JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 19/2004

BEFORE: **THE HON. MR. JUSTICE HARRISON, P.**
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	**CECILLIA MITCHELL DAVY**	**APPELLANT**
AND	**RILEY ADOLPHUS DAVY**	**RESPONDENT**

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright and Co., for the appellant

Gordon Steer instructed by Chambers, Bunny and Steer for the respondent

3rd, 4th, July 2006 and 30th March 2007

HARRISON, P.

This is an appeal from the decision of Sinclair-Haynes, J., on 9th February 2004 made under section 16 of the Married Women's Property Act that the respondent is the sole legal and beneficial owner of property at 70 Catherine Close, Queen Hill in the parish of St. Andrew.

I have read the judgments of Cooke and Harris, JJA., and I agree with their reasoning and conclusions. However, these are my comments.

The material facts are that the said property was solely owned by the respondent since 1984, by way of purchase. He subsequently met the appellant, with whom he lived from about 1987. They were married in 1991. The

appellant attended the College of Arts, Science and Technology (now University of Technology) from 1987 and graduated in 1990; the expenses of such tuition was borne by the respondent. On 26th January 1995 the respondent transferred the said property into their joint names as tenants in common. They separated in 2002. The respondent claimed that he was solely entitled to the beneficial interest in the property and sought such declaration and an order that the appellant transfer the legal interest to him. The learned trial judge found in favour of the respondent. This appeal resulted.

Where land is transferred into the names of husband and wife jointly, prima facie they are jointly entitled. However, such entitlement is not determinate of the beneficial ownership of each. If each contributes to its acquisition, the legal estate is in both jointly and the equitable interest is held by them in the proportion in which each contributed. See, for example, ***Cobb v Cobb*** [1955] 2 All ER 696.

Where a husband transfers property into his wife's name or the wife's name and his, he is presumed to intend to make a gift of such property to her, in the absence of a contrary intention. This is known as the presumption of advancement. It is based on the concept of a man's obligation to support his wife. It applies also to his obligation to support his children or anyone in loco parentis to him. In the case of the wife however, because of the shift in social and economic patterns and customs of women in general, and wives in particular, that presumption has lost a great deal of its earlier force and efficacy.

However, being a presumption, it may be rebutted by the actual intention of the parties. With reference to the presumption of advancement, Lord Hodson, in ***Pettitt v Pettitt*** [1970] AC 777, at page 811, said:

> "Reference has been made to the 'presumption of advancement' in favour of a wife in receipt of a benefit from her husband. In old days when a wife's right to property was limited, the presumption, no doubt, had great importance and to-day, when there are no living witnesses to a transaction and inferences have to be drawn, there may be no other guide to a decision as to property rights than by resort to the presumption of advancement. I do not think it would often happen that when evidence had been given, the presumption would today have any decisive effect."

Lord Upjohn referred to the evidence which could give rise to the presumption, or otherwise. He said, at page 813:

> The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then what are called the presumptions come into play. They have been criticised as being out of touch with the realities of today but when properly understood and properly applied to the circumstances of today I remain of opinion that they remain as useful as ever in solving questions of title."

and at page 814 he said:

> "These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence; let me give one or two examples.

> In ***In re Gooch*** (1890) 62 L.T. 384 a father purchased in his son's name stock in a certain company more than sufficient to qualify the son to be a director of the company, but the father kept the relative certificates in an envelope on which he had written 'belonging to me'; legal presumption of gift rebutted."

The presumption of advancement, therefore, arises by implication of law, where there is no direct evidence of the specific intention of the parties. That presumption is rebutted by even slight evidence of contribution by the spouse who claims that the presumption arises. Where therefore there is evidence of a common intention, the presumption cannot arise.

In ***Lynch v Lynch*** (1991) 28 JLR 8, Carey, J.A., contrasted the presumption with the evidence of the parties intention. At page 11, he said:

> "It seems to me absolutely plain that the doctrine of the presumption of advancement operates only where there is no evidence of intention, and one has to be imputed."

He relied on the advice of the Privy Council in ***Neo Tai Kim v. Foo Stie Wah (M.W.)*** (unreported) Privy Council Appeal No. 30/82 dated 4th March 1985, and said on page 11:

> "Thus the true nature of the presumption was explained by their Lordships in these words:
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> > 'In the opinion of their Lordships the presumption of advancement is not an immutable rule to be applied blindly where there is no direct evidence as to the common intention of the spouses. It is rather a guideline to be followed by the court in an appropriate case when it searches for the intention which ought, in the absence of evidence, to be imputed to the

> parties. It is proper for the trial judge to review the background of the case and to decide in appropriate circumstances that the guideline is not one which can sensibly be followed in the case before him'."

In circumstances therefore where a person's name, including that of a wife, is added to the title of a registered owner with the intention that it is meant to facilitate the obtaining of a mortgage or other similar reason, such clear evidence displaces any notion of the presumption arising. This practice arises frequently in current times in financing of mortgages, where the resources of one party may be insufficient to secure the requisite financing. Lord Diplock, in ***Pettitt v Pettitt*** (supra) recognized this practice. He said at page 824:

> "The old presumptions of advancement and resulting trust are inappropriate to these kinds of transactions, and the fact that the legal estate is conveyed to the wife or to the husband or to both jointly though it may be significant in indicating their actual common intention is not necessarily decisive since it is often influenced by the requirements of the building society which provides the mortgage."

In the instant case, the appellant bases her entitlement to an interest on two limbs, namely, her contribution to the construction of the house on the property and the presumption of advancement that exists in her favour. This stance creates an inherent conflict in the appellant's case.

The learned trial judge found that the appellant did not contribute to the construction of the house on the property and, that the construction was commenced by the respondent prior to the marriage of the parties. She concluded that if her finding was that the appellant contributed to the

construction, even after marriage, that would be ample evidence of the intention of the parties.

The appellant had stated, in paragraph 9 of her affidavit dated 7th August, 2003:

> "it was agreed between us that the claimant would pay off all of his arrears which he owed to the NHT and expedite the transfer of my name on the Duplicate Certificate of Title for the abovementioned property, so that, we both could access the loan."

The learned trial judge quite rightly found, from that statement of the appellant, at page 22 of the record:

> "Such a statement unequivocally asserts that the placing of her name on the title and the paying off of his arrears were pre-requisites to the acquisition of the loan."

On the evidence before her, the learned trial judge found that the appellant had agreed to give him her benefit under the National Housing Trust in order that he might obtain a higher mortgage. The respondent had placed her name on the title for that reason. The learned trial judge found however that:

> "... she reneged and refused to sign the NHT documents."

There was ample evidence before the learned trial judge from which she could make the findings that she did. She saw and heard the witnesses. In those circumstances, this Court may not disturb such findings.

On the evidence, it could be readily inferred that the intention of the parties was that the appellant's name was included on the registered title of the

respondent for the purpose of facilitating the receipt of a higher sum of money as a mortgage. That intention is manifest on the evidence of each party.

This finding of the learned trial judge of the intention was an irresistible one and clearly rebutted any presumption of advancement that could arise in favour of the appellant.

Carey, J.A., in ***Lynch v Lynch*** (supra) adverted to the practice of the placing of another name on the title for the purpose of mortgage financing. He said at page 13:

> "The fact that a wife agrees to be a party to a mortgage loan granted to her spouse and herself does not inevitably mean that she expects 'a piece of the action' if I may be pardoned the use of an Americanism. A great many relatives assist their relations in this way, and I have not the least doubt that no one would say that they expect thereby to have a share in the equity. What is required is evidence of the parties' intentions and therefore all the circumstances must be taken into account."

No presumption of advancement arises in favour of the appellant, in the circumstances of the instant case. The respondent is entitled to the beneficial interest in the property. The order of the learned trial judge should be affirmed.

COOKE, J.A.

1. The parties were married on the 25th June, 1991. They had previously co-habited between 1987 to 1990, during which time the wife was a student at the College of Arts Science and Technology, now the University of Technology. During this time it is undisputed that the husband provided the financial resources to enable the wife to complete her studies. Prior to the marriage, in fact some seven years before, the husband had acquired property at 70 Catherine Close, Queen Hill, Kingston 19 in the parish of Saint Andrew. Let me state at once that the parties never lived at these premises. The evidence does not reveal whether the construction of a house on these premises is yet complete. There is evidence that the building of a house on that property had commenced. Before the marriage the husband had fathered 5 children. On the 26th January, 1995 the husband effected a transfer in respect of the property at 70 Catherine Close whereby that property was now held by the parties as Tenants in Common. A daughter was born to the parties on 8th January 1996. The husband and wife separated in 2002.

2. By a Fixed Date Claim Form filed on 25th June, 2003 the husband sought the following remedies under the Married Women's Property Act.

> "1. The Claimant is entitled to the beneficial interest in property located at 70 Catherine Close, Queen Hill, Kingston 19 in the parish of Saint Andrew.

2. The Defendant transfers her legal interest in the said property to the Claimant.

3. The Registrar of the Supreme Court be empowered to sign any and all documents necessary to effect bring into effect any and all orders of this Honourable Court."

On the 9th February, the court granted those remedies. This is an appeal from the determination of that court.

3. The grounds of appeal were:

"(1) The decision of the learned trial judge is not supported by the evidence which weighs heavily in favour of the Appellant in strengthening the presumption of Advancement in that:

(i) Even on the Respondent's evidence the Instrument of Transfer was prepared by a lawyer who transferred the property by way of gift to the Appellant as Tennant in Common though the Respondent says that he did not intend to make a Gift.

(ii) The Respondent although he relies on convenience as a reason for transferring the property to the Appellant and himself, took no steps to undo the status of Tenancy in Common for 9 years until the marriage had broken down and he had filed for divorce.

(iii) There was absolutely no evidence from the Respondent as to how he made it clear to the Respondent that she would have no beneficial interest in the property.

(iv) The Respondent's evidence that he intended to obtain a joint mortgage with the Appellant clearly meant that binding legal and financial obligations were intended by both parties and would have been assumed by the Appellant. It is therefore ludicrous to accept the Respondent's evidence that the Appellant understood that he would be solely responsible for the mortgage.

(v) The Respondent's evidence that he intended the property to be the matrimonial home when added to the Transfer of the property to the Appellant as Tennant in Common which gave her an irrevocable right to freely alienate the same for over 9 years quite clearly demonstrates an intention to incur legal and financial obligations and that an outright gift to the appellant was intended.

(vi) The evidence that the Appellant promised to give her NHT benefit to the Respondent so that he could build a home for his adult children in exchange for having assisted her through College is incredulous in the circumstances where the parties were man and wife and had no home of their own.

(vii) The evidence that the Appellant a life interest (sic) in the property after her name was placed on the title in a more substantial capacity as joint owner is not believable.

(viii) The evidence that one half share of the property was willed to the Respondent children (sic) and the other one half to take care of his expenses is not believable since for his expenses to be taken care of the property would have

had to be the subject of some type of instrument, which means that he would have had to take steps to have legal control of the "other one half", a step which he failed to take for 9 years. It also contradicts the evidence that the property was for his children.

(2) The learned trial judge failed to correctly apply the principles of the Presumption of Advancement to the facts when:

(a) she having found non contribution by the Appellant to the construction of the house she used the non-contribution as evidence which negatived the presumption of advancement.

(b) She expressed the view that if the Appellant was responsible for the construction of the house the presumption of Advancement would not arise since the parties are registered as proprietors of the whole property which includes the land as well as the house.

(c) She failed to correctly interpret and apply the ratio decidendi of the case of **Harris v. Harris** (1982) 19 JLR 319.

(3) The Respondent's reason for transferring one-half of the property to the Appellant is incredulous and should not have been used to rebut the Presumption of Advancement since there was absolutely no necessity in law for the legal/beneficial interest in the property to be disturbed in order to access the Appellant's NHT benefit and obtain a larger mortgage—A fact which most certainly would have been told to him by the NHT and/or his attorney.

(4) The learned trial judge came to her decision in part by misconstruing the evidence of the

> Appellant concerning her contributions to the construction of the house."

4. A perusal of these grounds and tenor of the oral and written submissions, indicate that the thrust of this appeal is that court below was in error in not finding that the presumption of advancement was applicable in favour of the wife. Ground 1 sought to fault the learned trial judge in her assessment of the evidence. The essence of the evidence of the husband was captured in the judgment of court below. It was as follows:

> "Mr. Davy is adamant that Mrs. Davy's name was placed on the title only as a means of facilitating a larger loan from the National Housing Trust. He insists that he began construction before he met Mrs. Davy. He testified that he met Mrs. Davy in 1987 whilst she was employed to L.C. McKenzie. Sometime before 1995, but after they were married, he desired to obtain a loan from NHT. A friend of Mrs. Davy who worked at NHT informed him that he would need to join with Mrs. Davy in order to qualify for one million three hundred dollars instead of the six hundred and fifty thousand dollars he was entitled to on his own application. Mrs. Davy, he told the court, agreed to give him her NHT benefit. He made it clear to her that she would not acquire an interest in the property. The transfer was only to enable him to acquire the larger mortgage. She understood he would be solely responsible for the repayments of the loan.
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> She consented to give him her benefit because she was grateful to him for putting her through C.A.S.T. for three years. As a consequence of this understanding he instructed his Attorney-at-Law Dr. Dennis Forsythe to have her name placed on the title. He was supported by Dr. Dennis Forsythe who testified that Mr. Davy told him he was not making a

> gift to Mrs. Davy but rather wished to obtain a mortgage.
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> The understanding was that they would live in the house until "life came up" then they would acquire something else. In other words, when he was in a better position he would provide something for both of them. Mr. Davy's evidence is that after Mrs. Davy's name was placed on the title, she requested that he give her a life interest in the property. He refused, and told her that the property was for his five children. Consequently, she refused to sign the NHT documents. As a result the loan was never obtained and construction ceased in 1995."

In respect of the wife, the learned trial judge said:

> "Mrs. Davy vehemently disputed this claim. She contended that Mr. Davy intended exactly what was stated on the title. That is, she holds the legal and beneficial interest in the estate as a tenant in common with him. According to her, they met in 1984 and not 1987. Prior to their marriage in 1991, there was no construction on the property, except for one or two retaining walls. She was the main contributor to the construction of the house having contributed in excess of three hundred thousand dollars from her salary as a teacher at Holy Childhood High School and monies earned from teaching extra lessons.
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> Mr. Davy, she contended, was employed at a steady job for only three short years during the marriage. Thereafter, his trucks worked only intermittently, and the profits were either negligible or non-existent. They agreed that her name should be added to the title because that was to be their matrimonial home. There was never any promise to give Mr. Davy her NHT benefit. It was to benefit them both. It was she, she testified, who suggested, that they approach NHT because their funds were being depleted. She learnt that they could obtain a loan from NHT.

> He was unemployed at the time, and so he was to apply as self-employed. However, he was required to pay up his arrears before they could access the loan. He failed to do so, and that was the reason they did not access the loan and construction ceased. They agreed to devise and bequeath their respective interest in the property to each other so that in the event of death, the property would belong to their daughter."

5. The court roundly rejected the contention of the wife that she contributed to the construction of the house on the premises of 70 Catherine Close. As there is no ground of appeal challenging this finding, I will not be detained on this aspect. As regards the circumstances pertinent to the transfer, the learned trial judge dealt with the wife's evidence in this way.

> "Mrs. Davy's evidence is replete with inconsistencies. She insisted under cross-examination, that her name was placed on the title, before they had any discussion to approach the National Housing Trust. However, is this really true? At paragraph 9 of her affidavit, she deponed as follows:
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> > "It was agreed between us that the claimant would pay off all his arrears which he owed to the NHT and expedite the transfer of my name on the duplicate certificate of title for the abovementioned property, so that, we both could access the loan."
>
> Such a statement unequivocally asserts that the placing of her name on the title and the paying off of his arrears were pre-requisites to the acquisition of the loan.
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> Mrs. Davy in her affidavit, has therefore supported Mr. Davy that the discussions about approaching NHT

> indeed occurred before her name was placed on the title. Under cross-examination however, she denied making that statement even though her affidavit was signed by her, a teacher.
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> Under cross-examination by Mr. Steer, she testified that before construction commenced there were not many discussions that her name should be placed on the title. However, when confronted by her affidavit she admitted she had so deponed.
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> Mrs. Davy's testimony was that because Mr. Davy was unemployed at the time they approached NHT he sought the mortgage as an unemployed person. The evidence was that he was employed in 1995. Also her affidavit evidence was that they approached NHT before 1995, and not after as she testified."

Then the learned trial judge concluded as follows:

> "Mrs. Davy's credibility has been severely impugned under cross-examination. Upon examination of the evidence I have found Mr. Davy to be a more reliable witness. As a consequence in areas where their evidence conflict, I accept Mr. Davy's and reject Mrs. Davy's."

The learned trial judge saw and heard the parties. There was an adequate basis to ground her findings. There is no reason at all to disturb her findings as to preference of the evidence of the husband as against that of the wife.

6. I now turn my attention to the legal principles pertinent to the doctrine of the presumption of advancement. I will begin by quoting two passages from the advice of their Lordships' Board in **Neo Tao Kim v. Foo Stie Wah (m.w.)** Privy Council Appeal No. 30 of 1982 unreported, delivered the 4th March 1985. The first is at page 5 which is:

> "The nature of the presumption of advancement is accurately stated in Snell's Principles of Equity, 27th Edition, pages 176 at seq, under the distinguished editorship of Sir Robert Megarry V-C. "This presumption of advancement, as it is called, applies to all cases in which the person providing the purchase-money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, [e.g.] where the former is the husband or father of, or stands in loco parentis to, the latter ... Accordingly, if a man buys property and has it conveyed to his wife ... prima facie this is a gift to her ... However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened ..." The qualification expressed in the final sentence of this quotation reflects views which had been expressed four years earlier by Lord Diplock in **Pettitt v. Pettitt**, [1970] A .C. at page 824. Sir Robert Megarry rightly referred to "this presumption of advancement, as it is called" because, as Lord Upjohn pointed out in **Pettitt v. Pettitt** at page 814, "it is no more than a circumstance of evidence which may rebut the presumption of resulting trust"' i.e. a trust resulting to the husband if he is the provider of the money."

The second is at page 3 and reads thus:

> "Their Lordships respectfully observe that it was not appropriate for the Court of Appeal to pray in aid the doctrine of presumption of advancement. The trial judge had found as a fact, with which the Court of Appeal agreed, that there was a common intention that the house should be bought "for the wife as the matrimonial home", which in the context of the judgment of the trial judge meant "for the wife beneficially as the matrimonial home". This common intention by itself established the beneficial ownership and precluded the operation of any presumption".

It would seem to me that the doctrine of the presumption of advancement does not arise for consideration in circumstances where:

> (a) The common intention of the parties to share beneficially in the property is established and;
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> (b) Where the beneficial interest sought is on the basis of some contribution to the acquisition of the subject property.

In this case (a) is not relevant nor was it so suggested. It should be noted that no loan was realized from the National Housing Trust. As to (b) there was a fruitless attempt by the wife to persuade the court that she had contributed $300,000.00 to the construction. So therefore, critical question is – Did the husband moved by his moral obligation to provide for his wife by the transfer of 26th January 1995, make a gift to his wife? The resolution of this question is determinative of the issue which faced the court below. The learned trial judge's answer was that the husband never made any gift his wife. She said:

> "I accept Mr. Davy's evidence that she agreed to give him her benefit in circumstances outlined by him. I find she reneged and refused to sign the NHT documents."

7. Since the transfer does raise the issue of the presumption of advancement the court below had to determine if that presumption had been rebutted. The learned trial judge in her conclusion said:

> "I hold that the presumption of advancement to Mrs. Davy which arises on the facts of this case has been rebutted."

This finding was inevitable in view of the fact that on her assessment of the evidence presented she accepted that of the husband and rejected that of the wife. Essentially she found that the wife's name had been placed on the title only as a means of facilitating a larger loan from the National Housing Trust. There is no reason to disturb her findings. Accordingly the ground of appeal which is concerned with challenging the findings of the facts fails. The learned trial judge dealt adequately with all the complaints now raised. The learned trial judge was not oblivious to the social and economical milieu at the time of the transfer. There was reference to this consideration in **Neville Lynch v. Maureen Lynch** (1991) 28 J.L.R. 8 at page 13. D – G, where Carey J.A. in his judgment said:

> "It is now a fact a modern economic reality that many building societies require as a matter of policy the names of husband and wife to be joined as parties to a mortgage loan. This fact was appreciated by Lord Diplock in **Pettitt v. Pettitt** (1969) 2 ALL E.R. 385 at p. 415 when he observed:
>
> > "... The old presumptions of advancement and resulting trust are inappropriate to these kinds of transactions and the fact that the legal estate if conveyed to the wife or to the husband or to both jointly though it may be significant in indicating their actual common intention is not necessarily decisive since it is often influenced by the requirements of the building society which provides the mortgage."
>
> The fact that a wife agrees to be a party to a mortgage loan granted to her spouse and herself does not inevitably mean that she expects "a piece of

> the action" if I may be pardoned the use of an Americanism. A great many relatives assist their relations in this way, and I have not the least doubt that no one would say that they expect thereby to have a share in the equity."

8. Perhaps the views I have already given should be enough to dispose of this appeal which must be dismissed. However, in dealing with the doctrine of the presumption of advancement the learned trial judge appears to have veered a bit off course. She said:

> "However, had I found that she made contributions to the construction of the house, even though the construction began prior to their marriage, such evidence could be regarded as cogent evidence that the intention was that she should benefit. Campbell J.A. (Ag.) as he then was in **Harris v. Harris** very eloquently expressed the law as follows:
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> > "It is undoubtedly true that the presumption of advancement which arises as a matter of law may be strengthened by showing contribution by the grantee to the purchase price of the property, or by the conduct of pooling the resources by the parties but certainly is not weakened or negatived by proof or absence of contribution." (See **Harris v. Harris** [1982] 19 J.L.R. 319) (Emphasis mine)

In determining whether a presumption of advancement has been established it is the intention of the "donor" which is all important. The "donee" may entertain a wish or hope that there is a beneficial interest obtained – but that is all that such "donee" will have if the presumption is rebutted as it is in this case. But to

return to the dictum cited by the learned trial judge – that dictum was considered in **Lynch v. Lynch** (supra). In that case Carey, J.A. at page 11 pointed out that that same Campbell, J.A., (Acting.) in his judgment said:

> "... This presumption of advancement is not based on contribution to the purchase price, it is raised by implication of law as being consistent with an intention by a husband to satisfy an equitable obligation to support or make provision for a wife..."

It was therefore unwise for the learned trial judge to have placed reliance on the dictum she cited, which is not in harmony with the authorities. This passage from the judgment the learned trial judge just discussed prompted ground of appeal 2(a). I would regard the learned trial judge's comments as entirely obiter and does not detract from her core finding that the transfer was a matter of convenience. As for grounds 2 (b) and (c), all I need say is that there is no substance to them. Although I have scrupulously read the judgment I am unable to find that the learned trial judge expressed any view such as that complained of in ground 2 (b). Ground 2 (c) is unfounded.

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9. In respect of ground (3) this pertains to a question of fact and is really an addendum to ground 1, which has already been discussed. This comment also applies to ground 4 and it should be said that, while this ground was not abandoned it was not pursued.

10 It is only left to be said that I would dismiss this appeal and affirm the judgment of the court below. The wife should pay the costs of this appeal.

HARRIS, J.A:

This is an appeal from an order of Sinclair Haynes, J on an application by the respondent under section 16 of the Married Women's Property Act, declaring that the respondent was the sole legal owner of property known as 70 Catherine Close, Queen Hill in the parish of Saint Andrew.

The parties are husband and wife. The appellant is a teacher and the respondent a heavy equipment operator and a haulage contractor. They were married on June 15, 1991 but have been separated since July 2002. Prior to the marriage, they lived in a common law union for approximately two years. The marriage produced one child, born on February 8, 1996. The respondent has five other children, four from a previous marriage and one from another union.

Prior to and during the marriage, the appellant attended the College of Arts Science and Technology as a full time student for three years. Expenses for her education and maintenance were fully defrayed by the respondent while she was a student.

The property which forms the subject matter of this appeal was purchased by the respondent and transferred to him on July 6, 1984 as the sole registered proprietor. On March 7, 1995 it was transferred by the respondent to the appellant and himself as tenants in common.

The appellant's case is that the respondent and herself met in 1984. Construction on the land at 70 Catherine Close commenced in 1991, after the marriage. Prior to the marriage, only one or two retaining walls were erected on the land. She expended a significant amount in defraying the construction costs, as, at the time, she was employed as a teacher at Holy Childhood High School

earning a salary, as well as additional income from tuition in extra lessons. She also assisted with the household expenditure. During the marriage, the respondent had been steadily employed for three years only and thereafter profits from trucks owned by him which he operated as a haulage contractor were minimal. Sometime after the building commenced, funds available for construction costs became exhausted and a sum in excess of 1.3 million dollars was required. She introduced the respondent to the National Housing Trust (Housing Trust) with a view to obtaining a loan. He would have qualified for a loan of $650,000.00 while her contributions to the Housing Trust would have permitted her to secure a loan of a similar amount.

It was agreed between them that her name would be added to the title as that property would be their matrimonial home. The respondent's contributions to the Housing Trust were in arrears. They brokered an agreement that he would liquidate his indebtedness to the Housing Trust and he would expedite the endorsement of her name on the instrument of title, by way of a transfer, so that the total loan of 1.3 million dollars could be accessed by them.

She denied that the utilization of her Housing Trust benefits was soley to facilitate the respondent being able to access a loan in excess of that which his contributions allowed. Further, she declared that he was in default in making the requisite payments. As a result, the loan was not obtained and construction ceased.

It was the respondent's case that the source of funding of the construction was mainly from sums earned by him while working in the United States of America and the construction costs were funded by him solely.

Construction commenced in late 1982 or early 1983, prior to his meeting the appellant, he having met her in 1987. The appellant made no contribution to the building nor did she assist with living expenses of the household. The appellant and himself began living together in 1989, at which time, retaining walls as well as the foundation were complete and the walls of the house were in the process of being erected. The object of erecting the house was for the benefit of his children.

Sometime after the marriage but prior to 1995, he was advised by a friend of the appellant that a joint application with the appellant would secure their qualification for a mortgage of $1.3 million dollars from the Housing Trust. The matter was discussed with the appellant and she consented to allow him to utilize the full extent of the benefit of her loan facility from the Housing Trust as a token of her gratitude to him for having fully maintained and supported her for three years while she attended the College of Arts Science and Technology.

At the time he attended the Housing Trust his contributions were fully paid up to 1995. It was a requirement of the Housing Trust that both parties be signatories to the mortgage documents, as a consequence, it became necessary for the appellant's name to be placed on the certificate of title. The object of the transfer was to facilitate a loan in excess of that which he would have been able to borrow on his own.

He impressed on the appellant that she would not acquire an interest in the property and this she understood. She was also cognizant of the fact that the repayment of the loan would be his responsibility. Following this agreement, he attended on his attorney at law, Dr. Dennis Forsythe and issued instructions to

him to effect the transfer.

Dr. Forsythe was called as a witness for the appellant. He testified that the respondent told him that the transfer was not a gift to the appellant but was a means of obtaining a mortgage.

Subsequent to the transfer, the appellant requested that he make a will giving her a life interest in the property. He did not accede to the request, as, he informed her that the property was for the benefit of his five children. They agreed that they would continue to live in the house and upon improvement of his financial position he would provide a house for them both. Following this, the appellant refused to execute the mortgage documents because the respondent would not make a will in the terms desired by her, and as a consequence, the construction ceased in 1995.

The respondent, on June 25, 2003, by way of a fixed date claim form sought a declaration that he is entitled to the absolute beneficial interest in the property. He also sought an order that appellant transfer her interest in the property to him.

On February 9, 2004, the learned trial judge, made the following order:

> "(1) The claimant is entitled to the entire beneficial interest in the property.
>
> (2) The defendant is to transfer her legal interest in the property to the claimant and the claimant shall bear the costs of effecting same.
>
> (3) . . ."

The following grounds of appeal were filed:

"1 The decision of the learned trial judge is not supported by the evidence which weighs heavily in favour of the Appellant in strengthening the presumption of Advancement in that:

(i) Even on the Respondent's evidence the Instrument of Transfer was prepared by a lawyer who transferred the property by way of gift to the Appellant as Tenant in Common though the Respondent says that he did not intend to make a gift.

(ii) The respondent although he relies on convenience as a reason for transferring the property to the Appellant and himself, took no steps to undo the status of tenancy in common for 9 years until the marriage had broken down and he had filed for divorce.

(iii) There was absolutely no evidence from the Respondent as to how he made it clear to the Respondent that she would have no beneficial interest in the property.

(iv) The Respondent's evidence that he intended to obtain a joint mortgage with the Appellant clearly meant that binding legal and financial obligations were intended by both parties and would have been assumed by the Appellant. It is therefore ludicrous to accept the Respondent evidence that the Appellant understood that he would be solely responsible for the mortgage.

(v) The Respondent's evidence that he intended the property to be the matrimonial home when added to the Transfer of the property to the Appellant as Tenant in Common which gave her an irrevocable right to freely alienate the same for over 9 years quite clearly demonstrates an intention to incur legal and financial obligations and that an outright gift to the appellant was intended.

(vi) The evidence that the Appellant promised to give her NHT benefit to the Respondent so that he could build a home for his adult children in exchange for having assisted her through College is incredulous in the circumstances where the parties were man and wife and had no home of their own.

(vii) The evidence that the Appellant a life interest in the property after her name was placed on the title in a more substantial capacity as joint owner is not believable.

(viii) The evidence that one half share of the property was willed to the Respondent children (sic) and the other

one half to take care of his expenses is not believable since for his expenses to be taken care of the property would have had to be the subject of some type of instrument, which means that he would have had to take steps to have legal control of the "other one half", a step which he failed to take for 9 years. It also contradicts the evidence that the property was for his children.

(2) The learned trial judge failed to correctly apply the principles of the Presumption of Advancement to the facts when:

(a) she having found non contribution by the Appellant to the construction of the house she used the non-contribution as evidence which negatived the presumption of advancement.

(b) she expressed the view that if the Appellant was responsible for the construction of the house the presumption of Advancement would not arise since the parties are registered as proprietors of the whole property which includes the land as well as the house.

(c) she failed to correctly interpret and apply the ratio *decidendi* of the case of ***Harris v Harris*** (1982) 19 JLR 319.

(3) The Respondent's reason for transferring one-half of the property to the Appellant is incredulous and should not have been used to rebut the Presumption of advancement since there was absolutely no necessity in law for the legal/beneficial interest in the property to be disturbed in order to access the Appellant's NHT benefit and obtain a larger mortgage-A fact which most certainly would have been told to him by the NHT and/or his attorney.

(4) The learned trial judge came to her decision in part by misconstruing the evidence of the Appellant concerning her contributions to the construction of the house".

The grounds of appeal are, in essence, couched in terms of a challenge to the learned trial judge's findings on the question of the presumption of an advancement. However, the details of the order appealed and the findings of fact and law which have been challenged, incorporate the learned trial judge's complete findings. The learned trial judge first considered the question as to

whether there was a common intention that the appellant had acquired a beneficial interest in the property and having found that no such intention existed, proceeded to give consideration to the doctrine of the presumption of advancement and concluded that an advancement could not be presumed in the appellant's favour. It is therefore apt to give consideration to both limbs of the learned trial judge's decision.

Conveyance of property in the joint names of parties as tenants in common does not inevitably dictate their proportionate holding in the beneficial interest. Although the parties, on the face of it, have a vested interest in the property, unless expressly provided for, their respective shares may yet have to be determined.

In ***Stephenson v Anderson*** S.C.C.A. 55/00 delivered on June 12, 2003, Harrison, J.A., as he then was, said:

> "Where a registered title is in the names of parties as tenants in common, it is referable to the manner in which the legal estate is held. It is not thereby necessarily referable to the proportionate holding in the beneficial interest. However, the reference to property being held as tenants in common, prima facie, means that the beneficial interest is shared equally but the specific respective proportions in the absence of an express declaration, may be unknown".

He went on to say:

> "A mere recital that the legal estate is held by the parties as tenants in common is not determinate of the proportionate share of each party in the beneficial interest. A presumption arises that it is held in equal shares but the particular circumstances of the case must be considered".

The case of ***Stephenson v Anderson*** (supra), was concerned with the question as to whether title held in the joint names of an unmarried couple as

tenants in common was conclusive as to the legal beneficial interest of the parties one party having made no contribution to the purchase of the property. It establishes that where the legal estate is held by parties as tenants in common, the beneficial interest is presumptively held in equal shares in equity, which presumption is rebuttable.

Where property is conveyed in the joint names of a husband and wife, and the wife claims an interest therein, the determination of such issue may rest on one of two propositions of law. Such claim may be established, either by way of a common intention of parties that she should share in property, or by the presumption of an advancement.

Consideration will first be given to the question of a common intention. In order to establish an interest, a claimant must show that there was common intention between both parties that she should share the beneficial interest in the property in question and relying on that the common intention, acted to her detriment: ***Pettitt v Pettitt*** [1969] 2 All ER 385; ***Gissing v Gissing*** [1970] 2 All ER 780; and ***Grant v Edwards*** [1986] Ch 638; ***Lloyds Bank plc v Rossett & Anor*** [1990] 1 All ER 1111.

Due to the nature of the relationship between spouses, the application of the doctrine of a common intention is not devoid of some measure of difficulty, in cases where the parties are husband and wife. Notwithstanding the difficulties, the court will not imply an intention that a wife should share beneficially with her husband in property unless there is evidence to show that a reasonable man would have come to the conclusion that the beneficial interest should be shared. The necessary intention may be inferred from words or conduct or acts of the

parties. The court will only give effect to the intention if such intention is manifest. See ***Gissing v Gissing*** (supra). A court must not only be satisfied that there was a common intention that the claimant was acting in the belief that she was acquiring an interest but also that in so doing, acted to her detriment - see ***Pettitt v Pettitt*** (supra) ***Grant v Edwards*** (supra).

Conduct which will satisfy a common intention varies with the particular circumstances of each case. Where there is no express evidence of an agreement between the parties, inferences referable to a common intention may be drawn from a pattern of their conduct prior to the breakdown of the marriage. The relevant intention is not necessarily limited to the time of acquisition of the property but may extend to and include subsequent conduct throughout the marriage. See ***Gissing v Gissing*** (supra), ***Pettitt v Pettitt*** (supra), ***Nixon v Nixon*** [1969] 3 All E.R. 1134, ***Rose v Rose & Anor*** [1982] 19 J.LR 362.

Where as in this case, there is a dispute as to the existence of an express agreement between the parties, as to a shared beneficial interest, the court is harnessed with the arduous task of determining what possible inference can be drawn in establishing a common intention. Guidance in this regard is afforded by Lord Diplock in ***Pettitt v Pettitt*** (supra) when at page 413, he said:

> "How then, does the court ascertain the 'common intention' of spouses as to their respective proprietary interests in a family asset when at the time that it was acquired or improved as a result of contributions in money or money's worth by each of them they failed to formulate it themselves? It may be possible to infer from their conduct that they did in fact form an actual common intention as to their respective proprietary interests and where this is possible the courts should give effect to it."

Continuing, at page 414 he stated:

> "Unless it is possible to infer from the conduct of the spouses at the time of the concerted action in relation to acquisition or improvement of the family asset that they did form an actual common intention as to the legal consequences of their acts on the proprietary rights in the asset the court must impute to them a constructive common intention which is that which in the court's opinion would have been formed by reasonable spouses."

In dealing with the question as to whether a common intention existed between the parties that the appellant should acquire a beneficial interest in the property, the learned trial judge found that the construction of the house began before the marriage, appellant had not contributed to the construction costs, she was unable to state when the construction began, she was unaware of the progress of the project during the construction, and she exhibited no interest therein.

There is no dispute that the land was purchased by the respondent solely. The appellant contended that construction of the house commenced after the marriage and that she substantially assisted with the construction by expending sums in excess of $300,000.00. She made a valiant effort to convince the court that she was the major contributor in financing the building. The learned trial judge was not persuaded that her veracity was not impugned. Evidence by her is indeed crucial to the issue of contribution. It was shown to be manifestly unreliable.

There was evidence from a Mr. Byron McKinson, a member of the construction team, revealing that when the construction commenced, the appellant was a full time student and that the sum of $300,000.00 would have

been insufficient to defray the cost of construction of the retaining walls. This was confirmed by the respondent. Mr. McKinson carried out work on the building up to the point at which construction ceased in 1995. The edifice remained in an incomplete state up to 2003. Further evidence impugning the appellant's credibility was manifest in an assertion by her that she made payments to Mr. McKinson for work done yet she was unable to identify the periods during which he worked.

She declared that the respondent worked only three years during the marriage, thus implying that the burden of financial contributions were assumed by her. However, in cross examination, she agreed that up to 1995, the respondent was continuously employed. It was further asserted by her that the respondent infrequently secured haulage contracts for his trucks and as a result, the trucks operated at a loss, rendering the respondent's contribution to the construction negligible. These assertions proved to be untrue.

It appears from the evidence that the parties approached the Housing Trust prior to 1995. A letter from the Housing Trust shows that up to 1994, the respondent's contributions were not in arrears. This belies the appellant's assertion that the respondent's contributions were in arrears at the time of their attendance on the Housing Trust. Additionally, further documentary evidence in the form of a verification of contributions to the Housing Trust, duly executed by their Verification Officer and co-signed by the Compliance Inspector, indicates that between 1991 and 1995 the respondent was employed, as, his contributions were remitted to the Housing Trust.

It was also a finding of the learned trial judge that the appellant having

reneged on the agreement to sign the mortgage documents, had not acted to her detriment. The appellant averred that the acquisition of the loan was subject to the respondent paying off the arrears and the endorsement of her name on the title. The evidence reveals that the respondent was not in arrears at the time the mortgage was sought. This clearly points to the fact that the mortgage had not been obtained due to the respondent being in arrears with his contributions but for the reason of the appellant's refusal to execute the mortgage documents.

An averment of hers by way of an affidavit sworn on August 7, 2003, asserted that the parties agreed that the respondent would pay off his arrears and expedite the transfer. It is manifest that discussions as to the transfer would have taken place subsequent to their attendance at the Housing Trust, as indicated by the respondent. However, in cross examination, she insisted that her name was placed on the title before the respondent and herself had discussions touching the loan. This clearly contradicts her statement in the affidavit. She later admitted the contents of her affidavit.

There is no doubt that the building was funded by the respondent from his resources. The appellant made no contribution to the construction of the house. There were no acts referable to a common intention that she should acquire a beneficial interest in the property. She did not execute the documents for the loan. The loan from the Housing Trust never materialized. Therefore, it cannot be said that the appellant acted to her detriment by assisting with securing a mortgage to assist with construction. There is nothing to show that she altered her position in reliance of a promise by the respondent, or on an understanding between the parties that she should share in the property.

It was contended by Mrs. Taylor-Wright that the respondent, with the aid of legal advice, effected the transfer, and for over nine years raised no objection to the appellant's interest, which, in fact supports his true intention and he would be estopped from denying her an interest in the property.

The doctrine of estoppel was defined by Lord Wright in ***Canada & Dominion Sugar Co. Ltd. v Canadian National (West Indies) Steamships Ltd.*** [1946] 3 WWR 759, p. 764 as follows:

> "Estoppel is a complex legal notion, involving a combination of several essential elements – statement to be acted upon, action on the faith of it, resulting detriment to the actor. Estoppel is often described as a rule of evidence, as indeed it may be so described. But the whole concept is more correctly viewed as a substantive rule of law. ... Estoppel is different from contract both in its nature and consequences. But the relationship between the parties must also be such that the imputed truth of the statement is a necessary step in the constitution of the cause of action".

A party is precluded from denying his deed or action by virtue of his conduct or representations made to another. However, for the doctrine of estoppel to operate, it is of manifest importance that the party who seeks to rely on it establishes that he or she was acting on faith of the representation or conduct of the person who made the representation and was induced to change his position - ***Bell v Marsh*** [1903] 1 Ch 528. It must also be shown that the party against whom the estoppel is claimed had a duty not to mislead the claimant and the misleading was a real and proximate cause of his loss.

See ***Longman v Bath Electrical Tramways Limited*** [1905] 1 Ch 646.

The principle of equitable estoppel would not assist the appellant in the

circumstance of this case. No evidence of the appellant's contribution to the construction exists, nor did she facilitate the respondent in securing the proposed mortgage. Even if I had been satisfied that the respondent had represented to her that she would have acquired an interest in the property, this would not, in my judgment avail her as an estoppel. She did not act to her detriment. There is no evidence of any assurance, given to her by him, on which she acted, that she should acquire an interest in the property. Nor is there any evidence that the respondent, by his conduct, misled her as to the acquisition of a beneficial interest.

It was further argued by Mrs. Taylor-Wright that the transfer of the property in the joint names of the parties as tenants in common was not done as a matter of convenience but was in effect a gift to the appellant. She contended that there is overwhelming evidence demonstrating a joint enterprise between the parties.

The learned trial judge found that the appellant agreed to make available her Housing Trust benefits to the respondent in return for his benevolence to her, and that the transfer of the property was for the respondent's convenience. It was also her finding that the respondent's intention was to acquire other property for appellant and himself as he did not intend to clog the property with a life interest. She thereby concluded that the respondent did not intend to make an advancement.

The presumption of an advancement is raised by implication of law. Where a husband purchases property in the joint names of his wife and himself, in the absence of evidence to the contrary, a gift to the wife is presumed. In

re Bishop (dec'd) [1965] All ER 249.

The application of the presumption is recognized by the learned authors of Snell's Principles of Equity 27th Edition pages 176 and 177 as follows:

> "The presumption of advancement, as it is called, applies to all cases in which the person providing the purchase money is under an equitable obligation to support, or make provision for, the person to whom the property is conveyed, [e.g.] where the former is the husband or father of, or stands in *loco parentis* to, the latter. ... Accordingly, if a man buys property and has it conveyed to his wife ... prima facie this is a gift to her. ... However, under modern conditions, with the reduction in the wife's economic dependence on her husband, the force of the presumption is much weakened. ..."

This doctrine becomes operative only where no evidence of intention exists and one has to be imputed. In ***Pettitt v Pettitt*** (supra) at pages 405 & 406 Lord Upjohn said:

> "The property may be conveyed into the name of one or other or into the names of both spouses jointly in which case parol evidence is admissible as to the beneficial ownership that was intended by them at the time of acquisition and if, as very frequently happens as between husband and wife, such evidence is not forthcoming, the court may be able to draw an inference as to their intentions from their conduct. If there is no such available evidence then what are called the presumptions come into play."

He went on to say:

> "First, then, in the absence of all other evidence, if the property is conveyed into the name of one spouse at law that will operate to convey also the beneficial interest and if conveyed to the spouses jointly that operates to convey the beneficial interest to the spouses jointly, i.e., with benefit of survivorship, but it is seldom that this will be determinative. It is far more likely to be solved by the doctrine of resulting trust, namely, that in the absence of evidence to the

> contrary if the property be conveyed into the name of a stranger he will hold it as trustee for the person putting up the purchase money and if the purchase money has been provided by two or more persons the property is held for those persons in proportion to the purchase money that they have provided."

The Privy Council, in outlining the salient features of the doctrine in the case of ***Neo Tai v Foo Stie Wah (m.w.)*** Privy Council Appeal No. 30 of 1982, (unreported) delivered on March 4, 1985 stated:

> "In the opinion of their Lordships the presumption of advancement is not an immutable rule to be applied blindly where there is no direct evidence as to the common intention of the spouses. It is rather a guideline to be followed by the court in an appropriate case when it searches for the intention which ought, in the absence of evidence, to be imputed to the parties. It is proper for the trial judge to review the background of the case and to decide in appropriate circumstances that the guideline is not one which can sensibly be followed in the case before him".

The court, in determining the beneficial ownership of the property jointly held by husband and wife must draw inferences from the parties' conduct and any other relevant circumstances to establish whether it can be imputed that the husband intended to convey a gift to the wife - see ***Harris v Harris*** (supra), ***Lynch v Lynch*** (1991) 28 JLR 8. The presumption is no more than a circumstance of evidence which may rebut a presumption of resulting trust. This presumption, being rebuttable, in the absence of direct evidence of the parties' intention, ought not to be applied immutably. It's susceptibility to rebuttal on minimal evidence was acknowledged by Lord Upjohn in ***Pettitt v Pettitt*** (supra) at page 406 where he observed that: "These presumptions or circumstances of evidence are readily rebutted by comparatively slight evidence".

The Australian case of ***Muschinski v Dodd*** [1986] 160 C.L.R. 583

supports the view that property held by parties as tenants in common does not in itself assign to a claimant an inalienable right to a beneficial interest. In that case, property was purchased in the names of an unmarried couple. The woman provided the purchase money. The property was transferred to them as tenants in common with the consent of the woman, on condition that the man undertook to remodel a cottage thereon and pay for a prefabricated house. This condition was never fulfilled. A claim by the woman to the sole beneficial ownership of the property was upheld by the court, in that, the provision of the purchase money by the woman gave rise to the presumption of a resulting trust, which presumption had been rebutted for the reason that the intention of the woman to grant a beneficial interest to the man was immediate and conditional.

In the instant case, the appellant made no contribution to establish an interest in the property by way of a common intention. However, it is in the joint names of the parties. The further question is whether the doctrine of the presumption of advancement avails the appellant. Can it be imputed that the respondent intended an advancement of the property to her? The presumption being rebuttable, is there evidence demonstrating that it has not been rebutted?

In the case under review the respondent provided the purchase money. This however, provides no evidence of a contrary intention to that which is to be inferred as to the ownership of the property. Prima facie, the conveyance of an interest in the property to the appellant is considered a gift to her. See in ***re Bishop (dec'd)*** (supra) ***Harris v Harris*** (supra) ***Tinker v Tinker*** [1970] 1 All E R 540. The question therefore is whether there is evidence of an intention which can be imputed to the parties as to the ownership of the property. The

intention of the respondent at the time of the transfer is crucial to the determination of the issue as to whether a gift to the appellant can be presumed.

It is the appellant's contention that the documents for the loan were not executed by her for the reason that the respondent had failed to pay up the arrears with the Housing Trust, which rendered the loan inaccessible. As earlier pointed out, this statement was untrue. The documentary evidence does not disclose that the respondent was in arrears at the time the loan was sought.

The appellant further contended that her name was placed on the title prior to the discussions relating to the loan. Is there evidence which supports her contention? It was her averment by way of her affidavit sworn of August 7, 2003, in which she deposes at paragraph, 9 as follows:

> "It was agreed between us that the claimant would pay off all his arrears which he owed to the National Housing Trust and expedite the transfer of my name on the Duplicate Certificate of Title for the abovementioned property so that we both could access the loan".

In cross examination she resiled from the foregoing statement and insisted that her name was endorsed on the title before the discussions had taken place. However, when pressed, she acknowledged that she had made the averment as stated in her affidavit. The respondent related that the discussions with respect to the loan were carried out prior to the endorsement of her name on the document of title. Her admission surely lends credence to the respondent's evidence that the discussions with respect to the loan had taken place prior to her name being placed on the title. Clearly, this must be so. Logic dictates that the question of the endorsement of her name on the document of title would not have occurred until after the interview with the

Housing Trust officer.

The respondent declared that the purchase of the property was intended for the benefit of his children and himself and that the appellant refused to execute the mortgage documents because he declined to grant her a life interest in the property. He asserted that upon purchase, his intention was to apply one half of the property for the use and benefit of his children and the other half for his personal benefit. It is of worth to note that at the time of purchase, the child of the union between the appellant and himself was not yet born and the parties had not yet met. However, it does not necessarily follow that he could not have upon marriage changed his mind and decided to grant to the appellant an interest in the property.

The learned trial judge found that the object of the transfer was to allow the respondent access to a loan surpassing that to which he would have been entitled and that the appellant agreed to forego her beneficial entitlement to Housing Trust loan in favour of the respondent but refused to sign the mortgage documents consequent on his refusal to grant her a life interest. However, even if she had executed the mortgage document, that would not necessarily be sufficient to grant her a beneficial interest in the property.

In ***Lynch v Lynch*** (supra) the title to property was registered in the joint names of the husband and the wife. The husband paid the deposit on the purchase money as well as met the mortgage repayments. The parties were subsequently divorced. The wife contended that there was in existence an agreement for her to share in the property. The husband however maintained that her name was placed on the title in compliance with a requisition by the

company from which the mortgage was secured and that it was never his intention that she would be entitled to an interest in the property. The trial judge gave judgment in favour of the wife and ruled that she was entitled to one half share.

On appeal, in allowing the appeal, it was held among other things, that the presumption of advancement did not arise and that although the wife was a party to the mortgage agreement that in itself did not grant her an interest in the property. It was also held that the wife was discredited as to her income and contributions and that the husband would have completed the mortgage transaction on his own if it were possible and he had only agreed for the inclusion of the wife's name on the title for convenience.

Further, there is also evidence from Dr. Dennis Forsythe, which the learned trial judge accepted, that at the time of the transfer the respondent advised him that he did not intend a gift of the property to the appellant.

The transfer was registered on March 7, 1995. The respondent commenced action claiming his entitlement to the property, on June 23, 2003. It cannot be denied that subsequent to the transfer, over eight years elapsed before the respondent sought to present his claim, as contended by Mrs. Taylor-Wright. She maintained that this was demonstrably an intention on the part of the respondent to grant the appellant a beneficial interest in the property and she had a right to and could have alienated her interest. It is recognized that, following the transfer, it was distinctly possible that the appellant could have taken steps to alienate that part of the property which was vested in her as tenant in common. However, it would have been undoubtedly open to the

respondent to raise an objection to any attempt at alienation of the property by her.

In my judgment, the object of the transfer of the property would have been for convenience and not to convey to the appellant an interest in it. The evidence does not disclose that a conferral of a gift on her was intended. The circumstances of this case is not such as would lead the court to vest a share of the property in the appellant, as, it is manifest that an advancement of the property to the appellant cannot be presumed.

The learned trial judge based her evaluation of the evidence on the credibility of the witnesses. This is pre-eminently her duty. She saw and heard them. She found that the appellant was inexorably discredited under cross examination and therefore an unreliable witness. An appellate court will not interfere with the findings of a trial judge unless it is convinced that the learned judge had incorrectly applied the law or had misdirected himself or herself on the facts – see ***Watt v Thomas*** [1947] AC 484. She fully appreciated the weight of the evidence, correctly applied the legal principles and arrived at the correct conclusion.

I would dismiss the appeal, with no order as to costs.

HARRISON, P

ORDER:

Appeal dismissed. Order of the court below affirmed. No order as to costs.