states that in any event, she did not think it was necessary as they were in love and building their future together. She asserts that there was an express common intention that the Property was for their mutual benefit. In fact, the Claimant states that the Defendant encouraged her to inject her personal funds into the purchase and development of the Property. She states that she withdrew money from her savings account to help develop the Property and she would also have cooked and otherwise provided refreshments for the workers during construction. The Claimant states that she did this out of love and with the understanding that the Property would belong to both of them. She therefore alleges that she made direct and indirect financial contributions to the purchase and development of the Property and that in doing so she acted to her detriment.

[34] The Defendant robustly disputed the Claimant's contentions. Instead, he asserted that the decision to purchase and develop the Property was made solely by him. He stated that the Claimant showed little to no interest in the purchase or development of the Property and has never contributed nor assisted in any way. At paragraph 24 of his witness statement he stated:

"After purchasing the property, I informed the Claimant of the purchase of the Sage Mountain property and took her to see it, whilst at the location, I told the Claimant that if we were still together when I construct my house, she must learn to drive because driving is a necessity. I never represented to the Claimant that we would develop the Sage Mountain Property together and that the Sage Mountain property would belong to both of us."

When he was examined under oath, the Defendant's maintained this position.

[35] However when she was examined under oath, it became clear to the Court that Claimant was not in fact actively involved in the purchase of the Property. Indeed, her evidence is that when choosing the Property, the Defendant was accompanied by a third party and not herself. It is also common ground that she was brought onto the land after the Defendant had already determined to buy the land. This eroded the Claimant's contention that at the point of purchase, there was an express agreement or common intention that the Parties would jointly own the Property. This was further exacerbated when she testified that she was not involved when the mortgage was obtained or when the loan was refinanced.

- [36] The Claimant however, maintains that there was an express common intention that she would have a proprietary interest in the Property. At paragraphs 41 – 43 of her witness statement she recalled that when construction of the home began, the Parties discussed building their lives together. She clearly remembers the Defendant saying to her *“we are going to do this together. So your son can get a room here and mine too. And when we get tenants, we will be able to do something for your son back in St. Vincent.”* She states that this gave her even more encouragement to continue to invest in their project. She stated that the Defendant said similar things to her on several occasions and this led her to believe that they were investing in a property which was to be their own.
- [37] Again, at paragraph 61 of her witness statement she reiterated that the Defendant made it clear that the home was their joint project. She recalls a conversation which they had in July or August 2010 in which the Defendant said to her *“You notice I am involving you in what I am doing here? We are going to do this together because this property is going to be ours.”* As a result of this she believed him and in their love and she believed in their goal. She asserts that on this basis, she gave the Defendant money towards the development of the Property when she was able to put it together and she never sought its repayment.
- [38] The Court in **Lloyd’s Bank Plc v Rosset** held that the finding of an agreement or arrangement to share can only be based on evidence of express discussions between the partners however imperfectly remembered and however imprecise their terms may have been. In the case of **James v Thomas**¹⁴ where the assurances said to have been relied upon was that *“whenever the parties discussed carrying out improvements to the property and matters relating to the business, the Defendant would say to the Claimant ‘this will benefit us both’* the Court in that case observed:
- “It must be kept in mind that that was said by Mr. Thomas at a time when he and Miss James were living together at the property as man and wife; and in circumstances in which (on the evidence) there was no reason for either of them to doubt that they would continue to do so for the foreseeable future. In that context it is, to my mind, at least as likely that the observation “this will benefit us both” (in relation to improvements to the property) was intended to mean – and was understood at the time to mean – that the improvements would have the effect that the property in which they were living as their home would be more comfortable and more convenient: or, to put the point another way, that the improvements to the property would be reflected in an improvement to the quality of their life together. **It is, I think, unreal to suggest that an observation in those terms, made**

¹⁴ [2007] EWCA Civ. 1212

in that context, was intended or understood to be a promise of some property interest, either present or in the future. Confirmation that it was not so intended – and was not understood to be so intended – is found in the judge's observation (in the final sentence of paragraph [54] of his judgment) that "when, on the Claimant's evidence, she raised the issue of putting the Property in joint names, the Defendant was evasive and, she accepted, unwilling.

34. Nor, as it seems to me, can it be said that the observation "this will benefit us both", when made in the context of a discussion of matters relating to the business, was intended or understood to be a promise of some property interest in The Cottage. Given that the outgoings of both parties were funded by the receipts of the business – and that, from about 1999, the business was carried on in partnership – there is no reason to think that the observation "this will benefit us both" (in relation to the business) was more than a statement of the obvious: what was of benefit to the business was of benefit to both Mr. Thomas and Miss James, for whom the business was their livelihood." Emphasis mine

[39] The Court is guided by these authorities.

[40] The Claimant advanced no evidence to corroborate or support her contention that the Parties had written agreement that they would share ownership of the Property. However, the Court accepts that where there is no written evidence of declaration of a common intention as to a shared beneficial interest in the subject property, a court may have regard to the oral statements of the Parties. In that regard, the Court has considered the Claimant's evidence at paragraphs 35 – 42 of her witness statement. Here the Claimant recounts representations made by the Defendant which she asserts led her to believe that they were building a life together. In the Court's judgment, the purported representations that '*we are going to do this together*' and that a room was promised to the Claimant's son, could not equate to an agreement that the Claimant or her son would have a beneficial interest in the Property. At its highest they evidence an intention on the part of the Defendant to involve her in the project. If the Court accepts that these alleged oral representations were made, they could amount to no more than mere platitudes rather than to a common intention to share proprietary interest.

[41] In **Grant v Edwards**¹⁵ a man and woman had lived together for several years. The house in which they lived had been purchased in the names of the man and his brother. He had told the woman that her name was not included on the title deeds because to do so would cause prejudice in matrimonial proceedings taking place between the woman and her husband. She subsequently

¹⁵ [1986] Ch 638

claimed a beneficial interest in the house, but was unsuccessful, the judge holding that although she had paid some of the mortgage installments, this amount was not substantial enough to give her an interest in the property. On appeal, the Court held that to succeed, the woman had to establish a common intention between herself and the man that she was to have some sort of proprietary interest in the house and to show then that she had acted to her detriment in reliance on this intention. The court held that the excuse given by the man for not including her name on the title deeds was clear evidence of a common intention that she was to have an interest in the house.

[42] While the Claimant does not assert that the Parties had a similar discourse, at paragraph 61 of her witness statement, the Claimant asserts that in July or August 2010 following the acquisition of the land and while discussing its development, the Defendant made the following statement “*You notice I am involving you in what I am doing here? We are going to do this together because this property is going to be ours*”. She stated that she believed the Defendant and that on the basis of this reliance she gave him money towards the development when she was able to put it together. Critically, the Court notes that when she was examined under oath, this evidence was not specifically traversed. When the Court considers this in the context of the Defendant’s own evidence that notwithstanding her apparent lack of interest, he repeatedly tried to get the Claimant involved in the development of the Property, the Court is satisfied that the Defendant may well have made such representations to the Claimant in circumstances where he was intent on peeking her interest and involvement in the development and strengthening and cementing their relationship.

[43] Further, even if a claimant is unsuccessful in proving or establishing a common intention through express oral or written declarations does not without more jettison her case. Proof of common intention may nevertheless be established through the conduct of the parties either by direct financial contributions or to a lesser extent substantial indirect financial contributions in relation to the subject property and in some circumstances by extraordinary non-financial contributions whether or not such contribution is bolstered by oral declarations.¹⁶ Non-financial contributions include where a person undertakes domestic responsibilities, bears children and provides child care and looks after sick or elderly parents are contributions which can also be taken into account

¹⁶ Gissing v Gissing at pages 905 – 909

in determining the extent of the beneficial interest that will arise under a constructive trust established on the basis of an inferred common.

- [44] Direct financial contribution is a claimant's identifiable contribution to the purchase or construction of the subject property. The Claimant has not alleged any direct contribution to the acquisition of the Property. In fact, under cross examination, her evidence made this clear. She concedes that the money in the joint account was not used to purchase the Property. She also testified that in 2007, the Defendant paid a deposit of \$5000.00 for the Property and that she made no contribution towards this. In fact, she stated that she made no contribution to the purchase price at all and agreed that the balance of the purchase price was defrayed from a mortgage taken out by the Defendant solely which he repaid from his salary.
- [45] However, following the purchase of the land, the position changed. Although the Claimant readily concedes that she was not on equal financial footing with the Defendant and that he put more money into the Property than she did. She stated that she contributed much of her savings and resources to the development/improvement of the Property because it was their mutual intention to share the same.
- [46] In her witness statement, the Claimant recounts that they opened a joint savings account in the National Bank of the Virgin Islands as they would need funds to do things as a couple. The account was opened with the Claimant's savings of \$150.00. She stated that she deposited money into that account from her tips from work, small change and money which she earned from babysitting. She stated that she never made any personal withdrawals from that account and all the withdrawal was applied for their joint use and for the Property they had together.
- [47] At paragraph 45 of her witness statement she asserted that the monies were withdrawn from that joint amount and used to pay the architect who drew up the building plans. She also stated in May 2007, there were several withdrawals from her personal savings and again between December 2008 and January 2009, personal funds amounting to \$5849.65 was withdrawn and given to the Defendant to be applied to the improvements on the land. In February 2009, she alleged that a further \$1800.00 was advanced for that purpose. The Claimant states that these were not the only instances when she contributed towards the Property but that she failed keep track of the same

because she was in love and in little doubt that she would not need to keep track this. Following construction, she states that she paid for certain furnishings and a contributed on occasion to the cost of insuring the Property.

- [48] When she was examined under oath, it became clear to the Court that the Claimant's assertion that she made direct financial contributions to the development of the Property was supported mainly by the bank statements which did not reflect the actual use to which the withdrawn funds were put. The Claimant agreed that the bank statements do not indicate the purpose of the withdrawals or how the funds were applied and her inability to persuasively satisfy. First, the purported withdrawals in May 2007 could not have been applied to develop the Property because it is not disputed that it was only in April 2007 that the Defendant secured a loan to purchase the same.
- [49] Second, the Court is satisfied that construction on the Property only commenced between December, 2008 and January, 2009. At that time the Defendant had significant personal savings (in excess of \$50,000.00) which he used to begin construction prior to approaching the bank for a mortgage of \$229,000.00 to construct the ground floor. The Court also accepts that the Defendant's evidence that in 2010 he again secured a second mortgage loan from the bank to construct the second level of the building. His evidence that the mortgage payments were made via by a monthly deduction from his salary. The Court is also persuaded that he eventually moved the mortgage to another bank in order to make the payments more manageable.
- [50] Further, the Court finds it remarkable that notwithstanding that the Defendant would have had to disclose all documents relevant to the property and its development, the Claimant was unable to point to any invoice, receipt or payment which would prove her contribution. This is critical because the Defendant has categorically denied any direct financial contribution on her part. When it was pointed out to the Claimant that the Defendant had obtained a mortgage in order to develop the Property and so there would be no need for her to contribute financially to the construction, she testified for the first time that she would give cash to the Defendant which would be used to make the mortgage payments.

[51] In the premises, the Court has some difficulty in accepting the Claimant's evidence of substantial direct financial contributions in circumstances where she was unable to advance actual cogent evidence. The withdrawals from her bank account provided little assistance to the Court because there is no indication that these sums were directly applied to the Property. Further, the Court has some difficulty in accepting that she secured personal loans in aid of developing the Property when it is clear that this was financed from the Defendant's substantial savings and from mortgage loans. Absent this critical connecting evidence, the Court can only conclude that the Claimant's financial contribution would have been limited to the sums paid into the joint account held by the Parties and to the furnishings which the Parties agreed were purchased by her for use in the home. The Court has also noted the Claimant's contention that the funds used to pay the architect/draughtsman came from the moneys held in the joint account. This evidence was not directly traversed by the Defendant, who merely averred that he paid the architect/draughtsman but did not disclose the source of the funds. The Court has also noted the Defendant's acknowledgment that the Claimant gave him \$2000.00 which was intended to assist with insurance payments but which he deposited into the joint account.

[52] By way of alternative argument, the Claimant has advanced that the Court may infer a common intention from the couple's conduct during the course of their relationship. The Claimant contends that she made indirect financial contributions, without which the Defendant would not have had the means to acquire or construct the property. She points to the fact that she solely bore the rental burden while they resided at Sophie Bay and that she also assumed responsibility for paying several utility bills once they took up residence in the Property. This was done in order that the Defendant could accumulate sufficient funds to purchase the Property and later service the mortgage once the construction of the building was complete.

[53] The Claimant has also sought to rely on the role which she played as a homemaker. The Claimant concludes that there was a common intention that she would have a beneficial interest in the matrimonial home and it was in reliance of this intention that she continued to manage the home and take care of the Defendant.

[54] In **Grant v Edwards**, the English Court of Appeal concluded that indirect evidence of common intention could be inferred by the conduct of the Parties when such conduct on the part of the claimant is directly referable to the purchase of the property and could only be explained by reference to a person acting on the basis of having a beneficial interest in that property.

[55] This position has since been qualified at common law and in that regard the Court is guided by the learning in **Pettit v Pettit** and by the more recent Privy Council decision in **Abbott v Abbott**.¹⁷ In the latter case, the wife gave up working early in the marriage and remained a homemaker for the majority of the marriage. In delivering the Privy Council's judgment, Baroness Hale emphasized the fact the parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership. The Board favoured the reasoning of the trial judge Mitchell J., who relied heavily on the fact of the parties' joint and several liability to repay the mortgage supported by their life insurance policies and also the fact that their income went into a joint bank account, in concluding that the Parties had equal beneficial interests in the home. In rendering the Board's opinion, Baroness Hale quoted remarks which she has previously made but which are critical in the case at bar:

"The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it."

[56] The whole course of dealings has been said to include any advice or discussions at the time of acquisition which shed light on the parties' intentions. The Court is entitled to consider inter alia, the purpose for which the property was acquired, the nature of the relationship between the parties, the personalities of the parties, how they arranged their finances, how they discharged outgoings on the property and their other household expenses, whether they had children for whom they both had responsibility for providing a home.¹⁸ It follows that in determining whether there was a shared common intention that both parties would have a beneficial interest in the property, the whole conduct of the parties must be considered. Each case will therefore turn on its own facts.

¹⁷ [2008] 1 FLR 1451

¹⁸ *Stack v Dowden* [2007] UKHL 17; ANUHCVP2012/0040 *Teckla Edwards v Dr. Alvin G. Edwards*

- [57] In the case at bar, the Court is satisfied that the Parties had a serious long term relationship. By the time they separated, the Parties had lived together for over 10 years, first sharing rental premises at Sophie Bay and eventually moving to the Property at Sage Mountain. It is accepted between the Parties that the Defendant always had a higher earning capacity than the Claimant and yet the Parties shared the living expenses with the Claimant paying the monthly rental at Sophie Bay while the Defendant paid the household utilities, cable and gas. They also both contributed to the cost of food. The evidence reveals that the Parties lived together in de facto marital relationship with the Claimant carrying out the duties of a homemaker, while the Defendant, who was the main breadwinner/provider, assumed the leadership and goal oriented role.
- [58] The Court accepts that it was the Defendant's dream to own a property in the BVI and that he diligently went about accumulating savings in order to invest in this home/income earning property at Sage Mountain. On the Claimant's own evidence, the Defendant only began talking about acquiring the Property sometime in 2005 after they had already begun to live together and after they had divided the financial responsibilities. Given this evidence, the Court is unable to conclude that the decision to share the living expenses was informed by their common intention to purchase the Property.
- [59] Indeed, it is clear to the Court that no constructive trust could have arisen at the outset when the Property would have been acquired. The Claimant's evidence does not allege that there was any express agreement at the point of acquisition, that she would be given an interest in the Property. The Property was actually purchased with the Defendant's substantial personal savings and with loan funds obtained from a local lending institution. This not disputed by the Claimant, who conceded under cross examination that the money in the joint account was not used to purchase the Property. She also testified that in 2007, the Defendant paid a deposit of \$5000.00 for the Property and that she made no contribution towards this. In fact, she stated that she made no contribution to the purchase price at all and agreed that the balance of the purchase price was defrayed from a mortgage taken out by the Defendant solely which he repaid from his salary.
- [60] However, it is clear that notwithstanding that a constructive trust may not have arisen at the outset when property is acquired, a trust may "*arise later as the circumstances may require*". The Court in

Hussey v Palmer¹⁹ made that clear. At paragraph 747 of the judgment Lord Denning MR observed:

“By whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process, founded upon large principles of equity, to be applied in cases where the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. The trust may arise at the outset when the property is acquired, or later on, as the circumstances may require. It is an equitable remedy by which the Court can enable an aggrieved party to obtain restitution.

..... The present case is well within the principles of those cases. Just as a person, who pays part of the purchase price, acquires an equitable interest in the house, so also he does when he pays for an extension to be added to it.”

[61] It follows that a trust may arise later when subsequent improvements are undertaken and once the relevant constituent elements are present. It is not disputed that the land in question was purchased in 2007, when the Parties had been living together for some time. At that point, the Court is satisfied that the Defendant’s intention was to make a home for himself and the Claimant in which they would continue to reside as a couple. He diligently continued to save his earnings in order to secure this end. Their conjugal bliss is further evidenced by the fact that they pooled their resources together into a joint account. It is accepted that consistent with their disparate earning capacities, the Defendant made the larger and more consistent contributions but the Court has no doubt that this joint savings was intended to fund their joint expenses and that both Parties contributed to this account.

[62] The Court has no doubt the development of the Property is directly and principally attributable to the Defendant’s effort. However, having reviewed all of the written evidence and having observed the oral testimony of the Parties, the Court is satisfied that the Defendant would by his representations and conduct have conveyed to the Claimant that the development of the land was to be a joint venture. The Defendant’s evidence is that he repeatedly encouraged the interest and participation of the Claimant²⁰ and so the Court has no hesitation in finding on a balance of probabilities that in 2010, he would indeed have represented to the Claimant that; *“You notice I am involving you in what I am doing here? We are going to do this together because this property is going to be ours.”* The Court finds that this express representation would have provided

¹⁹ [1972] 3 ALL ER 744 at page 747 and *Davis v Vale* [1971] 1 WLR 1022

²⁰ Paragraphs 30 and 32 of the Defendant’s witness statement

encouragement to the Claimant which would have giving rise to the expectation that the Property was to be shared beneficially.

[63] It is clearly the intention of both Parties that the Property would serve as their home. This is a reasonable inference drawn from the fact that even after the first floor of the Sage Mountain Property was completed; the Defendant did not take up occupation but continued to reside at the Sophie Bay apartment where the Claimant paid the monthly rental. The Parties eventually moved into the Property in 2011 together after they both proceeded to furnish the same. It is also clear that the Property was also intended to operate as an income earning asset with the rental income first servicing the mortgage and then later providing supplemental income for the couple. After completion Sage Mountain Property consisted of 2 self-contained 2-bedroom apartments and one self-contained 1-bedroom apartment. The Parties moved into one of the 2-bedroom apartments while the others were leased.

[64] The evidence also discloses that during the course of their relationship, the Parties assumed different roles in the relationship. The Court is persuaded that they adopted the stereotypical gender roles in which the Claimant essentially deferred to the Defendant and left all matters concerning the construction on the Property to the Defendant. Given their respective roles in the relationship, it is not surprising that the Claimant is unable to provide any cogent evidence of a direct financial contribution to construction/improvement of the Property. She testified that when she was able, she gave money to the Defendant which was then applied to the construction and insurance of the building. However, she was unable to indicate the precise use to which these funds would have been put because she yielded all control to the Defendant.

[65] The Defendant has essentially denied that the Claimant made any direct financial contribution at all but he has conceded that the Claimant paid in \$1000.00 and a further \$2000.00 into the joint account and he has not sought to challenge the Claimant's evidence that she never withdrew any funds for her sole personal use. He also conceded that the Claimant would have purchased furniture: a living room and dining room set, a bed and mattress and two chests of drawers and he has not sought to challenge her evidence that she would have travelled with him to Puerto Rico to purchase the same when the apartments were nearing completion.

- [66] During the time when they resided together as a couple at the Sophie Bay, the evidence discloses that the Parties cooperated in the discharge of outgoings and household expenses in way which clearly would have facilitated the improvement of the Property. The Parties continued to maintain the joint account and the Court has no doubt that they organized their financial affairs on the basis that their relationship was a long term one and that they intended to share their lives and the Property.
- [67] Having had a chance to observe both Parties in *viva voce* testimony, the Court is satisfied that the Defendant's repeated efforts to minimize the role played by the Claimant did not ring true. Instead, the Court is satisfied that the conduct of the Parties from the time they began living together at the Sophie's Bay apartment to their move to the Sage Mountain Property was one of cooperation between the two in meeting the expenses of their union. The Court finds that despite her relatively small income, the Claimant played her part in meeting their joint living expenses.
- [68] It is implausible that the Claimant who bore the entire the cost of the entire rental when they lived at Sophie Bay would have ceased to contribute to the household at Sage Mountain and so the Court finds that in their new living arrangements, the Claimant paid the utilities and contributed to the cost of food while the Defendant supplemented the rental income to pay for the mortgage payments.
- [69] In **Abdool Hack v Rahieman**²¹, the court was concerned with unmarried parties who had cohabited continuously over a period of 28 years in a *de facto* marital relationship. There were no children of the marriage. The property in dispute was purchased and conveyed in the sole name of the appellant. The appellant made the initial deposit from his own money and took a loan on mortgage which he undertook to repay by installments from his salary in order to pay the balance of the purchase price. The Respondent throughout the period of their life together worked as a peddler and operated a cafeteria. From the profits of her business, she said she made significant financial contributions to the running of the home in view of the fact that the appellant was paying the mortgage. There was no evidence of an express agreement or declaration as to the share of the parties.

²¹ 1977 CA 21 – Guyana

[70] In the lower court, the judge accepted the Respondent's evidence in preference to that of the appellant and found as a fact that the substantial contributions made by the Appellant towards the housekeeping expenses were directly referable to the acquisition of the home as they enabled the Appellant to pay the mortgage installments.

[71] On appeal, the Court found that there was evidence of the requisite common intention on which a claim for a resulting trust could be grounded given that the litigant's contributions to the household were directly referable to the acquisition of the property. The Court further found that there was a common intention that she should benefit from the property.

[72] It is therefore clear that indirect contributions (in the form of contributions to general household expenses thereby releasing the other party's income to pay the purchase price of mortgage installments) may be capable of supporting a claim to a beneficial share under an inferred constructive trust.²² It is insufficient, however, for a claimant to contribute merely towards household expenses *simpliciter*, purchase furniture or electrical appliances, or to do the housework, decorating or gardening, since such conduct does not manifest an intention of assisting the purchase of the house and, therefore, with the aim of acquiring some interest in the property. As Fox LJ in **Burns v Burns**²³ observed:

“...the fact that the parties lived together and do the ordinary domestic tasks, is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them... The undertaking of such work is, I think... the sort of things which are done for the benefit of the family without altering the title to the property.”

[73] No constructive trust will arise if the contribution is made in circumstances that demonstrate that there was no common intention to share ownership of the property. A common intention would not be inferred if the parties have merely done what spouses would normally do. This view was also reiterated in **Pettit v Pettit** at page 826 of the judgment:

“It is common enough nowadays for husbands and wives to decorate and to make improvements in the family home themselves with no other intention than to indulge in what is now a popular hobby and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or bathes the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or

²² *Le Foe v Le Foe* [2001] 2 FLR 970

²³ [1984] 2 WLR 582, [1984] 1 ALL ER

any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would enter their heads.”

[74] Having said this, it is also clear that if an express common intention that the claimant should have a beneficial interest were proved, then indirect contributions may suffice as was the case in **Grant v Edwards** and **Hammond v Mitchell**.²⁴ In the Court’s judgment, the non-financial contributions asserted by the Claimant in this case would not *without more* allow an inference of a common intention. However, the Court is satisfied that there is evidence of an express common intention demonstrated in this Defendant’s oral representations and in the Parties’ conduct and the whole course of their dealings.

[75] The Court accepts that evidence of indirect contribution financial otherwise should be explained by reference to a person acting on the basis of having a beneficial interest in the property and that this contribution must be in excess of what could be expected as a normal contribution and without which contribution the legal owner of the property would not have had the means to acquire the property or keep up with the payments. It is clear that this Property included not only the Parties’ residence; but also other income earning apartments. The Court has considered the Claimant’s untraversed evidence that when the first apartment was completed, she cleaned and facilitated the viewings by potential lessees. In the Court’s judgment, separate and apart from the homemaker duties which she carried out in their main residence, this non-financial contribution is significant in that it speaks to the fact that the Claimant’s contribution was more than that of a simple homemaker. This evidences that she was a partner in their endeavor and the Court has no doubt that she would have been acting on the basis of the Defendant’s representation to her that “*this property is going to be ours*”. Together with all of the other matters which the Court has considered, the Court can therefore infer that there was as a shared intention that the Property be shared beneficially.

[76] During the course of the trial, Counsel for the Defendant placed great reliance on the Claimant’s letter of 10th December 2014. That letter served to respond to the Defendant’s Notice to Quit and in it the Claimant made the following statement:

²⁴ [1991] 1 WLR 1127

"let me plainly say here I do not want your house, what I need is to have you give me a settlement for and with whatever contribution that I have made towards you for twelve years and the house for four years."

[77] In the following paragraph she summarized this contribution as cleaning, cooking, washing and ironing and supplying sexual favours. The Defendant argued that the Claimant's written evidence is wholly inconsistent with her Claim. In circumstances, where the Claimant contends that her interest in the Property was unequivocally and expressly agreed between the Parties, Counsel for the Defendant argued that it is incongruous that she would not assert her right or beneficial entitlement to the Property at that obvious opportunity presented in her letter of 10th December 2014.

[78] In the Court's judgment, this evidence is not unequivocal. Notwithstanding her inability to properly articulate her legal position it is clear that the Claimant is attempting to assert some equitable interest in the Property based on her contribution. When she was cross examined under oath, the equivocation became clear because while the Claimant confirmed that the letter did not allege any agreement that she would have an interest in the Property, she nevertheless asserted that there was an agreement that she and her children would in fact have such an interest.

[79] The Defendant has not asserted that this correspondence operated as a waiver of the Claimant's rights instead the argument appears to be that it reflects the true nature of the Parties' intentions. However, it has not escaped the Court's attention that letter is written by the Claimant who is not legally trained and who would not have been sensitive to the operative equitable doctrines and who would have recently been ejected from her place of residence.

[80] In light of these findings, the Court is not satisfied that the letter could without more discharge an inference that there was a common intention that the Claimant would have an interest in the Property.

Detriment

[81] The constructive trust arises because it would be inequitable to allow the legal owner to refuse to give effect to the intention when the claimant has acted in a personally detrimental manner.

Therefore, where a claimant has successfully established that there was a common intention, he or she then needs to establish that they have acted to their detriment in reliance of such common intention.

- [82] It is now settled law that detriment required in the case of constructive trust based on express common intention is analogous to that required to a claim to sustain a remedy under the principle of proprietary estoppel.²⁵ Generally, to qualify as detriment, the substantial activity undertaken must be such that there can be no there reasonable explanation for the claimant performing the relevant acts other than they were in reliance of the fact that she was to share in the subject property.²⁶ This must be considered within the broader context of unconscionability. At page 232 of the judgment in **Gillett v Holt**, Walker LJ held:

"The issue of detriment must be judged at the moment when the person who had been given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the assurance to be disregarded – that is, again, the essential test is one of unconscionability. The detriment alleged must be pleaded and proved".

- [83] In **Grant v Edwards** the court made it clear that in order to succeed on this ground, a claimant must have done something which she could not reasonably be expected to have done unless she was to have an interest in the property.²⁷ However, at page 657A – B, Sir Nicolas Browne-Wilkinson V – C, set out the following qualification:

"As at present advised, once it has been shown that there was a common intention that the claimant should have an interest in the house, **any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify.** The acts do not have to be inherently referable to the house." Emphasis mine

- [84] The case law has however demonstrated that detriment is not to be regarded as a narrow or technical concept. It need not consist of the expenditure of money or other quantifiable financial detriment. Rather, it must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances. In evaluating whether the acts in question amounted to a sufficient alteration of a claimant's position to her detriment in reliance on a common intention, a judge is therefore entitled to have regard to the entirety of the relationship.

²⁵ Lloyd's Bank Plc v Rosset at page 132; Grant v Edwards at page 656

²⁶ Gillett v. Holt [2000] 2 ALL ER 289, per Robert Walker LJ

²⁷ Grant v Edwards per Nourse LJ

[85] Accordingly, conduct which amounts to indirect evidence of common intention will invariably be relied on to establish detrimental reliance. Once a common intention is inferred rather than express, the conduct leading to the inference will generally suffice to demonstrate detriment. Lord Bridge in **Lloyd's Bank v Rosset** explained the position in the following terms²⁸:

“once it has been shown that there was a common intention that the claimant shall have an interest in the house any act done by her relating to the joint lives of the parties in my judgment is sufficient detrimental reliance.”

[86] The Court is guided by this dictum and finds that this limb has been adequately satisfied on the evidence before the Court.

Quantification of Beneficial Interest

[87] The final question that arises for consideration is in what proportion was it intended that they share the beneficial interest. The principle emanating from the authorities such as **Oxley v Hiscock**²⁹ is that where the property is registered in the sole name of one party, there is no presumption of joint beneficial ownership. In determining what share each party is entitled to, the court must consider the whole course of dealing between them in relation to the property and determine what is fair. In doing so it must be noted that financial contribution is only one of the relevant factors. The Court must also have regard to the “arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.”³⁰

[88] In this case there is no evidence of any discussion between the Parties as to the amount of the share which each was to have. However, even in a case where the evidence is that there was no discussion on that point the court must still endeavor to quantify the beneficial entitlement. Here, the evidence shows that the Claimant was uninvolved in any way in the acquisition of the land at Sage Mountain. Although the Court has no doubt that the Claimant has a beneficial interest in the Property, it is clear that any direct financial contribution to the improvement of the Property would have been comparatively marginal. The construction of the house was largely financed from the Defendant's personal savings and from the mortgage which the Defendant pays. However, the

²⁸ [1990] 1 AC 107 at 132 - 133

²⁹ [2004] EWCA 546

³⁰ *Oxley v Hiscock* per Chadwick LJ

Court is obliged to be fair having regard to the whole course of dealing between the Parties in relation to the Property. The Court is satisfied that the Claimant's marginal direct financial contributions and her indirect contributions make it unconscionable to deny her an equitable interest in the Property. In the Court's judgment, the Claimant is entitled to a 5% interest in the Sage Mountain property.

CONCLUSION

[89] In view of the foregoing premises, it is ordered and declared that:

- i. The Claimant is entitled to 5% interest in the Property, at the current market value.
- ii. The Property is to be valued by a competent property valuer, agreed to by both parties, and costs be borne by each party equally.
- iii. The agreement as to the valuer should be reached no later than 21 days from the date of this order.
- iv. The Defendant is ordered to pay to the Claimant such amounts as represents her interest in the Property.
- v. The Claimant's claim for breach of promise to marry is dismissed.
- vi. Given the way in which the claims have been disposed of in the judgment, the Court is satisfied that each party should bear their own costs.

**Vicki Ann Ellis
High Court Judge**

By the Court

Registrar