JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 26/93

BEFORE: THE HON. MR. JUSTICE RATTRAY, P
THE HON. MR. JUSTICE GORDON, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.

BETWEEN	URSIE ESTELLA HILL	APPLICANT/APPELLANT
AND	DELROY SYLVESTER HILL	RESPONDENT/RESPONDENT

Miss Nancy Anderson instructed by **Crafton S. Miller & Co.**, for Appellant

Miss Hilary Phillips & Denise Kitson instructed by **Grant, Stewart, Phillips & Co.** for Respondent

21st, 22nd, 23rd, 24th October 1997 & January 21, 1998

RATTRAY, P.

I have read the draft judgment of Gordon, J.A. and concur with his conclusion.

The trial judge's finding against Mrs. Hill's claim rested on the rejection of her evidence by virtue of what he considered the conflict between her case as presented and the statutory declaration in support of her caveat which she lodged to protect the interest which she claims in Dove Hill Farm.

In the statutory declaration she states in paragraph 14:

> "That the lands acquired by my husband and registered solely in his name was purchased as a result of contributions by me in respect of assisting of meeting expenses of the family."

In her affidavit dated 25th January, 1990 at paragraph 11 she states:

> "That in August, 1979 with the use of money from our joint account, the sale of 6 Foster Davis Avenue and the mortgage on 36 West Great

> House Circle we purchased premises at Dove Hill Bog Walk in the parish of Saint Catherine... "

The statutory declaration has several errors which an examination of the titles of the respective properties immediately discloses as follows:

> (i) Paragraph 4 has the date of the transfer of Longfellow Avenue to the Hills as being in the 60s. The real date of transfer is the 8th of May, 1972.
>
> (ii) Paragraphs 4, 5 & 6 have the date in which the Hills resided at Longfellow Avenue as between 1965 and 1972. The fact is that they resided there until 1974. The sale of Longfellow Avenue was in 1974 and not 1972 as stated in paragraph 6.
>
> (iii) Paragraph 7 has the proceeds of Longfellow Avenue going towards the purchase of 6 Foster Davis Drive in 1972. In fact Foster Davis Drive was purchased in 1975.
>
> (iv) Paragraph 8 has Foster Davis Drive being sold in 1977. In fact Foster Davis Drive was sold in 1979.

Despite this there is no difficulty in accepting that the Certificates of Title exhibited to her affidavit contain the correct information

Mrs. Hill states that the statutory declaration contained a further error in the sense that the contributions resulting from the sale of Foster Davis Drive and the mortgage of Great House Circle were omitted. In a declaration which is full of errors we have to assess the contents of paragraph 14 in comparison with her sworn evidence in her affidavits before the trial judge at the hearing. Is her affidavit evidence supported by the records of the sale, mortgages and purchases of the various pieces of property? Where do the probabilities lie in this regard?

There was no challenge to her entitlement to a half interest in Longfellow Avenue (a bequest to both from her father,) in Foster Davis Drive or in Great House Circle. All three matrimonial homes were jointly owned. We cannot

ignore the existence of the Bank account in the National Commercial Bank, King Street, Linstead in the joint names of both parties - D and/or U. Hill trading as Dove Hill Farms. Of some assistance also is the letter dated 18th April, 1984 from National Commercial Bank, Linstead:

> "We wish to advise that Mrs. Hill has been our valued customer for the past five years and operates a satisfactory account jointly with her husband.
>
> The latest financial statement of affairs on file reveals assets in the low seven figures, consisting mainly of real estate which are jointly owned with her husband."

This letter was clearly written with the knowledge of Mr. Hill and he cannot in my view distance himself from its implications.

We should not also ignore the fact that Dove Hill Farm became the matrimonial home.

This Court is in as good a position as the learned trial judge to assess the evidence since the totality of that evidence was given by affidavit and the conclusion was not assisted by an assessment of the demeanour of the parties as witnesses.

The purpose of lodging a caveat is to ensure that before any person can be registered as a transferee or proprietor of the property caveated, the Registrar of Titles must notify the person lodging the caveat as well as the registered proprietor of the existence of the caveat. The intending transferee or proprietor must then summon the caveator to attend before the Supreme Court or a Judge in Chambers to show cause why the caveat should not be removed.

The statutory declaration supporting the caveat must state the nature of the title under which the claim is made, that is some definite estate or interest

must be specified. There is no requirement for the statutory declaration to contain the evidence upon which the caveator relies to establish his claim. In the caveat lodged by Mrs. Hill, she makes her claim "as equitable owner of half share of each premises." Dove Hill Farm was the subject of two Certificates of Title. In the statutory declaration she mentions only her contributions "in respect of meeting expenses in the family." Does her omission to mention in the statutory declaration, the utilization of the proceeds of sale of 6 Foster Davis Drive and the mortgage proceeds from 36 Great House Circle towards the purchase of Dove Hill Farm estop her from relying upon these factors or create a conflict between the statutory declaration and paragraph 11 of her affidavit of the 25th January, 1990? I would think not.

The duty of the Court was to assess all the evidence and arrive at its conclusion on the standard of proof required.

I accept the law and the approach to be as was stated by Lord Justice Waite, in ***Midland plc vs Cooke and Another*** [1995] 4 All E.R. 562 at page 574 as follows:

> "When the court is proceeding, in cases like the present where the partner without legal title has successfully asserted an equitable interest through direct contribution, to determine(in the absence of express evidence of intention) what proportions the parties must be assumed to have intended for their beneficial ownership, the duty of the Judge is to undertake a survey of the whole course of dealing between the parties relevant to their ownership and occupation of the property and their sharing of its burden and advantages. That scrutiny will not confine itself to the limited range of acts of direct contribution of the sort that are needed to found a beneficial interest in the first place. It will take into consideration all conduct which throws light on the question what shares were intended. Only if that source proves inconclusive does the court fall back on the maxim that 'equality is equity'."

The learned trial judge found that Mrs. Hill's contribution to household expenses could not be of assistance to her claim to a beneficial interest in the property because - "in none of the affidavits is Mrs. Hill saying that she made adjustments to permit Mr. Hill to pay the mortgage." He relies upon ***Gissing v. Gissing*** for the proposition that contribution to household expenses alone is not enough to rebut the evidence of purchase. The affidavit evidence of Mrs. Hill is "that throughout our marriage our joint earnings were pooled together to pay for household expenses, purchase furniture, pay mortgage and other joint purchases." Mr. Hill's reply is that "save and except for mortgage payments we both contributed from our earnings to household expenses and purchase of furniture." He states however, that since 1972 he has been wholly responsible for the payment of household expenses.

Viewing the life style of the parties and their family, and the history of the marriage and their domestic environment within a Jamaican context, which account on the balance of probabilities is more credible? In my view, with an equal opportunity as the learned trial judge to make a determination on this point, I would maintain that the balance of probabilities is in favour of Mrs. Hill's account.

The learned trial judge erred in so summarily dismissing the effect of her contribution to a pool of funds utilized for the purpose of the joint needs of the parties and the family, to wit household expenses, furniture purchases , mortgage payments and other joint purchases.

It is in my view more credible that these parties commencing marriage so to speak from scratch and continuing on a domestic journey of joint acquisitions and mutual financial support did pool resources for the purposes

indicated by Mrs. Hill. As Lord Pearson stated in ***Gissing v. Gissing*** [1971) AC 886 (H.L.) at page 902 with respect to husband and wife -

> "The arrangements which they make are likely to be lacking in the precision and finality which an agreement would be expected to have. On the other hand, an intention can be imputed: it can be inferred from the evidence of their conduct and the surrounding circumstances."

The history of the relationship of the parties with respect to the acquisition of property, the proximity of the purchase of Dove Hill Farm to the receipt of the mortgage proceeds from Great House Circle, and the proceeds of sale of Foster Davis Drive, the joint bank account with relation to Dove Hill Farm and the contents of the letter dated April 14, 1984 from the National Commercial Bank Linstead, the fact that Dove Hill Farm became the matrimonial home in a scenario and a historical course of conduct between husband and wife in which all earlier matrimonial homes were jointly owned, are the factors which combine to convince me that on a balance of probabilities a compelling inference arises that there existed a common intention at the time of the purchase of Dove Hill Farm that the property should belong to both parties. These factors are in no way outweighed by the failure in a statutory declaration for the purpose of supporting a caveat to mention the contributions coming from the sale of Foster Davis Drive and the proceeds from the mortgage from Workers Savings and Loan Bank on Great House Circle.

I agree therefore with Gordon J.A. that the beneficial ownership of Dove Hill Farm at the time of the acquisition vested in the appellant and respondent in equal shares. The question now posed is as to whether that proportion has since changed.

In the quest for a satisfactory answer I am guided by the language of Griffiths LJ in ***Bernard v. Joseph*** [1982] 3 All E.R. 162 at page 171-

> "It might in exceptional circumstances be inferred that the parties agreed to alter their beneficial interests after the house was bought; ... But this depends on the court being able to infer an intention to alter the share in which the beneficial interest was previously held; ... As a general rule the only relevant contributions will be those up to the date of the separation, but it does not necessarily follow that what happens after the separation will in every case be irrelevant. In my opinion the judge should examine all the evidence placed before him and not regard the date of separation as a cut-off point. The task imposed on the judge is so difficult that every scrap of evidence may be of value, and should be available to him."

Although there is no evidence as to the date of separation, the appellant deponed in 1990 that the marriage had broken down and the respondent agreed. Is there any evidence upon which the Court could rely to find that the original proportion of equality at the time of acquisition of the property should now be varied?

Although the proportional entitlement at that date would be as it was at the date of acquisition in my view equity requires that account be taken of the fact that since that time the mortgage and property tax payments would have been made solely by the husband respondent.

The appropriate order must therefore reflect this factor.

I would allow the appeal and order that the ownership of Dove Hill Farm vests jointly in Mr. & Mrs. Hill in equal shares. For the reasons stated I agree with the full Order as proposed by Gordon, J.A.

GORDON J.A.

Ursie Estella Hill, (the **Appellant**) and Delroy Sylvester Hill (**the Respondent**) were married on 4th August 1963 and thereafter lived and cohabited at 22 Longfellow Avenue, Duhaney Park in the parish of St. Andrew, a house owned by Mrs. Hill's father, Mr. Nathaniel Johnston. Nathaniel Johnston bequeathed this house to his daughter and her husband and after his death the property was transferred by his executors to Mr. and Mrs Hill as joint tenants by instrument of transfer registered on 10th May, 1972. The property was subject to a mortgage registered on 28th October, 1965 in the sum of One Thousand Five Hundred and Seventy Five Pounds (£1575.00).

22 Longfellow Avenue was sold for Twenty Two Thousand Dollars ($22,000.00) and transferred to the purchasers on 23rd December, 1974, the proceeds of this sale were used to acquire 6 Foster Davis Drive, Kingston 6 for Thirty Thousand Dollars ($30,000.00) subject to a mortgage of Seventeen Thousand Dollars ($17,000.00). These premises were transferred to Mr and Mrs Hill jointly by instrument dated 4th February, 1975 and registered on 6th February, 1975. This house now became the Hills' matrimonial home.

By instrument of transfer dated 31st March 1977 and registered on 28th April 1977 premises , 36 West Great House Circle, Havendale , St. Andrew was transferred to the Appellant and Respondent as joint tenants for a purchase price of Fifty Two Thousand Dollars ($52,000.00). A mortgage for Thirty Three Thousand Dollars ($33,000.00) from Blaise Trust Company Ltd. was registered

on April 28, 1997. The uncontraverted evidence was that Mrs. Hill contributed Three Thousand Dollars ($3,000.00) to the deposit on this property. This sum she obtained as a loan from the Jamaica Civil Service Mutual Thrift Society Ltd. of which society, as a Civil Servant, she was a member. The family moved into residence at West Great House Circle which became the matrimonial home.

On 18th May, 1979 the respondent entered into an agreement to purchase two lots of land totalling one hundred and fifty five (155) acres and known as Dove Hill Farm in Linstead in the parish of St. Catherine for One Hundred and Forty Five Thousand Dollars ($145,000.00). On 10th August , 1979, these lots were transferred to the respondent's name as the sole owner. A mortgage of One Hundred and Twenty Thousand Dollars ($120,000,00) was registered on the title. The Hill family continued to live in apparent bliss at the home at West Great House Circle until 1984/85 when they moved to reside on the farm at Dove Hill in St. Catherine. This now became the matrimonial home.

The home at Foster Davis Drive was sold in July 1979. West Great House Circle was mortgaged in 1979 to secure the sum of Twenty Five Thousand Dollars ($25,000.00); both transactions were registered on 26th July, 1979. West Great House Circle was sold in 1986 and the proceeds shared between the Appellant and Respondent. Difficulties developed as the appellant learnt of her exclusion from the title to Dove Hill Farm. In January, 1989, she lodged a caveat on Dove Hill Farm and one year later she sought, by originating summons, a declaration of her entitlement to an interest namely: a one half share in Dove Hill Farm.

Her claim to that interest was denied on the hearing of the originating summons and by this appeal she seeks a reversal of the order of the trial judge and a declaration of her entitlement to a half (1/2) share in Dove Hill Farm.

Before the trial judge the evidence consisted of affidavits filed by the parties in which the statements made by one were challenged by the other, and there was tendered by the respondent the declaration filed by the appellant in support of the caveat. The main contention of the respondent was that the declaration contains falsehoods and as such was fraudulent and was concocted to deceive. The appellant countered that there were errors in the declaration but that these were corrected in the affidavit, filed in support of the originating summons and subsequent affidavits.

Smith J. sought to determine where the truth lay in order to assess the issues on the balance of probabilities. In his deliberations he did not have the benefit of evidence given on cross examination hence he as a tribunal of fact did not have the advantage of observing the demeanour, the deportment or the manner of delivery of the witness' testimony. He therefore did not have any advantage we do not now have and his assessment of the evidence was challenged by the appellant.

The Appellant in evidence contended that the deposit on Dove Hill Farm was provided in part by funds from a joint account they operated with the Linstead Branch of National Commercial Bank. The judge accepted the respondent's contention that this account was opened subsequent to the purchase of the Farm.

On the subject of contribution he found:

> "The applicant states that they both paid the mortgage and all household expenses. In none of the affidavits is Mrs. Hill saying that she made adjustments to permit Mr. Hill to pay the mortgage".

On the deposit he said:

> "It is important to examine this aspect bearing in mind the contention of the Applicant that she contributed to the deposit and general household expenses.
>
> The Applicant's evidence is that in 1979, with the use of monies from the joint Account, sale of Foster Davis and a mortgage on West Great House Circle, Dove Hill Farm was purchased.
>
> The Respondent denies this. There was no joint account at the time of purchase. I have already concluded that there was no joint account. The Respondent stated that 35 West Great House Circle was not mortgaged to purchase Dove Hill. He paid the deposit of $30,000 in May, 1979 from his own funds. Foster Davis Drive was sold in June, 1979. A mortgage of $115,000 from NCB was taken out on Dove Hill in his own name and he alone paid mortgage and interest."
>
> There are two conflicting versions - Which version do I accept? Who is speaking the truth on a balance of probabilities?
>
> "I have spent a lot of time going through all the Affidavits, and the submissions of Mr. Miller, Miss Anderson and Miss Phillips.
>
> I had to consider them in the context of the Statutory Declaration made by Mrs. Hill on 10th January, 1989, filed with the Registrar of titles in support of a Caveat. I considered carefully this
>
> declaration which was used to challenge the credit of the Applicant.

> ***Paragraphs 8,11,13 and 14*** of the Declaration are important. These paragraphs conflicted her evidence in the Affidavits.
>
> When one looks at these paragraphs carefully one sees that whereas in her Affidavit she says that the proceeds of sale of Foster Davis Drive went towards the purchase of Dove Hill, in paragraph 8 of the Declaration Mrs. Hill said the proceeds of sale of Foster Davis was used to purchase West Great House Circle. Further, she says the Respondent used his own funds to purchase Dove Hill Farms. It is clear to my mind that she was not then claiming to have contributed funds to the purchase of Dove Hill Farms". (Emphasis supplied).

The statutory declaration of the appellant largely influenced the deliberations of the Judge. In referring to it he said:

> "I have considered the submission of Mr. Crafton Miller that the Declaration was not intended for court, it was intended to preserve her status as beneficial owner. He submitted that paragraph 8 is an error, it only contained what was necessary for a Caveat, and not for trial. He says that the Statutory Declaration does not reflect the true position. When a Statutory Declaration is made, the person is declaring a solemn declaration, conscientiously believing the same to be true. It is made in lieu of an oath. S 8 of the Perjury Act makes it an offence and misdemeanor, to make a false declaration in any Statutory Declaration punishable by two (2) years imprisonment. It is a very serious thing. The Court has to take it seriously.
>
> I am driven to the view that it does impeach the credibility of the Applicant herein and I find that on the balance of probabilities the deposit was made by Mr. Hill as he is claiming".

Continuing he said:

> "On the evidence on which I have found so far, Mr. Hill has made the deposit, taken a conveyance, and mortgage in his own name. Therefore prima facie he intends to acquire the sole beneficial interest as well as the legal estate. There would have to be evidence to rebut that presumption.
>
> I have gone through the evidence carefully and the submissions of Mr. Miller and Miss Anderson. I have looked at the fact that the first three (3) houses were purchased jointly and registered in the names of both parties. I looked at the disposal of these properties and disbursement of the proceeds. I looked at household expenses. I am not satisfied on the evidence that Mrs. Hill has rebutted this presumption.
>
> I also considered her assistance in relation to the farm. This assistance was made after the acquisition. In my view it would have to be something which was referable to the acquisition. However, it was couched as a loan that is something that had to be repaid. It is therefore difficult to find a common intention that she should benefit."

In concluding he said:

> "**The Statutory Declaration affects Mrs. Hill credibility.** The parties evidence is diametrically opposed. One is inclined to accept Mr. Hill's evidence which is supported by the documentary evidence".

In the absence of evidence of an express trust or of an express agreement of a common intention the appellant to succeed must establish an implied constructive trust by showing it would be inequitable for the respondent to claim sole beneficial ownership. There has to be shown that there was a

common intention and that the appellant acted to her detriment on the basis of that common intention. We therefore must look at the history of the conduct of the parties and examine the statutory declaration which the judge found to be inimical to the appellant's cause. The other documents, particularly the endorsements on the Certificate of Titles must be examined.

In paragraphs 6 and 7 this declarant mentioned the sale of Longfellow Avenue and the purchase of Foster Davis Drive but gave the wrong dates for these transactions.

a) In the declaration at paragraph 8 the appellant declared that:

> "6 Foster Davis Drive was sold in 1977 and the proceeds went towards the purchase of 36 West Great House Circle in the said year".

In fact Foster Davis Drive was sold in 1979, the Transfer registered on 26th July, 1979. The appellant contributed a Three Thousand Dollars ($3,000.00) towards the deposit on West Great House Circle which was transferred to them on the 28th April, 1997.

b) **Paragraph 11:**

> " In 1979 my husband acquired the lands the subject matter of this application, the purchase of which was partly financed by a mortgage".

This is factually correct.

c) **Paragraph 12:**

> "In 1979 I acquired a Mazda motor car in my name which my husband used almost exclusively".

The respondent in Affidavit admitted his wife's acquisition of this motor car and he never challenged her assertion that he used it almost exclusively.

d) **Paragraph 13:**

> " That throughout the marriage up to the present time I have contributed towards the household expenses thereby relieving my husband somewhat of all the responsibilities so that he has been able to channel some of his finances into other areas such as the purchase of the lands the subject matter of this application."

e) **Paragraph 14:**

> " That the lands acquired by my husband and registered solely in his name was purchased as a result of contributions made by me in respect of assisting in meeting expenses of the family".

In her affidavit in support of the originating summons the Appellant said:

> "In August, 1979 with the use of money from our joint account, the sale of 6 Foster Davis Avenue and a mortgage on 36 West Great House Circle, we purchased premises at Dove Hill, Bog Walk in the parish of St. Catherine".

In Paragraph 8(a) of her affidavit of 7th June, 1990 the Appellant deposed:

a) "The deposit on Dove Hill was not paid solely from the respondent's funds, but from our joint account, and the proceeds of the sale of Foster Davis Avenue some three (3) months before".

There does appear to be conflict in her evidence about the acquisition of Dove Hill Farm but central to her assertion is the sale of Foster Davis Avenue and a mortgage.

The Agreement for Sale of Dove Hill Farm was executed on 18th May 1979. The Transfer of Foster Davis Drive was registered on 26th July, 1979 realising a sum of Thirty Five Thousand Dollars ($35,000.00) from which a mortgage of Seventeen Thousand Dollars ($17,000.00) was discharged. On the said date 26th July, 1979 a mortgage of Twenty Five Thousand Dollars ($25,000.00) was registered on Great House Circle. There was thus about this period a pool of funds i.e. Thirty Five Thousand Dollars ($35,000.00) less Seventeen Thousand Dollars ($17,000.00) plus Twenty Five Thousand Dollars($25,000.00) viz Forty Three Thousand Dollars ($43,000.00) from which the deposit on the Dove Hill Farm could have been paid. It is an accepted conveyancing practice that deposit on a sale of real estate or advance of cash on execution of mortgage antidate registration. The registration of the above mentioned transactions having occurred on 26th July, 1979, there is no evidence when the payments in respect thereof were made.

The appellant claims these funds formed the deposit on Dove Hill Farm, the respondent claims the appellant received her half (1/2) share of the sale of Foster Davis Drive, and the Twenty Five Thousand Dollars ($25,000.00) realized on mortgage undertook repairs of West Great House Circle.

The history of the transactions re the matrimonial homes tells an interesting story. Longfellow Avenue was transferred on sale to purchasers on

December 23, 1974 and on even date the mortgage given to the purchasers was registered on the Title.

Foster Davis Drive was transferred to the appellant and respondent on 26th February, 1975 and on that date the mortgage they obtained was registered. The transfer to them as purchasers of West Great House Circle was dated 31st March, 1977 and registered on 28th April , 1977 when the mortgage they obtained was registered.

The agreement for sale of Dove Hill Farm is 18th May, 1979 the Transfer to respondent is registered on 10th August, 1979 fifteen days after the sale of Foster Davis Drive and the mortgage on West Great House Circle were registered. It is noteworthy that the mortgage was registered on 10th December 1979 significantly different from the pattern established in the other transactions given above.

In any event to determine where the truth lies on a balance of probabilities the evidence has to be scrutinized and the conduct of the parties examined. The Hills were given a start in life by Mrs Hill's father when they were allowed to live in his house at Longfellow Avenue. He later bequeathed the house to them in the hopeful expectation they would live there happily ever after.

With this start they began to move up in life. They acquired 6 Foster Davis Drive a location in a better residential area. Longfellow Avenue was a low income residential area. From Foster Davis Drive they moved to West Great House Circle then acknowledged to be upper middle class housing area.

All three residences they owned jointly and on the appellant's evidence she contributed to the household expenses including mortgage and her contributions were such that the respondent was enabled to shoulder his responsibilities. There is abundant evidence, the appellant was employed and promoted periodically in the Civil Service from a Temporary Typist in 1965 to a Senior Secretary in 1986 when she left the Civil Service to become a real estate agent. The respondent was as a soldier in the Jamaica Defence Force; there is no evidence he rose above the rank of a private. He resigned in 1972 and became an Insurance Salesman. He claims his earnings were such he undertook all domestic expenses and he made the mortgage payments to the exclusion of the appellant. However, the appellant borrowed Three Thousand Dollars ($3,000.00) to deposit same in the purchase of West Great House Circle in 1977, the year in which his gross commissions as a Life Underwriter peaked at One Hundred and Thirty Nine Thousand Dollars ($139,000.00). The respondent claimed that the sale of Foster Davis Drive in July, 1979 netted Twenty Four Thousand Dollars ($24,000.00) and on demand he paid Twelve Thousand Dollars ($12,000.00) to the appellant which she used to purchase a Mazda motor car. The appellant denied receipt of this sum. The proceeds of sale she said went to purchase Dove Hill Farm and she borrowed from the bank to purchase the Mazda which the respondent used almost exclusively to commute to the farm. The farm was some 30 miles from their home. The respondent was an Insurance salesman.

In his Affidavit of the 22nd February, 1990 at paragraph G the respondent said:

> "My wife knew from May, 1979 that I was purchasing Dove Hill Farms as my sole property; that it was an investment towards my pension and that I had no intention of making it joint property with her."

This question now begs itself, would the appellant knowing that a part of her father's legacy had been invested by her husband in the acquisition of a farm exclusively for his benefit and to provide for his retirement to her exclusion, invest her portion, her patrimony, in a motor car and give it to her husband for his exclusive use on or in the development of his farm !? Mrs. Hill the appellant would not. Indeed, no wife in Jamaica would. This evidence of the respondent is incapable of belief.

One can go further. The evidence is that the appellant loaned the respondent Ten Thousand Dollars ($10,000.00) to purchase a Honda motor car, she said a Land Rover. She also provided a loan to enable him to pay statutory deductions due namely: National Insurance Scheme payments. He denied other advances but here there is sufficient evidence that she was of independent means. The question may again be asked would she have made these advances had she known she had no interest in the Farm? I would again answer in the negative. These episodes show that the appellant had means to contribute to the discharge of household expenses and to assume absolute responsibility therefor, when the respondent was out of funds.

The current account at the Linstead Branch of the National Commercial Bank was opened by the respondent in the joint names of himself and his wife.

There is no evidence that he was coerced into doing this. He stated it was opened on the 15th August, 1979. The respondent exhibited cheques and it is to be observed that on each cheque is printed the legend:

"D &/or U. Hill T/A Dove Hill Farm".

Cheques are printed by banks and the information they give about the drawer is supplied by the drawer and printed at his request. The information printed on the cheque informs the world at large that the cheque can be signed by either **D, or U. Hill** and that they are trading as - **Dove Hill Farm.** The respondent claimed that he added his wife's name to the account " but without giving her any signing or drawing rights". This is untenable. The cheques clearly state either or both **D or U Hill** can issue cheques on the account. Given the antecedent history of their marital relationship in their dealings with the homes they acquired and that there was an indication that they would reside at Dove Hill Farm which would become the matrimonial home, one can readily understand that the appellant was lulled into a sense of security. In her Affidavit of 25th January, 1990 she stated in paragraph 13:

> "That it was only after the purchase of Dove Hill that I discovered that the titles were not in our joint names, as all the other properties had been, but as the Respondent was my husband I did not concern myself overly, particularly as it was our matrimonial home, I believed my husband intended it to be ours jointly."

The legend on the cheques would certainly have assisted in cementing her belief that her husband intended the farm to be their's jointly. Thus at the time of the acquisition of Dove Hill Farm and subsequently there are acts of the appellant which may be categorised as having been done to her detriment.

a) The purchase of the farm was partly financed by funds from the sale of Foster Davis Avenue, she said. He said she demanded her share and bought a Mazda motor car. She said she borrowed money to purchase the car but the unchallenged evidence is that the respondent had the almost exclusive use of this car;

b) The mortgage of West Great House Circle on 26th July, 1979;

c) Mortgage of West Great House Circle on 12th October, 1981 to raise One Hundred and Forty Thousand Dollars ($140,000.00).

There is no evidence of the use to which this sum was put so that the reasonable inference is that it was used in farm development;

d) Mortgage on October 5, 1982 of West Great House Circle realizing Two Hundred and Forty Three Thousand Dollars ($243,000.00) thereby increasing indebtedness on this the current matrimonial home. The use made of this sum remaining after discharge of the previous mortgage is not given.

On the mortgages the appellant as joint owner had to sign the relevant documents thus rendering herself personally liable for the debts.

e) Loan of Ten Thousand Dollars ($10,000.00) to purchase a motor vehicle;

f) Loan of Five ($5- $10,000.00) to pay National Insurance dues;

g) Appellant undertaking additional household expenses;

h) Appellant assisting in operating farm.

The learned judge regarded the evidence of respondent as credible and supported by the documentary evidence, whilst the evidence of the appellant was seen as having been impeached by the statutory declaration which he found to be inconsistent with her affidavit evidence. Although there were inaccuracies in the statutory declaration these are largely in respect of the date of transactions. There was evidence which supported the fact and substance of the appellant's evidence.

The declaration that goes with the Caveat is required to indicate the interest claimed by the Caveator in the property and not the evidence to support the claim. A Caveat is intended to pre-empt transactions affecting the Caveator's interest and it is required that he should be advised of adverse claims.

The trial judge took such a serious view of the inconsistencies in the declaration that he suggested in his judgment that they could attract criminal

sanctions in a prosecution for perjury. Having examined the evidence I entertain grave doubts that any prosecution for perjury on this evidence could succeed.

It seems that the judge was so taken up with the perceived inconsistencies he failed to examine with care the evidence.

I have not been able to find in the Affidavits or the Declaration where the appellant said as quoted in the judgment above " The Respondent used his own funds to purchase Dove Hill Farm".

Counsel in submission referred to :

- **Gissing vs Gissing [1970] 2 All E.R. 780;**
- **Burns vs Burns [1984]1 All E.R. 244**
- **Lloyd's Bank plc v. Rossett et al [1990], 1 All E.R. 1111[H.L]**
- **Azan vs Azan SCCA 53/87** delivered on 22nd July, 1988

quoting and adopting excerpts from the judgments.

Decided cases do establish principles by which courts are guided in their decisions but a significant consideration in the deliberations - decisions of the courts must be the mores of the participants in the action.

In this case we have an established pattern of conduct in which this couple joined in matrimony in 1963 lived harmoniously sharing expenses acquiring premises jointly over the years. In 1972, they acquired Longfellow Avenue jointly as a gift. In 1975, they bought Foster Davis Drive jointly , in 1977 West Great House Circle was bought jointly and in 1979 Dove Hill Farm was bought. The established pattern up to then was joint acquisition and there is nothing on the face of the transaction to indicate that this was different.

Indeed the opening of the joint bank account would have lulled the appellant into a sense of security in her belief of the continuance of a consistent course of conduct of co-ownership. The letter from the bank stating that they jointly owned the Account and real estate gives the impression the bank had of the state of their affairs.

One must understand that in our culture, persons marry and have a common goal. Their aims may change from time to time as circumstances dictate, but the objectives remain constant to provide for themselves and their children a better life and make adequate provision for a secured retirement.

The truth of this is evident in the history of this family. There was no "ad hoc" approach, no "living one day at a time," but a studied progressive advancement in position and living standards. The evidence shows that a daughter of the family was overseas and ill and the appellant went to her aid. She next went overseas to assist a son in his attempt to enter University.

This couple enjoyed twenty three (23) years of marital bliss until 1986. It was in this year that West Great House Circle was sold and the proceeds divided but not equally. There is no evidence directly indicating when problems began, but this division I apprehend could have been the start of problems. They separated in 1989.

In the branch of law in these matters equity plays a major role. While they lived in harmony the legitimate expectations of the appellant was that she had an entitlement to a half share in Dove Hill Farm. The legal title was vested

in the respondent but she had an equitable interest therein. Forte JA in **Azan vs Azan** states the correct approach:-

> "The determination of the beneficial interest in property of one party to a marriage, where that property is registered in the name of the other party, is in most cases difficult to resolve because of the nature of the relationship of the husband and wife, which in the days when the property is acquired usually enjoys a degree of trust which results in the acceptance of verbal or implied promises made without any consideration of any possible dispute arising thereafter. Inspite of this, the law does not make any presumption of beneficial interest because of the marital relationships, and therefore, the party in whom the legal estate is not vested must resort to the law of trust to establish such a beneficial interest." This was stated with clarity by Lord Diplock in the case of **Gissing vs Gissing [1970] 2All E.R. 780**

There was no express agreement, the common intention must therefore be inferred from conduct. The chronology of the dealings in property has been given, the joint account opened at the National Commercial Bank tells its own story.

The bank in a letter written, on behalf of the Appellant stated

> **To whom It May Concern**
>
> Re: Ursie Hill
>
> "We wish to advise that Mrs. Hill has been our valued customer for the past five years and operates a satisfactory account jointly with her husband.
>
> Latest financial statement of affairs on file reveals assets in the low seven figures, consisting mainly of real estate which are jointly owned with her husband".

The bank would not have written this letter, to which incidentally the respondent did not object on the evidence before us, had they not been impressed with the view that although the respondent was the registered owner of the property on which they held a mortgage, it was intended to be jointly owned beneficially. I find that it would be inequitable for the respondent to claim the sole beneficial interest in Dove Hill Farm. He holds the legal estate which is subject to a constructive trust in favour of the appellant. What then is the appellant's equity?

The maxim equality is equity comes immediately to mind. Indeed that appears to have been the equities at the time of acquisition in the mid 1979. That on the respondent's evidence was how the proceeds of sale of Foster Davis Drive was divided. The appellant did not question the equities but averred that contrary to the respondent's evidence that she took her half share, all proceeds of sale or at least her portion went into the acquisition of Dove Hill Farm. As I have indicated in the analysis of the evidence given above, the probabilities lie in her favour.

Sir Hugh Wooding , C.J, in **Mahabir vs Mahabir** [1964] 7 W.I.R 131 at p.138 B expressed the principles by which the Court should be guided and I repeat them with approval:

> "I return now to the views I indicated earlier and am confirmed in them by the Commonwealth authorities. No matter whether the title to the property which is in question is registered in the name of the husband alone, or the wife alone, or of both husband and wife, the decisive issue is: in whom is the beneficial interest? I agree with Taylor J that the question of beneficial ownership as between husband and wife is

> not to be determined according to strict rules. Some latitude must be allowed by reason of the casual informality which normally characterises arrangements between spouses. Theirs may be partnership, but it is not a business relationship. In the confidence with which they look to the future, it never enters their minds that their marriage may come to grief. The issue must therefore be examined broadly and niceties must be disregarded. The ordinary considerations which are well known to affect the dealings between husband and wife should be given their full scope. But once the beneficial ownership has been established by the evidence, s. 20 of the Ordinance does not empower the court to vary the respective rights of the parties merely because by reason of subsequent events or according to the notions of "**palm tree justice**", it may be thought that some unfairness or injustice will result to one or other of them. If the beneficial ownership as originally established is to be held to have been in any way altered, then, in my judgment it must be because circumstances can be shown (again, having due regard to their married state) from which it may fairly be concluded that the parties themselves had so agreed".

The beneficial ownership of Dove Hill Farm at the time of acquisition vested in the appellant and respondent in equal shares. Applying the principles as stated, I must now consider whether the ownership originally established has been altered in any way. In 1979 when Dove Hill was acquired, the matrimonial home at 36 West Great House Circle was held by them in equal shares. In 1986 West Great House Circle was sold and the proceeds divided between them, but **not** equally. The appellant received Seventeen Thousand Five Hundred Dollars ($17,500.00) and the respondent Forty Six Thousand Five Hundred ($46,500.00). The respondent explained the division thus:

> "This was with our mutual agreement as it was understood that I had undertaken the heavier burden of meeting the expenses".

This is an acknowledgement that the appellant shared in meeting expenses.

The appellant in an affidavit dated 7th June, 1990 responded to this averment of the respondent. She acknowledged receipt of Seventeen Thousand Five Hundred Dollars ($17,500.00) but described it as:

> "from the sales of Foster Davis Drive, West Great House Circle .."

She did not contradict or challenge the respondent's explanation for the division of the proceeds of West Great House Circle. It does not inexorably follow that the beneficial interest in Dove Hill Farm has in any way been altered. No circumstances have been shown from which it may fairly be concluded that the parties have so agreed. The appellant is entitled to a half (1/2) share interest in Dove Hill Farm.

I therefore allow the appeal and set aside the order of the Court below. I declare that the appellant is entitled to one half (1/2)of the share of the Dove Hill Farms subject to a charge thereon in favour of the respondent of half (1/2) of the amount paid by the respondent for taxes and mortgage payments on the said property as of January, 1990. The appellant is to have costs here and below to be taxed if not agreed.

HARRISON, J.A. (Dissenting)

This is an appeal from the judgment of Smith J., in which he dismissed an originating summons brought by the wife applicant under the provisions of Section 16 of the Married Women's Property Act seeking a determination of her interest in premises Dove Hill Farms in the parish of St. Catherine registered at Volume 1140 Folio 941, and Volume 936 Folio 81 in the name of husband/respondent only.

The parties were married on the 24th day of August, 1963; the respondent was then a soldier in the army. The appellant was employed as a secretary in the Ministry of Health from 1965 until 1987 when she became involved in real estate sales.

On the 10th day of May, 1972, the executor for the estate of the appellant's father transferred to the appellant and the respondent, as joint tenants, by way of gift, premises 22 Longfellow Avenue, Kingston 20. They resided there treating it as the matrimonial home. In 1972 the respondent became a life insurance salesman.

On the 23rd day of December, 1974, the said premises, 22 Longfellow Avenue, was transferred by way of sale. Premises 6 Foster Davis Drive was bought by and transferred to the appellant and the respondent on the 6th day of February, 1975, as joint tenants; the proceeds of sale of the Longfellow Drive premises was used to pay the deposit. The parties obtained a mortgage of Fifteen Thousand Dollars ($15,000.00) on the said premises, 6 Foster Davis Drive to complete the purchase.

On the 28th of April, 1977, the parties bought premises 36 West Great House Circle, which was transferred to them on the said date, also as joint tenants.

The appellant paid the deposit of Three Thousand Dollars ($3,000.00) and the purchase was completed by means of a mortgage from Blaise Trust Company Ltd. on the said West Great House Circle for Thirty Three Thousand Dollars ($33,000.00).

The learned trial judge quite rightly found that the appellant was incorrect when she stated that a mortgage was taken out on premises Foster Davis Drive to complete the purchase of 36 West Great House Circle. He correctly found that the appellant was equally incorrect to state in her statutory declaration dated the 10th day of January, 1979, that the premises 6 Foster Davis Drive was sold in 1977 to assist in the purchase of 36 West Great House Circle. The premises at 6 Foster Davis Drive was not sold until July, 1979.

On the 18th day of May, 1979, the respondent paid a deposit of Thirty Thousand Dollars ($30,000.00) and signed an agreement for sale for the purchase of premises, Dove Hill Farms, in the parish of St. Catherine for a purchase price of One Hundred and Forty Five Thousand Dollars ($145,000.00). A mortgage of One Hundred and Twenty Thousand ($120,000.00) No. 341202 was effected from the National Commercial Bank, Linstead, on the security of the said Dove Hill Farm, and registered on the 10th day of December, 1979, to complete the said purchase. The respondent repaid the said mortgage. The title to the said property was registered in the name of the respondent only on the 6th day of August, 1979.

The parties continued to live at 36 West Great House Circle until probably 1984. The respondent stated that it was in 1985 that they removed from West Great House Circle to Dove Hill Farms.

The appellant maintains, as she contended before Smith J., that although the property Dove Hill Farms is in the name of respondent only, he holds it in trust as to 50% in the beneficial interest, in her favour, because of the various contributions direct and indirect made by her towards its acquisition.

The question is, can the learned trial judge be faulted in the findings that he made and the conclusions to which he came?

He came to his findings on his examination of the affidavit evidence filed by both parties in the case.

The appellant relied on several grounds of appeal. She contended that the said judge:

> "2. was wrong in law in holding that there was no evidence of a common intention that the Applicant/Appellant was to have an interest in the properties, and failed to direct himself as to the proper inference to be drawn from the following:
>
> a) the previous conduct of the parties with respect to properties, all of which were the matrimonial home, as was this property;
>
> b) the opening and operation of a joint account by the parties;
>
> c) the contributions of the Applicant/Appellant to the deposit and mortgage by direct contribution to the deposit and indirect contribution through paying household expenses;
>
> d) the Applicant/Appellant's assistance with expenses on the farm;

> 3. ...misdirected himself, and was wrong in holding that the joint account was (not) used to purchase the property as there was no evidence to support this finding;
>
> 4. ...erred in law in holding that as there was no evidence of any "adjustment" of the Applicant/Appellant's payment of household expenses, she had failed to prove that she assisted the respondent with the purchase of the properties with these indirect contributions."

In determining the ownership of property between spouses, the general law applies. There is no separate specific principle of law peculiar to the area of family law. There is no principle of community of property (**Pettitt v. Pettitt** [1969] 2 All E.R. 385.) Whenever one spouse whose name is not on the title to property claims to be entitled to a share in the beneficial interest, on the basis that such spouse made contributions towards its acquisition such spouse has to rely on the law of trusts. On proof of such contributions and of a common intention of the parties, the court will regard it as inequitable that the party whose name is on the title should deprive the contributing party of a share in the beneficial interest which latter party, in reliance on that intention and acting to such party's detriment made the contributions.

The court will hold in such circumstances that the party whose name is on the title holds it in trust for the contributing party as to her share **(Grant v. Edwards** [1986] 2 All E.R. 426 at p. 437).

This principle was expressed by Lord Diplock in **Gissing v Gissing** [1970] 2 All E.R. 780, at page 789:

> " Any claim to a beneficial interest in land by a person, whether spouse or stranger in whom the legal estate in the land is not vested must be based on the proposition that the

> person in whom the legal estate is vested holds it as trustee on trust to give effect to the beneficial interest of the claimant as cestui que trust. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts'...Where the trust is expressly declared in the instrument by which the legal estate is transferred to the trustee or by a written declaration of trust by the trustee, the court must give effect to it. But to consttute a valid declaration of trust, by way of gift of a beneficial interest in land to a cestui que trust the declaration is required by s 53 (1) of the Law of Property Act 1925, to be in writing. If it is not in writing it can only take effect as a resulting, implied or constructive trust to which that section has no application. A resulting, implied or constructive trust and it is unnecessary for present purposes to distinguish between these three classes of trust is created by a transaction between the trustee and the cestui que trust in connection with the acquisition by the trustee of a legal estate in land, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land."

Where the parties have made an express agreement in respect of the beneficial interest, and have acted on it, the court will give effect to such manifest intention. However, in the majority of cases between spouses where, as in the instant case, there is no agreement, the court will examine the evidence in order to ascertain if there was a common intention between the

parties by their conduct, or if such a common intention could be inferred by their conduct at the time of the acquisition.

This common intention must be that as understood by both parties. It imports a sense of mutuality between them, not a unilateral act by one not acquiesced in by the other.

Of that common intention, Lord Diplock said in **Gissing v. Gissing** supra, at p. 740:

> "..... the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words or conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party. On the other hand, he is not bound by any inference which the other party draws as to his intention unless that inference is one which can reasonably be drawn from his words or conduct. It is in this sense that in the branch of English law relating to constructive, implied or resulting trusts effect is given to the inferences as to the intentions of parties to a transaction which a reasonable man would draw from their words or conduct and not to any subjective intention or absence of intention which was not made manifest at the time of the transaction itself."

Direct contributions to the deposit at the time of the initial acquisition of the property by a spouse whose name is not placed on the title is good evidence of the common intention to share in the beneficial interest. This act may also assist a court in determining the quantum of such spouses share. Indirect contributions, such as sharing in the household expenses, although equivocal, and therefore less conclusive, is also referable to such an intention

In describing the effect of such contributions, Lord Diplock, in the **Gissing** case said, at p. 791:

> " When a matrimonial home is not purchased outright but partly out of moneys advanced on mortgage repayable by instalments, and the land is conveyed into the name of the husband alone, the fact that the wife made a cash contribution to the deposit and legal charges not borrowed on mortgage gives rise, in the absence of evidence which makes some other explanation more probable, to the inference that their common intention was that she should share in the beneficial interest in the land conveyed....
>
> Even where there has been no initial contribution by the wife to the cash deposit and legal charges but she makes a regular and substantial direct contribution to the mortgage instalments it may be reasonable to infer a common intention of the spouses from the outset that she should share in the beneficial interest or to infer a fresh agreement reached after the original conveyance that she should acquire a share...."

However, the situation was viewed alternatively, and the attitude of the court revealed, when he continued and said, at p. 793:

> " Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is the absence of evidence of an express agreement between the parties, no material to justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses on the household. For such conduct is no less

> consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate; and the difficult question of the quantum of the wife's share does not arise."

In the instant case, Smith J., found that the respondent made the initial deposit, took a conveyance and mortgage all in his own name in the purchase of Dove Hill Farms, and therefore the presumption is that he intended to acquire the beneficial interest and the legal estate solely. He found that the appellant had not rebutted the presumption. I am of the view that Smith, J., was correct.

The evidence before the said judge was that the respondent paid the deposit of Thirty Thousand Dollars ($30,000.00) to the vendor on the 18th day of May, 1979, from his own funds. The agreement for sale exhibited to his affidavit dated the 4th of October, 1991 supports this. The carriage of sale was conducted by a reputable firm of attorneys-at-law, Messrs. Livingston, Alexander and Levy. The receipt clause reads:

> "How payable: A deposit of THIRTY THOUSAND DOLLARS shall be paid to the vendor on the execution here(of).
> Balance on completion."

It is true that the clause omits the time honoured term-of-art phrase, "the receipt of which is hereby acknowledged." However, the special condition, permitting the vendor, in the event of the non-delivery of the mortgagee's irrevocable letter of undertaking by the 30th May, 1979, to rescind the

agreement and refund the deposit, less the attorneys' costs, were not enforced. This reinforces the finding of the trial judge based on the evidence of the respondent that he paid the deposit of Thirty Thousand Dollars ($30,000.00) on 18th May, 1979.

The total purchase price for Dove Hill Farms was One Hundred and Forty Five Thousand Dollars ($145,000.00). The balance of the purchase price for completion of the sale, after the initial deposit of Thirty Thousand Dollars ($30,000.00) was One Hundred and Fifteen Thousand Dollars ($115,000.00). This is evidenced by special condition 1 of the said agreement, reciting the amount of the required mortgagee's "irrevocable undertaking", by letter on the receipt of which the vendor would exchange with the purchaser, the duplicate certificate of title registered in the name of the purchaser.

Therefore, in August, 1979, the only outstanding transaction to complete the said purchase was, the expected mortgage of One Hundred and Fifteen Thousand Dollars ($115,000.00).

The transfer (No. 374858) of Dove Hill Farms was registered on 10th August, 1979, in the name of the respondent only, for a consideration of One Hundred and Forty Five Thousand Dollars ($145,000.00); the mortgage would have by then been long negotiated and obtained and was registered on the 10th day of December, 1979:

> " to secure the monies mentioned in the mortgage stamped to cover One Hundred and Twenty Thousand Dollars ($120,000.00) with interest...."

The latter transaction completed entirely the purchase of Dove Hill Farms. There was therefore no necessity nor requirement for any other

monetary payment towards the acquisition of the said property, after the payment of the deposit of Thirty Thousand Dollars ($30,000.00) in May of 1979 and the mortgage recorded as One Hundred and Twenty Thousand Dollars ($120,000.00) registered, December. 1979.

The evidence before Smith J., disclosed that the premises , Foster Davis Drive, was transferred by the parties on 26th July, 1979, realising a net sum of Twenty Four Thousand Dollars ($24,000.00) and on the said date a mortgage on 36 West Great House Circle was effected in the sum of Twenty Five Thousand Dollars ($25,000.00). Neither sum of money was referable to the acquisition of Dove Hill Farms. There is no evidence that any such sums were paid towards its acquisition in July or August, 1979; nor was any such sums or any sum whatsoever required to be paid then, to effect such acquisition.

The appellant said, in her affidavit dated 25th January, 1990 at paragraph 11:

> ".... in August 1979, with the use of money from our joint account, the sale of 6 Foster Davis Drive, and a mortgage on 36 West Great House Circle, we purchased premises at Dove Hill, Bog Walk...St. Catherine."

The trial judge correctly rejected this testimony as untrue. No joint account was shown to be in existence until the acquisition of the said Dove Hill Farms. The respondent said that he opened the joint account on 15th August, 1979. A letter dated 18th April, 1984 exhibited by the appellant and written by the Manager, N.C.B. Linstead, supported the respondent that the account was in fact opened in 1979. No "money from our joint account" could therefore have been used in the said purchase. Nor was any "mortgage on 36 West Great

House Circle" used in the said transaction. Rather, it was a mortgage on the said Dove Hill Farms, that completed the said transaction.

Furthermore, the appellant in her affidavit dated 7th June, 1990, at paragraph 8, said:

> "8 ...in reply to the paragraph 2 (G) of the Respondent's affidavit I repeat paragraphs 11, 12 and 13 of my Affidavit and further state:
>
> a) The deposit on Dove Hill Farms was not paid solely from the Respondent's funds, but from our joint account, and the proceeds of the sale of Foster Davis Avenue some three (3) months before;
>
> b) The mortgage was paid jointly by the Respondent and myself;
>
> c) I received a total of Seventeen Thousand Five Hundred Dollars ($17,500) from the sales of Foster Davis Avenue, West Great House Circle, and I state that the remaining proceeds of both sales were used to assist with the purchase of Dove Hill Farms" (Emphasis added)

This contention Smith J., also rejected as not capable of belief, and in conflict with her earlier assertion. With this finding I do not disagree.

The respondent had stated in the said "paragraph 2 (G)" of his affidavit dated 22nd February, 1990, inter alia:

> "2.
>
> G... At the time of purchase of Dove Hill, we had no joint account and I did not mortgage 36 West Great House Circle in order to purchase Dove Hill Farms.
>
> I paid the deposit of Thirty Thousand in May 1979 on the purchase of Dove Hill Farms from my own funds, and I obtained a mortgage of One Hundred and Fifteen Thousand Dollars ($115,000.00) from National Commercial Bank,

> King Street, Linstead, to complete the purchase" (Emphasis added).

When the appellant, in reply, stated "the deposit on Dove Hill Farms was not paid solely from the respondent's funds, but from our joint account....," she was by virtue of a traverse in such a manner:

> 1) admitting that the deposit was paid in May 1979,
>
> 2) falsely stating that the deposit was paid from "our joint account" it did not exist in May 1979, and
>
> 3) falsely stating that the said deposit was paid from the proceeds of sale of Foster Davis Drive" some three (3) months before."

The premises 6 Foster Davis Drive was transferred on 26th July, 1979. Smith J., observed a marked conflict in the evidence, with the assertions of the appellant in her said affidavits, on the one hand and with a statutory declaration sworn to by her on 10th January, 1989, and filed with the Registrar of Titles in support of a caveat filed against the title of the said Dove Hill Farms.

Of the said statutory declaration, Smith J., found:

> "...this declaration ...was used to challenge the credit of the Applicant. Paragraphs 8, 11, 13 and 14 of the Declaration are important. These paragraphs conflicted her evidence in the Affidavits.
>
> When one looks at these paragraphs carefully, one sees that whereas in her Affidavit she says that the proceeds of sale of Foster Davis Drive went towards the purchase of Dove Hill, in paragraph 8 of the Declaration, Mrs. Hill said the proceeds of sale of Foster Davis Drive was used to purchase West Great House Circle. That would contradict her assertion about the joint account and that the purchase of Dove Hill was partly funded by

> mortgage on West Great House Circle. Further she says the Respondent used his own funds to purchase Dove Hill Farms. It is clear to my mind that she was not then claiming to have contributed funds to the purchase of Dove Hill Farms."

Smith J., then referred to the submission of counsel for the appellant that the said declaration not intended for court, contained an error in paragraph 8, and was filed only with the information necessary for the caveat, to preserve her status by way of the beneficial interest claimed, and continuing found:

> ".....a false declaration in a Statutory Declaration ... is a serious thing. The Court has to take it seriously.
>
> I am driven to the view that it does not impeach the credibility of the Applicant herein and I find that on a balance of probabilities the deposit was made by Mr. Hill as he is claiming."

Miss Anderson for the appellant, also maintained in submission before us that the said statutory declaration dated 10th January, 1979 was filed with sufficient content to support the caveat filed but had no legal effect in declaring an interest; that the appellant having admitted that she had made errors in the said paragraph 8, should not be viewed by the trial judge as having lost her credibility.

Miss Phillips for the respondent urged the court to accept the findings of Smith J., and contrasted the conflicts in the appellant's affidavits with the statutory declaration as to the acquisition of Dove Hill Farm. She submitted that the fact that the three former properties were acquired in the joint names of the parties cannot per se be proof that Dove Hill Farms was intended to be in the names of the said parties. She submitted that the said statutory declaration

was properly viewed by the trial judge in determining the credibility of the parties and noted that the "household expenses" relied on therein by the appellant to base her claim was now no longer relied on in her affidavit in support of her originating summons claiming a beneficial interest. Both counsel relied on several authorities in support of their arguments.

The statutory declaration dated 10th January, 1989, sworn to by the appellant was in support of a caveat on the said property. It is true that it was not intended specifically to support a claim to the beneficial interest in the said property. However, the trial judge could not pay less attention to it for that reason. Despite its purpose on filing it operated subsequently as a previous statement inconsistent with a later affidavit of the appellant and in that regard the trial judge was bound to give it as he in fact did, due consideration in deciding on the credibility of the appellant. The appellant in her affidavit dated 17th November, 1991 said:

> " That I admit that an error was made in the statutory declaration of paragraph (8) eight.."

She failed however to state the reason why such an error was made. Neither is there any principle of law that because a document containing previous inconsistent statements is filed in proceedings other than the substantive proceedings, and for a different purpose, a court can ignore such discrepancies, especially, if raised by one of the parties.

Despite the "error" that she admits, it reveals her state of mind in January, 1989, in regard to her interest in a property acquired since 1979.

She does not admit any "error" in paragraph 11 of the said declaration when she said:

> " That in 1979, my husband acquired the land the subject matter of this application, the purchase of which was partly financed by a mortgage" (emphasis added.)

The trial judge was quite right to accept that the appellant was then saying that the respondent acquired Dove Hill Farms with his own funds as distinct from funds derived from the proceeds of sale of joint properties. In contrast she said, in paragraph 12:

> " in 1979, I acquire (sic) a Mazda 929 motor car in my name which my husband used almost exclusively." (Emphasis added).

She does not admit an "error" in paragraph 13, when she said"

> "13 That throughout the marriage up to the present time I have contributed towards the household expenses thereby relieving my husband somewhat of all the responsibilities so that he had been able to channel some of his finances into other areas such as the purchase of the lands the subject matter of this application."

nor in paragraph 14, when she said:

> "14. That the lands acquired by my husband and registered solely in his name was purchased as a result of contributions made by me in respect of assisting in meeting expenses of the family." (Emphasis added.)

Smith J., found:

> " Paragraphs 8, 11, 12, 13 and 14 of the Declaration are important. These paragraphs conflicted her evidence in the affidavits.
>
> When one looks at the paragraphs carefully one sees that whereas in her affidavit she says that the proceeds of sale of Foster Davis Drive went towards the purchase of Dove Hill, in paragraph 8 of the Declaration, Mrs. Hill said the proceeds of sale of Foster Davis was used to purchase West Great House Circle. That would contradict her

> assertion about the joint account and that the purchase of Dove Hill was partly funded by mortgage on West Great House Circle. Further, she says the Respondent used his own funds to purchase Dove Hill Farms. It is clear to my mind that she was not then claiming to have contributed funds to the purchase of Dove Hill Farms.....
>
> I am driven to the view that it does impeach the credibility of the applicant herein, and I find on a balance of probabilities the deposit was made by Mr. Hill as he is claiming....
>
> ....Mr. Hill has made the deposit, taken a conveyance and mortgage in his own name."

I agree with this finding of Smith J. It is less than frank to argue that this declaration was not directed towards the establishment of the appellant's claim. It in fact traced the acquisition and other transactions concerning the Longfellow Avenue, Foster Davis Drive and West Great House properties, and then recited how the Dove Hill Farm was acquired. Nowhere in the said declaration was the appellant relying on direct contributions from sales of any of the latter properties, which she could have done by the use of the said recitals, but relied rather on the less precise indirect contribution of household expenses. These previous inconsistent statements were properly analysed by the trial judge and he came to the proper conclusions as he was entitled to do, on the evidence before him.

Affidavit evidence is permitted to be used, in support of any summons, instead of viva voce evidence, by the provisions of section 406 of the Judicature (Civil Procedure Code) Act:

> ".... but the Court or a Judge may on the application of either party, order the

> attendance for cross-examination of the person making such affidavit...."

The evidence disclosed in the affidavits filed on behalf of, and against each party has to be assessed by the trial judge and findings of facts made by him. On an appeal from his decision a Court of Appeal is precluded from substituting its own findings on facts, except in specific circumstances.

The circumstances in which an appellate court is entitled to intervene were clearly indicated by Lord Thankerton, in **Watt or Thomas vs. Thomas** [1947] A.C. 484. He said at pages, 487 and 488:

> "(i). Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion ;
>
> (ii). The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence;
>
> (iii). The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court." (Emphasis added)

The Judicial Committee of the Privy Council in approving the above dictum by Lord Thankerton said, per Lord Oliver, in **Industrial Chemical Co. (Ja) Ltd. vs. Ellis** (1986) 23 J.L.R. 35, in respect of the conclusion of the Court

of Appeal in justifying its decision to substitute its own findings of fact for that of the trial judge, at p. 43:

> " With respect, their Lordships consider that this was a quite impermissible conclusion and on two grounds. First, it rests upon the fallacy, sometimes propounded from the Bar, that because the sworn testimony of a witness cannot be directly contradicted by that of another witness or by contemporary documents, it must necessarily be accepted as truthful by the judge regardless of his assessment of the credibility of the witness. Secondly it seems to their Lordships directly to contravene the well-established principles upon which an appellate court has to approach the task of reviewing the trial judge's findings of fact. The question which the court should have considered was whether there was evidence before the learned trial judge from which he could properly have reached the conclusion that he did or whether, on evidence the reliability of which it was for him to assess, he was plainly wrong. (Emphasis added.)

Although the "evidence" referred to by Lord Thankerton is taken to be the verbatim report of the proceedings as opposed to the judge's notes of the proceedings, there is no rule to be extracted from the cases, that the Court of Appeal has the authority to substitute its own findings of fact for that of the trial judge because there was no viva voce evidence before the said judge by means of which he was able to have the advantage of judging the witnesses' demeanour. A necessary pre-condition for such intervention is a clear indication that the trial judge misdirected himself, or that he came to the conclusion on mistaken premises, which he would not be entitled to do. If this was otherwise, it would mean that there is a rule that the Court of Appeal may intervene and make its own findings of facts, in any case where the trial judge came to his

findings on affidavit evidence without the benefit of cross- examination. The Court's power to so function would therefore be determined by an option exercised by the whim of counsel. This reasoning would make quite ineffective and nullify the provisions of section 406 of the Code.

Smith J., had before him the affidavits of the parties, including the previous statutory declaration of the appellant. The latter document was inconsistent, in several instances to her later affidavits, in respect of major matters fundamental to the issues of the basis of the appellant's claim to the beneficial interest in Dove Hill Farms.

I am of the view that he adopted the correct approach in his treatment of the affidavit evidence and his findings should not be faulted.

Miss Anderson submitted to us and also at the trial that there was a pattern of dealings between the parties in the acquisition of the three matrimonial homes, which amounts to evidence that the intention was to acquire Dove Hill Farms as joint tenants, despite the fact that it was conveyed into the name of the respondent solely.

Having found that the respondent made the deposit and took the mortgage in his own name, Smith J., said:

> " Therefore prima facie he intends to acquiesce the sole beneficial interest as well as the legal estate. There would have to be evidence to debate that presumption..... I have looked at the fact that the first three houses were purchased jointly and registered in the names of both parties. I looked at the disposal of the properties and disbursement of the proceeds. I looked at household expenses. I am not satisfied on the evidence that Mrs. Hill has rebutted this presumption."

There is no presumption of continuity of conduct that attracts a reasoning that because the parties took properties in their own names in the past, they are presumed to have intended to do so on Dove Hill Farms in respect of the beneficial interest. One has to view the specific facts in order to determine the issue.

In May, 1979, the parties owned both premises 6 Foster Davis Drive and 36 West Great House Circle, in their joint names simultaneously. They had not previously owned two properties at the same time; moreso, they had never previously held three properties simultaneously.

In May, 1979, when the respondent sought to purchase Dove Hill Farms, the appellant, the proverbially cautious civil servant in the Ministry of Health earning approximately Six Hundred Dollars ($600.00) per month gross salary was already the owner of the said two properties jointly. Either or both of these could have been described as the "matrimonial home." It is not surprising that the respondent states in his affidavit dated 22nd February, 1990.

> " My wife knew from May, 1979, that I was purchasing Dove Hill Farms as my sole property."

In May, 1979, the respondent was earning a gross commission of One Hundred and Four Thousand and Eighty Four Dollars and Sixty Eight Cents ($104,084.68) per annum, and in 1978 he earned One Hundred and Thirty Four Thousand Five Hundred and Fifty Six Dollars and Ten Cents ($134,556.10), an insurance salesman probably alive to the risks of the commercial activity of real estate investments.

This state of affairs that existed then is not inconsistent with the appellant's state of mind when she made the statutory declaration on 10th January, 1989, stating inter alia:

> ".... in 1979 my husband acquired the land the subject ...of this application...
>
> ..... my husband ... he was able to channel some of his finances
>
> .....into...the purchase of the lands the subject matter of this application
>
> .....the lands acquired by my husband was purchased as a result of contributions.. by me..in meeting expenses of the family."

The trial judge was correct to find that on the facts there was no such pattern to point to an intention to acquire Dove Hill Farms other than by the respondent and as sole owner.

Even if the appellant made contributions to the household expenses, that by itself, without showing an attendant mutual understanding by the parties, is equivocal without more and cannot give rise to the basis for a claim to the beneficial interest in the property.

Dealing with the effect of the contribution to household expenses, in a claim to a share in the beneficial interest in property, Lord Diplock said in **Gissing vs Gissing** supra, at p. 793:

> " Where the wife has made no initial contribution to the cash deposit and legal charges and no direct contribution to the mortgage instalments nor any adjustment to her contribution to other expenses of the household which it can be inferred was referable to the acquisition of the house, there is in the absence of evidence of an express agreement between the parties, no material to

> justify the court in inferring that it was the common intention of the parties that she should have any beneficial interest in a matrimonial home conveyed into the sole name of the husband, merely because she continued to contribute out of her own earnings or private income to other expenses of the household. For such conduct is no less consistent with a common intention to share the day-to-day expenses of the household, while each spouse retains a separate interest in capital assets acquired with their own moneys or obtained by inheritance or gift. There is nothing here to rebut the prima facie inference that a purchaser of land who pays the purchase price and takes a conveyance and grants a mortgage in his own name intends to acquire the sole beneficial interest as well as the legal estate; and the difficult question of the quantum of the wife's share does not arise."

Smith J., found that the appellant made no contribution to the initial deposit, nor to the mortgage payments, and therefore payment towards household expenses, simpliciter, cannot rebut the presumption on the evidence that the respondent intended to acquire the said property solely. With this finding I also agree.

The fact that property is purchased with moneys from a joint account is not conclusive of the title to such property as being owned by such parties to the said joint account.

If any party to a joint account, on the understanding that he may do so, draws moneys from such account, the moneys withdrawn or any investment made with it belongs to such drawer, as a general rule, exclusively, (see **National Provincial Bank vs. Bishop et al** [1905] 1 All E.R. 249). If however the said account was held for a specific purpose for the parties, such withdrawal

or investment made with it, is owned by the parties jointly: (see **Jones vs. Maynard** [1951] 1 All E.R. 302, referred to in **Azan vs. Azan** (unreported), S.C.C.A. 53/87 delivered 22nd July, 1988).

In the instant case, there was no evidence before the trial judge that the account opened in the parties' joint names was for a specific purpose. The uncontradicted evidence was that the respondent opened the account for his convenience, contributed sums to it, and the appellant had never operated it. The appellant's contention, assuming it to be true, which the trial judge found was not, that "...with the use of money from our joint account.." or "...deposit..was... paid...from our joint account..." for the acquisition of Dove Farms could not for that reason result in joint ownership. The joint account was not shown to be for a "specific purpose."

In any event the unchallenged evidence of the respondent was that the only joint account was that opened by him at the Linstead Branch of National Commercial Bank on 15th August, 1979, a date after the transfer of the said property to him; no money was therefore available from any joint account, nor could have been so used for, and at the time of, the acquisition of the said property.

The letter from the said bank dated 18th April, 1984, and exhibited to the affidavit of the appellant dated 3rd October, 1991, expressing its opinion that:

> " Latest financial statement of affairs on file reveals assets in the low seven figures, consisting mainly of real estate which are jointly owned with her husband",

is inadmissible, in that it seeks to convey the contents of documents and in addition is, without substance or foundation, in law or in fact, in attempting to

identify the ownership of particular beneficial interests. I agree for these reasons, with Smith J., when he said:

> " On the evidence and the law, I find in favour of Mr. Hill on the question of the joint account."

In respect of the loans made by the appellant to the respondent, the trial judge accepted the evidence of the respondent that he had received loans amounting to Fifteen Thousand Dollars ($15,000.00) which he repaid. The appellant had maintained in her affidavit that she made these loans to the respondent "to develop the Farm on the premises at Dove Hill," and sought in her originating summons:

> "7. An order that the Respondent to repay to the Applicant the sums loaned to him in a total sum of Twenty Eight Thousand Dollars ($28,000.00) with interest thereon."

in addition to her claim to a half share in the beneficial interest in the said farm.

It seems to me to be quite inconsistent with a claim to a beneficial interest in a farm where a reputed owner seeks a repayment of a loan made for the express purchase of the development of a property claimed to be owned by her the lender.

For the above reasons, I hold that grounds one to six and eight to ten have failed.

The appellant argued in ground seven that:

> "7. The Learned Trial Judge failed to direct himself as to the significance of the Respondent telling the Applicant/Appellant that the property was to be the matrimonial home and the subsequent fact, admitted by both parties, that the Farm was the matrimonial home, for several years before the parties separated."

Smith J., did direct his mind to the use of the term "matrimonial home." He said:

> " I have also considered the fact that it was said to be the matrimonial home and looked at the authorities. It is evident that the term does not necessarily confer any right to a party. There is no magic in the term 'matrimonial home.'"

Even the use of the term "matrimonial home" cannot confer a title on a spouse by the mere use of the words. In the absence of the requisite proof of the existence of a trust in these circumstances, no right to an interest can arise thereby. The trial judge dealt adequately with the issue. That ground also fails.

The parties were actively engaged in transactions involving the premises West Great House Circle, to the exclusion of Dove Hill Farms, by way of numerous mortgages given. Mortgage No 305728 registered on 28th April, 1977 and mortgage No. 336443 registered on 26th July, 1979, for Thirty Three Thousand Dollars ($33,000.00) and Twenty Five Thousand Dollars ($25,000.00) were both discharged on 12th October, 1981, when mortgage No 392259 for One Hundred and Forty Thousand Dollars ($140,000.00) was created. This latter mortgage was discharged on 5th October, 1982, when mortgage No. 405607 for Two Hundred and Forty Three Thousand Dollars ($243,000.00) was created. The premises West Great House Circle was sold on 18th November, 1986, for Three Hundred and Twenty Thousand Dollars ($320,000.00) on which date the said mortgage of Two Hundred and Forty Three Thousand Dollars ($243,000.00) was discharged. The gross proceeds after the discharge of the mortgage would then have been Seventy Seven Thousand Dollars ($77,000.00). The unchallenged evidence is that the respondent received Forty

Six Thousand Five Hundred Dollars ($46,500.00) and the appellant Seventeen Thousand Five Hundred Dollars ($17,500.00); both parties were knowingly accepting responsibility for the repayment of the mortgage debt from the proceeds of sale; the appellant was then a real estate agent. At no time did the appellant allege that any of the various loans by way of mortgage was used in the development of Dove Hill Farms. The extent of her involvement in such development was, "I assisted him with money from my earnings..."

These were transactions independent of the existence and development of Dove Hill Farms.

The powers of the court under section 16 of The Married Women's Property Act is restricted to a mere declaration of the existing rights of the parties to matrimonial property. The court has no power to re-distribute property to parties or to re-adjust property between parties "as the court thinks fit or just in the circumstances of the case." This latter approach is more consistent with the less strict provisions of section 20 of the Matrimonial Causes Act, under which latter Act it would have been more prudent for the appellant to have proceeded.

I am of the view that Smith J., conducted a proper analysis of the evidence before him and applied it adequately to the relevant law. He could not and did not ignore the numerous conflicts in the evidence of the appellant and he came to a proper finding in all the circumstances. The appellant made no deposit at the time of the initial acquisition of the property, and there was no agreement nor common intention between the parties, nor any that could be inferred from the facts. The conduct of the parties does not convey any mutual

understanding that this could be so inferred and any payment by the appellant is not referrable to any such common intention. The trial judge's findings should not be faulted. I would dismiss the appeal.