**[2022] JMCA Civ 31**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MISS JUSTICE EDWARDS JA**
**THE HON MR JUSTICE D FRASER JA**
**THE HON MRS JUSTICE G FRASER JA (AG)**

**SUPREME COURT CIVIL APPEAL NO COA2019CV00075**

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| **BETWEEN** | **JENIFFER JOHNSON** | **APPELLANT** |
| **AND** | **HORACE BOSWELL** | **RESPONDENT** |

**Mrs Denise Senior-Smith instructed by Oswest Senior-Smith & Company for the appellant**

**Hopeton Henry instructed by Hopeton C D Henry & Associates and Ms Kimberly Taylor for the respondent**

**7 March and 23 September 2022**

**EDWARDS JA**

[1] I have read in draft the judgment of my sister G Fraser JA (Ag) and I agree with her conclusion. I have nothing further to add.

**D FRASER JA**

[2] I too have read in draft the judgment of my sister G Fraser JA (Ag) and I agree with her reasoning and conclusion.

**G FRASER JA (AG)**

**Background**

[3] This is an appeal against the decision of Nembhard J (Ag) (as she then was) ('the learned judge') made on 7 February 2019 declaring that, the respondent, Mr Horace Boswell has an 80% and the appellant Miss Jeniffer Johnson a 20% legal and beneficial

interest, respectively, in premises located at Lot 5, White River, in the parish of Saint Ann being land comprised in certificate of title registered at volume 1172 folio 45 of the register book of titles ('the subject property'). The learned judge made this declaration notwithstanding the endorsement on the certificate of title that both parties held the subject property as "Tenants-in-Common in equal shares." In addition, the learned judge also made other consequential orders.

[4] The circumstances and allegations of the respondent which led to the request for the court's intervention are best relayed by way of background information concerning the interaction between the parties, which I will now briefly outline.

[5] The undisputed evidence is that the parties met in 2004 and, about a year later, began an intimate relationship. The parties were in a visiting union as the respondent resided and worked in Canada and the appellant resided and worked in Jamaica. During the currency of the relationship, the respondent would periodically visit the appellant on his vacations to Jamaica, and he would stay with her at her rented premises.

[6] As the relationship advanced, the parties decided to purchase a house. The appellant was tasked with finding a suitable house, which she subsequently did. In 2008, the subject property was purchased for $8,000,000.00 and a mortgage was obtained from Jamaica National Building Society ('JNBS') in the amount of $6,000,000.00. The parties were registered as "[t]enants-in-common in equal shares" on the certificate of title. After acquiring the subject property, the appellant commenced major repairs and received financial contributions from the respondent to effect these repairs.

[7] Unfortunately, sometime after purchasing the subject property, the relationship between the parties soured and eventually came to an end. Thereafter, the parties' interests in the subject property became an issue of contention. This resulted in the respondent commencing proceedings in the Supreme Court challenging the appellant's legal and beneficial entitlement to equal shares in the subject property.

**Proceedings in the court below**

[8] Initially, the respondent had filed a fixed date claim form on 17 February 2016, which was supported by affidavit evidence. In the claim, he had asked that "the Court determines the extent and degree of proprietary interest owned by [the respondent] and [the appellant] in the Property…". At the time he sought to proceed under the Property Rights of Spouses Act ('PROSA'). Almost two years later on 8 January 2018, the respondent changed the claim to one resonating in equity. He accordingly filed an amended fixed date claim form along with a supplemental affidavit in support in which he sought several orders from the court. The question for the court's determination was whether the respondent was "fully entitled to the legal estate or all the proprietary interest" in the subject property under the principle of constructive trust, notwithstanding that the appellant's name was endorsed on the certificate of title as a tenant-in-common with an equal share. Alternatively, he sought the court's determination of the question of whether the appellant was entitled to any legal or proprietary interest in the subject property. He also sought a specific order that he was entitled to no less than 80% legal and beneficial interest in the subject property.

[9] The factual matrix of this case is indeed a unique one because although the appellant and respondent were in a relationship at all material times between 2005 and 2014, the parties were neither spouses by marriage nor by common law, and therefore, the claim does not fall to be determined under the aegis of PROSA. However, a visiting relationship is a well-recognized form of relationship in this country and a term with which our Family Courts are quite familiar. For that reason, the court's equitable jurisdiction is appropriate in determining questions relating to a beneficial interest in the subject property.

[10] The dispute concerning the subject property involves a house in which the appellant had been resident since its purchase, with the knowledge and apparent support of the respondent. The respondent although domiciled abroad, would visit and spend time with the appellant at the subject property during his annual vacation period. The appellant averred that there was a common intention for the house to be used as a home,

not only for herself but for the respondent as well. The respondent on the other hand had initially testified that he had intended to make the house his residence after his retirement and on his repatriation to Jamaica. However, in cross-examination for the first time since he filed suit in 2016, he averred that he had intended to utilize the subject property in a commercial enterprise and operate it as a "bed and breakfast".

The respondent's evidence

[11] The respondent had sworn to a number of affidavits. Apart from the affidavits filed 17 February 2016 and 8 January 2018 in support of his fixed date claim form and amended fixed date claim form respectively, he also filed two affidavits in response to the appellant and one in response to her daughter on 3 August 2017. These were allowed to stand as the amalgam of his evidence in chief.

[12] In his affidavit evidence the respondent averred that he took a decision to purchase a residential property. He identified the subject property which was offered for sale at the price of $8,000,000.00. He gave instructions to his attorney-at-law and provided him with a deposit. He caused the appellant's name to be "added to the Duplicate Title for reason that I loved and trusted her and believed that out of convenience it was necessary for such addition to be made as I do not live in Jamaica". The respondent categorically averred that he was solely responsible for obtaining and funding the mortgage which he would send to the appellant via Western Union Money Transfer. He further stated that the appellant did not contribute to the deposit or the mortgage payments.

[13] The respondent, in his affidavit evidence, further indicated that the mortgage payments were not being made by the appellant and he was informed by JNBS that the mortgage was in arrears. It was as a result of this "duplicity", that he decided in or about July 2014 to send the monthly mortgage payments directly to JNBS. Further, the respondent asserted that he was unaware of the appellant making mortgage payments out of her pocket or income as they never had any such discussion or arrangement.

[14] The respondent further deposed that after the purchase of the subject property, the appellant started to treat him badly, in that she would not answer his calls, refused to visit him in Canada and allowed her adult children to move into the subject property. He also stated that although he was living in Canada he would visit the subject property but as time progressed, he began to feel unwelcomed and intimidated by the appellant's adult children, hence, his reason for no longer visiting the subject property.

[15] In terms of the mortgage payments, the respondent outlined that the monthly instalments were between $48,000.00 and $55,000.00 and that he was the one paying the mortgage since its inception. The respondent staunchly denied that he had informed the appellant that they would own a home together and denied that she provided any National Housing Trust ('NHT') contributions, as there was no such discussion about her contribution nor was there any indication that such was used in the purchase of the subject property. He further contended that the appellant was unemployed at the time the deposit was paid on the subject property and he was unsure whether she would have qualified for any NHT assistance, in any event.

[16] In cross-examination, the respondent denied that at all material times, from 2005 until after 2008, the appellant was employed as an Office Administrator. He, however, agreed that:

i. She was employed at Northern Cable Network Limited during the time of the purchase.

ii. She told him that she ran errands during her lunch break to get papers for the property.

iii. Both parties own the property as tenants-in-common in equal shares.

iv. They were both to benefit equally from the Title.

[17] The respondent also agreed that the appellant was the principal actor or had substantially participated in activities on which he commented in his evidence, as follows:

i. Identifying and locating the subject property; to which he said "I agree that it was important that both of us liked the house that was being purchased".

ii. Signing the agreement for sale and transfer document along with him; to which he said she "purchased the house with me".

iii. Sending documents to him in Canada to sign; to which he said she was the only party physically present in Jamaica during the sale.

iv. Communicating with the attorney-at-law who had carriage of the sale; to which he said he was not in communication with the attorney-at-law.

v. Signing the mortgage documents.

vi. Managing the repairs and upkeep of the subject property; to which he said "I don't deny that she did most of the work on the property".

[18] It is to be noted that the names of both parties appear on the mortgage statements, and a loan was obtained from JNBS in the sum of $6,000,000.00. According to the respondent "…One Million Two Hundred Thousand Dollars ($1,200,000.00) are [sic] not shown on the Title. I would assume it came from the Housing Trust that Miss Johnson is responsible for".

[19] In further cross-examination, the respondent agreed that he intended for the appellant to own the house with him and that he had put her name on the mortgage because he trusted her; but the friendship between them he said, had broken down. He agreed that the appellant "has a legal and beneficial interest in the property. The only issue is the shares each party holds".

[20] Notwithstanding the foregoing answers, the respondent was adamant that his intention was to make a bed and breakfast, claiming that, "…I wasn't planning on having a house to stay, me and her". He further refuted that there were any discussions between them to own the property in equal shares. He said, "I don't agree that at the time our names were being added to the Title, I wanted to own 50 and Miss Johnson to own 50.

I was not forced to register names as tenants-in-common in equal shares". The respondent, therefore, refuted his entitlement to 50% interest in the subject property and instead urged the court to award him 85% legal and beneficial interest.

The appellant's evidence

[21] In answer to the respondent's claim, the appellant filed an affidavit and supplemental affidavit on 24 April 2017 and 29 June 2017, respectively, which stood as her evidence in chief. She averred that she always had a crush on the respondent and subsequently they formed an intimate relationship after his estranged wife died. When the friendship commenced she was living in Saint Mary at premises she rented next door to the respondent's father and siblings. The respondent at all material times was living in Canada but would visit her in Jamaica periodically and would stay with her. So as to accommodate the respondent staying with her whenever he visited Jamaica, the appellant had moved to more spacious accommodations. At this time in the relationship she had her teenage daughter permanently residing with her and an adult daughter who visited frequently.

[22] The respondent was enthused about the relationship, so she felt comfortable discussing with him her ambition to own a house and that she had been trying to buy one for a while but was hampered by the high prices. She said he encouraged her to move forward with the house purchase and promised to assist her. She said she was "more than elated" at his response.

[23] The appellant continued to search for a home and when she identified a suitable property she contacted the respondent. He liked the description of the property and promised to send the deposit money. Further to acquiring the subject property, the appellant agreed that the respondent sent money to pay the deposit, but they both obtained a mortgage through JNBS and she contributed her NHT benefits.

[24] The appellant outlined her involvement in the process such as corresponding with the respondent and sending documents to Canada to be signed and returned by the respondent. In addition, she organized the valuation process, made arrangements with

the mortgage company to obtain a mortgage and dealt with the vendor's attorney-at-law. She admitted that, "it is fair to say [the respondent] provided most of the financial support but not all". The mortgage was approximately $70,000.00 per month and her obligation was to pay $27,000.00, which she commenced paying in 2009. To assist with the mortgage and the upkeep of the property, she began renting the ground floor of the house for $28,000.00, in January 2014. The rent eventually increased to $30,000.00, of which, she admitted in cross-examination, the respondent did not receive a share.

[25] The appellant indicated that her name was added to the title as she was also a purchaser and the property was "…intended at all material times to belong to both of us in equal shares". The sale of the subject property was finalized in 2008, however, in 2009 the relationship began to deteriorate.

[26] The appellant contended that she was entitled to a 50% interest in the subject property due to the contributions she made and also to the fact that at the outset of the purchase transaction the parties had intended to equally benefit from the subject property, which she referred to as "the home".

[27] The appellant, in cross-examination, agreed that before any paperwork had started she and the respondent had discussions about the property, but said he had not urged her to make sure that in moving forward she would bear part of the financial responsibility. She had made that decision for herself. She agreed that she could not find any part or portion of the deposit and that at the time they signed the agreement for sale, she did not have money in hand from her NHT contributions, although she had applied for same. The appellant conceded that she could not produce any proof of her NHT mortgage payments at the time of trial.

[28] In further cross-examination she gave responses to suggestions made by the respondent's attorney-at-law as follows. She denied that:

i. the respondent mentioned to her that he trusted her, but admitted that he sent money to her to pay the mortgage, so she said, "I believed that he trusted me";

ii. the respondent had said he would cause her name to be put on the title as a co-owner if she were to live up to her obligations as to her NHT contributions and keep up the arrangements in paying her share of the mortgage; and

iii. it was the common intention of both parties that if she did not live up to her responsibility – NHT contributions, mortgage, rent, her name would appear on the title only as a matter of convenience.

Further, the appellant was adamant that "…Mr. Boswell and I had a relationship. Through that relationship we did all transactions together".

The findings of the court

[29] On 20 September 2018, the learned judge heard evidence and submissions in the matter. On 7 February 2019, she gave judgment in favour of the respondent and made the following orders:

> "(1) The property located at Lot 5, White River in the parish of Saint Ann being the land comprised in Certificate of Title registered at Volume 1172 Folio 45 of the Register Book of Titles in the names of [the respondent], Horace Boswell and [the appellant], Jennifer [sic] Johnson, as tenants in common in equal shares, is declared to be held on constructive trust by [the appellant], Jennifer [sic] Johnson, on behalf of [the respondent], Horace Boswell;
>
> (2) [The respondent], Horace Boswell, is declared to have an 80% legal and beneficial interest in the said property;
>
> (3) [The appellant], Jennifer [sic] Johnson, is declared to have a 20% legal and beneficial interest in the said property;
>
> (4) The said property is to be valued by Cohen & Cohen Realty, as agreed on by [the respondent], Horace Boswell, and [the appellant], Jennifer [sic] Johnson, within 42 days of the date hereof. The cost of the Valuation Report is to borne by [the respondent] and [the appellant] in the percentage of their respective

share [sic] in the said property, as has been determined by this Honourable Court;

(5) Upon a determination of the market value of the said property, [the respondent], Horace Boswell, has the first option to purchase [the appellant's], Jennifer [sic] Johnson's, share in the said property, as has been determined by this Honourable Court;

(6) Should [the respondent], Horace Boswell, fail to execute an Agreement for Sale, in exercise of the option to purchase pursuant to paragraph (5) of this Order, within 180 days of the date hereof, then [the appellant], Jennifer [sic] Johnson, shall be at liberty to purchase [the respondent's] interest in the said property, as has been determined by this Honourable Court;

(7) Should [the appellant], Jennifer [sic] Johnson, fail to execute an Agreement for Sale, in exercise of the option to purchase pursuant to paragraph (6) of this Order, within 360 days of the date hereof, then the said property is to be sold on the open market and the net proceeds of the sale are to be shared between [the respondent], Horace Boswell and [the appellant], Jennifer [sic] Johnson, in the percentage of their respective share [sic] in the said property, as has been determined by this Honourable Court;

(8) The Registrar of the Supreme Court is empowered to sign all documents necessary to give effect to the Orders made herein in the event that either party refuses or neglects to do so, either by himself or by his Attorney-at-Law;

(9) Within 120 days of the date hereof, [the appellant], Jennifer [sic] Johnson, is to provide [the respondent], Horace Boswell, and/or his Attorneys-at-Law, with an accounting of the rental income generated from the rental of the said property during the period 2014 to 7 February 2019;

(10) Within 180 days of the date hereof [the appellant], Jennifer [sic] Johnson, is to pay to [the respondent], Horace Boswell, 80% of the rental income generated

from the rental of the said property during the period 2014 to 7 February 2019;

(11) Costs to [the respondent] to be taxed if not sooner agreed;

(12) Liberty to apply;

(13) [The respondent's] Attorneys-at-Law are to prepare, file and serve the Orders made herein."

**The appeal**

[30] Aggrieved by the outcome of the proceedings in the court below, the appellant on 7 June 2021 filed, in this court, an amended notice and grounds of appeal challenging the decision of the learned judge.

Grounds of appeal

[31] The following are the grounds on which the appellant has sought to rely in challenging the learned judge's decision:

"1. That the Learned Judge erred when she found that there was no evidence before the Court of any actual discussions between the Respondent and the Appellant, capable of supporting a finding of an expressed agreement or arrangement between them as to how each is to benefit from the subject property.

2. That the Learned Judge erred when she found that the Appellant's National Housing Trust benefits amount to fifteen percent (15%) of the total cost of acquiring the subject property.

3. That the Learned Judge erred when she found that there was an agreement between the Appellant and the Respondent that each would pay their independent mortgage during the time of the relationship.

4. That the Learned Judge erred when she found that the Appellant failed to prove that she has complied with the agreement between herself and the Respondent to pay her share of the mortgage.

5. That the Learned Judge erred when she found that the disparity between the amount that each party was to pay towards the mortgage, as well as, the Respondent's sole contribution towards the deposit is not indicative of an agreement between the parties that each was entitled to an equal share in the subject property.

6. That the Learned Judge erred when she found that the whole course of conduct between the parties in respect of the subject property, does not demonstrate a mutual intention between them that each would benefit equally from the subject property.

7. That the Learned Judge erred when she found that the Respondent has proven, based on his conduct in relation to the subject property, that he is entitled to a beneficial interest in the subject property that is greater than the legal interest held by himself and the Appellant.

8. That the Appellant has failed to prove that her conduct in the course of her dealing with the subject property, entitles her to an equal share in same.

9. That the Learned Judge failed to take into consideration the physical labour of the Appellant at the time of the acquisition of the property to ensure that same was renovated and made liveable as part and parcel of the Appellant's initial contribution to the acquisition of the said property.

10. That the Learned Judge took into consideration irrelevant material in her analysis of the evidence.

11. That the Learned Judge erred in law when she applied the whole course of conduct to events that occurred after the parties' relationship had severed or was deteriorated."

[32] In light of the above-mentioned grounds, the appellant is seeking the following orders from this court:

"1. That the decision of the Learned Judge be set aside for judgment and costs (sic) [;]

2. Costs to the Appellant to be taxed if not agreed;

3. Such further and/or other relief as this Honourable Court deems fit."

Appellant's submissions

[33] Although the appellant had filed some 11 grounds of appeal, during the hearing of the appeal, counsel Mrs Senior-Smith, on behalf of the appellant, opted to group and argue several of the grounds together as they dealt with similar issues. Accordingly, grounds 2, 5, 6 and 9 were argued together and grounds 3, 4, 7 and 8 were similarly treated. Other grounds were argued individually.

*Ground 1:* *That the Learned Judge erred when she found that there was no evidence before the Court of any actual discussions between the Respondent and the Appellant, capable of supporting a finding of an expressed agreement or arrangement between them as to how each is to benefit from the subject property.*

[34] Counsel for the appellant, Mrs Senior-Smith contended that, in light of the evidence, the learned judge erred when she found that there was no express agreement or arrangement between the parties that each would benefit equally from the subject property. Counsel highlighted that the appellant in her affidavit evidence had indicated that: (i) the parties had agreed verbally to own the subject property in equal shares, and (ii) that she would not have been a party to the purchase if there was no such agreement.

[35] Further counsel submitted that at para. [19] of the judgment, the learned judge had noted the appellant's assertion that it was the parties' common intention to own the subject property in equal shares. However, the learned judge in her assessment of the case failed to indicate whether she accepted or rejected the appellant's assertion. There was no indication that the learned judge had rejected this evidence as lacking in cogency or that it was untruthful.

[36] In contrast, the learned judge had acknowledged that the respondent's evidence was replete with inconsistencies and had rejected such contradictory evidence, for

example, she had rejected the respondent's reasons for adding the appellant's name to the title and said she preferred the appellant's explanation instead.

[37] It was, therefore, counsel's contention that the affidavit evidence of both the appellant and the respondent indicated that the parties intended to share equally, and the learned judge could have inferred such an intention therefrom.

*Ground 2:* *That the Learned Judge erred when she found that the Appellant's National Housing Trust benefits amount to fifteen percent (15%) of the total cost of acquiring the subject property.*

*Ground 5:* *That the Learned Judge erred when she found that the disparity between the amount that each party was to pay towards the mortgage, as well as, the Respondent's sole contribution towards the deposit is not indicative of an agreement between the parties that each was entitled to an equal share in the subject property.*

*Ground 6:* *That the Learned Judge erred when she found that the whole course of conduct between the parties in respect of the subject property, does not demonstrate a mutual intention between them that each would benefit equally from the subject property.*

*Ground 9:* *That the Learned Judge failed to take into consideration the physical labour of the Appellant at the time of the acquisition of the property to ensure that same was renovated and made liveable as part and parcel of the Appellant's initial contribution to the acquisition of the said property.*

[38] Counsel, Mrs Senior-Smith, submitted that the learned judge had not utilized a holistic approach, as recommended in **Stack v Dowden** [2007] UKHL 17 (paras. 68 and 69) in determining the appellant's contribution to the acquisition of the subject property. She should have commenced with the premise that the legal title evinced equal shares and therefore, equal beneficial interests were to be presumed, it was argued. The learned judge instead treated with the appellant's NHT contribution separately as a determinative factor. Although the appellant did not provide any documentary evidence in support of the quantum of her financial contribution to the acquisition of the subject property, she testified that she had in fact contributed financially. She stated that she was a party to

the mortgage obtained from JNBS and that she had also used her NHT benefits as a contribution.

[39] Counsel argued that the formula utilized by the learned judge to calculate the appellant's contribution was therefore "inaccurate" because in determining same, she only considered the shortfall from the loan, which amounted to $1,200,000.00. This balance was arrived at after the respondent's cash deposit of $800,000.00 was deducted from the purchase price of $8,000,000.00 and after taking account of the mortgage loan of $6,000,000.00 obtained from JNBS. The learned judge did not take into consideration the fact that the appellant had obtained the JNBS loan of $6,000,000.00 equally with the respondent. This, counsel argued, formed a part of the appellant's case and was highlighted by the learned judge at para. [20] of her judgment. Mrs Senior-Smith pointed out that the respondent had not produced any documents as to this initial mortgage (JNBS mortgage) obtained by both parties. What he had produced in evidence, she argued, was his contributions to the monthly mortgage payments which were made by the appellant. The learned judge treated the JNBS mortgage as if the respondent was the sole mortgagor to that loan and he was the only one paying the mortgage on the subject property, counsel submitted. She failed to take account of the conduct of the respondent, in that he was sending money to the appellant to pay the mortgage for both of them over a period of seven years, conduct which commenced immediately after the acquisition of the subject property.

[40] Counsel also challenged the learned judge's conclusion that the appellant did not live up to her agreement regarding the mortgage payments. This conclusion was premised upon a suggestion made to the appellant in cross-examination, to the effect that the respondent had told her he would cause her name to be put on the title as a co-owner if she lived up to her obligations regarding her contributions and payment of the mortgage. This, counsel said, influenced the learned judge to arrive at the unequal shares she apportioned, when in fact there was no evidence that supported such a finding. In any event, counsel submitted, the suggestion was nonsensical since mortgage contributions would only ensue after the mortgage was obtained.

[41] Counsel further contended that a true representation of the contribution of the appellant was not accurately analysed. The learned judge, she submitted, erred since the only factor considered was the disparity of the financial contributions of the parties at the time of the acquisition of the property. The respondent's reason for saying that the appellant held the property on trust for him was because of his financial contributions, which contradicted the manner in which the property was acquired and how the respondent related to the appellant regarding the property and the finances therein prior to separation.

[42] In addition, counsel noted that having regard to the applicable test in **Stack v Dowden** (para. 69), the steps taken by the learned judge in her analysis were inadequate. According to counsel, the learned judge applied the principle erroneously, as gleaned from paras. [67] and [68] of her judgment, where she concluded that there was an agreement between the parties as to ownership of the subject property; the appellant failed to abide by that agreement; and based on the financial contribution of the respondent, which surpassed that of the appellant's, she was only entitled to 20% interest in the subject property.

[43] Counsel also highlighted that the respondent in his evidence had initially said he did not know of any NHT contribution made by the appellant, and that he alone paid the mortgage. In cross-examination, however, he said he "assumed" that the NHT benefits amounted to $1,200,000.00. The learned judge, counsel submitted, elevated this utterance of the respondent to the status of evidence and, therefore, erred.

[44] Counsel submitted that the physical labour of the appellant, which was a critical aspect of the evidence was not considered by the learned judge. For instance, the unchallenged evidence that the appellant assumed the responsibility for the much needed renovation of the subject property. The respondent was in Canada and in his evidence he said he had to rely on the appellant for the management of the repairs done on the house. This, counsel argued, formed part of the appellant's initial contribution to the subject property and evinced an agreement that the appellant would deal with the

physical labour further to the acquisition and the respondent, the financial. The parties did not accord any greater weight to their respective contributions.

*Ground 3:* *That the Learned Judge erred when she found that there was an agreement between the Appellant and the Respondent that each would pay their independent mortgage during the time of the relationship.*

*Ground 4:* *That the Learned Judge erred when she found that the Appellant failed to prove that she has complied with the agreement between herself and the Respondent to pay her share of the mortgage.*

*Ground 7:* *That the Learned Judge erred when she found that the Respondent has proven, based on his conduct in relation to the subject property, that he is entitled to a beneficial interest in the subject property that is greater than the legal interest held by himself and the Appellant.*

*Ground 8:* *That the Appellant has failed to prove that her conduct in the course of her dealing with the subject property, entitles her to an equal share in same.*

[45] Counsel pointed out that according to the evidence, it was only after the relationship ended that the parties separated their mortgage payment shares. The respondent had decided to pay his share and urged the appellant to pay her share separately. Thus, the reason why the respondent had receipts for that latter period (July 2014 onwards). Based on established principles, counsel submitted that the conduct of the parties after separation does not render assistance in determining the common intention of the parties at the time of the agreement, the learned judge therefore erred when she took this irrelevant evidence into consideration. Counsel argued that the learned judge failed to properly take account of how the property was acquired and had not considered that up to the point of separation, there was no evidence of an intention to revise the parties' intention. She submitted that the learned judge was persuaded to consider matters, such as the respondent's payment of the deposit, as the basis of the interests of the parties, thereby resulting in grave injustice to the appellant.

[46] Counsel refuted that there was an agreement for the appellant to pay her share of the mortgage. She submitted that although the respondent sought to lead evidence

that there was such an agreement, he was unable to say: (a) how much she was to have paid, (b) for how long she was to have paid, and (c) the interest she would have acquired. However, she argued (citing **Stack v Dowden** at paras. 32, 61, and 62) that even if there was such an agreement, that would not detract from the initial common intention of the parties. Further, counsel complained that the learned judge, in accepting this disputed contention, fell into error as it contradicted the premise on which the respondent based his reasons for acquiring an interest that was greater than that of the appellant.

[47] Counsel contended that the learned judge erred in only taking into consideration the disparity in the financial contributions of the parties at the time of the acquisition of the subject property. She had ignored how the parties related in their whole course of dealings with the subject property, from its identification, acquisition, and maintenance, relatively close to acquiring same. The respondent had sought to buttress his claim that the appellant held the property on trust for him due to his greater financial contributions. According to counsel, this was contradicted by the manner in which the parties had acquired the property and how the respondent had related to the appellant about the property and the finances before their separation.

[48] The law puts the burden on the party seeking to depart from the equal share presumption, counsel contended. The learned judge erred in finding that the appellant had failed to prove by her conduct and dealings with the subject property that she was entitled to an equal share.

*Ground 10: That the Learned Judge took into consideration irrelevant material in her analysis of the evidence.*

[49] The submissions in relation to this ground were very sparse. Counsel submitted that the evidence evinced by the respondent was more supportive of his view of the relationship and/or interests after the separation between the parties.

*Ground 11: That the Learned Judge erred in law when she applied the whole course of conduct to events that occurred after the parties' relationship had severed or was deteriorated.*

[50] Counsel submitted that the initial contributions of the parties or what they had agreed were not considered by the learned judge in assessing their entire conduct. In light of the issue arising in this ground counsel belatedly indicated that this ground could properly be argued in conjunction with grounds 3, 4, 7 and 8. Further counsel pointed out that the respondent, in his fixed date claim form, did not make an application for an accounting of the rent or to receive a share of it.

Respondent's submissions

[51] Counsel for the respondent, Mr Hopeton Henry, in challenging the appellant's submissions, opted not to directly respond to each of the respective grounds of appeal as canvassed by Mrs Senior-Smith for the appellant. Instead, counsel adopted an issue-based approach and submitted on the following two issues:

> "1. Did [the learned judge] err when the Respondent Horace Boswell was awarded 80% of the beneficial and legal ownership in property situate at Lot 5 White River, Saint Ann and the Appellant awarded 20% in light of the Certificate of Title being registered as Tenants-in-Common in equal share [sic]?
>
> 2. Was [the learned judge] within her wisdom and judicial duty and authority empowered to look beyond that which is endorsed on the Certificate of Title and vary the shares to the parties by looking at the entire context to vary the shares endorsed?"

I will now summarize the submissions in respect of these two issues.

*Issue 1: Did [the learned judge] err when the Respondent Horace Boswell was awarded 80% of the beneficial and legal ownership in property situate at Lot 5 White River, Saint Ann and the Appellant awarded 20% in light of the Certificate of Title being registered as Tenants-in-Common in equal share [sic]?*

[53] In commencing his submissions, counsel from the outset acknowledged that the case at bar does not fall to be determined under PROSA. The case, he submitted, falls under "trust" (by that, I take it to mean he is referencing the equitable jurisdiction of the

court). Therefore, it follows that the interests of the parties are to be shared based on the common intention of the parties.

[54] Counsel reiterated the scope of review of this court as it relates to findings of fact, and also whilst relying on **Stack v Dowden**, noted that the onus of proof rests on the person who contends that the beneficial interest differs from the legal interest. Accordingly, he agreed that the onus was on the respondent in the instant case to prove that he was entitled to a greater beneficial interest in the subject property than what was indicated on the title, and advanced that the respondent had discharged that burden. Based on the input of the parties in the instant case, counsel argued that it was their intention to have their beneficial interests differ from their legal interest. Counsel argued further that the respondent only added the appellant's name to the title because it was convenient to do so and emphasized that as stated in **Stack v Dowden** "context is everything". Counsel highlighted that in that case, the House of Lords dealing with property jointly owned, upheld the Court of Appeal's apportionment of 65% and 35% shares to the parties. Their Lordships' decision, he stated, was influenced by the circumstances of the case and the respective contributions made by each party.

[55] Counsel contended that in the instant case, the parties led separate lives, so it was clear that it was not intended that they would hold equal shares in the subject property. In support of this point, counsel also relied on the facts in **Stack v Dowden** and underscored that the fact that the parties had separate accounts over their 13 years of relationship whilst living in the same house, bore strongly on that court's decision. He juxtaposed the factual matrix in **Stack v Dowden** with that of the instant case and pointed out that the parties in this case had never lived together, nor shared a joint life, and kept their finances separate. All this, counsel said, could be used to shed some light on the intention of the parties as to how the interests in the subject property were to be divided. In explaining the endorsement on the title, counsel highlighted the evidence of the respondent, who said that the appellant's name was added merely for convenience.

[56] Counsel further contended that the principles enunciated in **Laskar v Laskar** [2008] EWCA Civ 347 should be adopted and applied in the instant case as the subject

property was intended to be a commercial enterprise and not a home as the appellant insisted. Although the arrangements, in the **Laskar v Laskar** case, were between a mother and daughter, and the property title was held in their joint names, the court therein recognized that the property was purchased for rental purposes. The court, counsel submitted, had to look at the size of the contributions by calculating the financial inputs of each party and, therefore, the equity could not be split equally. In that case, counsel said, in arriving at its decision the court calculated the financial inputs of the mother and the daughter, which included the contributions to the deposit, discount earned on the sale price and contributions to the mortgage. The learned judge, counsel concluded, did not err in applying that approach to the instant case as it was acceptable, equitable and advisable.

[57] Alternatively, counsel advanced that this court is empowered to imply a bargain under constructive trust even in the absence of any express document. Counsel submitted that as in the case of **James v Thomas** [2007] EWCA Civ 1212, this court can have due regard to the conduct of the parties, which is a material factor.

*Issue 2: Was [the learned judge] within her wisdom and judicial duty and authority empowered to look beyond that which is endorsed on the Certificate of Title and vary the shares to the parties by looking at the entire context to vary the shares endorsed?*

[58] Counsel submitted that to establish a trust it must be shown that: (1) there is a common intention, (2) there is detrimental reliance, and (3) there is an unconscionable denial of rights. He reiterated that the common intention to hold unequal shares is evident. He also submitted that in these circumstances the time when the intention was formed is irrelevant and can be after the acquisition of the property (see **Austin v Keele** (1987) 10 NSWLR 283). Further, each purchaser is deemed to hold a beneficial interest in the proportion to which he/she contributed to the purchase price (see **Muschinski v Dodds** (1985) 160 CLR 583).

[59] Also relying on **Raymond Lincoln, Oliver Johnson v Angela Eunice Johnson** [2015] JMSC Civ 112, counsel contended that even where the parties are endorsed on

the title as equal joint owners the court will look at the financial contributions and improvements which were done mainly by one party. Resulting from this, it is clear that the shares can be varied to reflect contributions made. It is of importance to note, that the respondent in financing the purchase/deposit used his personal funds from his savings and income.

[60] Counsel contended that even in the absence of any express agreement, the court having assessed the facts can imply a constructive or resulting trust. He found support in the case of **Clinton Campbell v Joyce McCallum and Renea Whitmore** (unreported), Supreme Court, Jamaica, Civil Claim No 01825/2003, judgment delivered 11 February 2011, which essentially reiterates the premise that there need not be a trust document for a trust to be established in such cases. Therefore, direct contribution is a critical consideration and the learned judge's determination that the appellant's NHT contribution was valued at approximately 15%, cannot be faulted. Especially since, the learned judge ultimately awarded 20% to the appellant, in light of the 15% contribution, which was generous as she also took into account the appellant's presence and oversight of the subject property.

[61] In closing his submissions, counsel highlighted that although renovations were overseen by the appellant, it is undisputed that the respondent was the one to solely finance the same, and on visits to Jamaica he would do physical work on the subject property as an electrician. Counsel strenuously contended that the respondent bore the burden of the subject property whilst the appellant was free to go on with her life and, therefore, it would be only conscionable and equitable for him to be awarded a greater share.

**The overarching issue for determination**

[62] I wish to acknowledge the industry of counsel for the appellant who comprehensively outlined and arranged her arguments on the 11 grounds of appeal. However, I am of the view that this appeal can be adequately but succinctly determined by addressing the following overarching issue:

> Whether the learned judge erred in awarding the respondent 80% and the appellant 20% of the beneficial and legal interests in the subject property, notwithstanding that they were registered as tenants-in-common in equal shares on the certificate of title

[63] I will accordingly tailor my discussion and analysis under this central issue, and for ease of reference, employ subheadings where appropriate.

**Discussion & Analysis**

Scope of review

[64] The scope of review of an appellate court in respect of findings of fact of a judge at first instance is well established and has been reiterated in numerous cases of this court. The guidance of Brooks JA (as he then was) in **Rayon Sinclair v Edwin Bromfield** [2016] JMCA Civ 7 is apt. He had enunciated that:

> "[7] It has been stated by this court, in numerous cases, that it will not lightly disturb findings of fact made at first instance by the tribunal charged with that responsibility. Their Lordships in the Privy Council, in **Industrial Chemical Co (Ja) Ltd v Ellis** (1986) 23 JLR 35, an appeal from a decision of this court, approved of that approach. The Board ruled that it is only in cases where the findings of the tribunal are not supported by the evidence, or it is clear that the tribunal did not make use of the benefit of having seen and heard the witnesses, that the appellate court would disturb those findings. Their Lordships re-emphasised that principle in their decision in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. The Board stated, in part, at paragraph 12:
>
> > '... It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have

> reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.** Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo KokBeng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169.'" (Emphasis as in the original)

[65] These principles have been helpfully and succinctly itemized by McDonald-Bishop JA (Ag) (as she then was) in **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37 at para. [27] as follows:

> "[27] …
>
> (i) An appellate court has the jurisdiction to review the record of the evidence that was before the trial judge in order to determine whether the conclusion originally reached upon that evidence cannot stand. The jurisdiction, however, must be exercised with caution.
>
> (ii) If there is no evidence to support a particular conclusion arrived at the trial (which is a question of law), the appellate court will not allow the conclusion arrived at to stand. However, if the evidence as a whole can reasonably be regarded as justifying the conclusion, and especially if that conclusion has been arrived at on conflicting testimony, the appellate court should bear in mind that it has not enjoyed the opportunity which had been afforded the trial judge to

see and hear the witnesses. Therefore, the view of the trial judge on matters concerning issues of credibility is entitled to great weight.

(iii) If there is no question that the trial judge had misdirected himself where a question of fact had been tried by him, an appellate court even if disposed to come to a different conclusion on the evidence, should not do so unless it is satisfied that the advantage enjoyed by the trial judge to see and hear the witnesses could not be sufficient to explain or justify the trial judge's conclusion.

(iv) 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 evidence. Where the appellate court is satisfied that the trial judge had not taken proper advantage of his having seen and heard the witnesses because the reasons given by the trial judge are not satisfactory, or it unmistakably appears to be so from the evidence, then the matter is at large for the appellate court.

(v) Ultimately, the decision of an appellate court whether or not to reverse conclusions of fact reached by the judge at the trial must naturally be affected by the nature and circumstances of the case under consideration. Also, the value and importance of having seen and heard the witnesses will vary according to the class of case and perhaps the individual case in question."

[66] It is, therefore, well established that where a finding turns on the judge's assessment of the credibility of a witness, an appellate court will take into account that the judge had the advantage of seeing the witnesses give their oral evidence, an advantage which is not available to the appellate court. An appellate court should therefore, not lightly disturb a trial judge's finding of fact or finding as to a person's credibility. Likewise, where any finding involves an evaluation of facts, an appellate court must take into account that the judge has reached a multi-factorial judgment, which takes into account her assessment of many factors.

[67] The correctness of the trial judge's evaluation is not undermined, for instance, by challenging the weight the judge has given to elements in the evaluation unless it is shown that the judge was clearly wrong and reached a conclusion that on the evidence he or she was not entitled to reach. In other circumstances, where the finding turns on matters on which the appellate court is in the same position as the judge, for example, where an appellate court is well placed and entitled to reconsider for itself the trial judge's findings as to what should or should not be inferred regarding the primary facts which he/she found, the appellate court must, in general, make up its own mind as to the correctness of the judge's finding (see **Datec Electronics Holdings Ltd and others v United Parcels Service Ltd** [2007] 1 WLR 1325 at para. 46, per Lord Mance).

[68] I will bear the foregoing sage utterances and warnings in mind and will tread carefully as I assess the complaints made by the appellant relative to the findings of the learned judge.

The learned judge's treatment of the claim

[69] The learned judge at para. [26] of her judgment appropriately outlined the following four issues for her determination:

> "(a) Is Mr. Boswell entitled to an eighty percent (80%) share of the legal and beneficial interest in the subject property?
>
> (b) Where does the burden of proof lie?
>
> (c) What was the intention of the parties before and/or at the time of the acquisition of the subject property?
>
> (d) Is Mr. Boswell entitled to a share of the income generated from the rental of the subject property?"

[70] In addressing the above-mentioned issues, the learned judge relied extensively on the House of Lords decision of **Stack v Dowden**. The three salient principles which she extracted from that case are as follows:

> i. The starting point is joint beneficial interest. Therefore, the onus is on the person seeking to show that the

beneficial ownership is different from the legal ownership;

ii. The preferred question to ask is what share was intended and not what share was fair; and

iii. The court must examine the whole course of conduct of the parties in relation to the property.

[71] The learned judge after analysing the evidence made the finding that there was no express agreement between the parties that the beneficial interest was to be shared equally and further that based on the whole course of conduct between the parties there was no evidence of a common intention for them to benefit equally. Accordingly, their conduct gave rise to a constructive trust in favour of the respondent. At para. [59] of her judgment, she articulated that:

> "There is no evidence before the Court of any actual discussions between Mr. Boswell and Miss Johnson, capable of supporting a finding of an express agreement or arrangement between them as to how each is to benefit from the subject property. Where there is no evidence to support a finding of an express agreement or arrangement to share, the Court must rely entirely on the conduct of the parties, both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation, direct contributions to the purchase price by one of the parties, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust."

The registration on the certificate of title

[72] As already established, the parties were registered on the certificate of title as "tenants-in-common in equal shares". This type of ownership speaks volumes. As tenants-in-common, each party was entitled to their individual shares and could divest such interest easily, even by bequeathing their share in a will.

[73] Counsel for the parties as well as the learned judge relied heavily on the case of **Stack v Dowden** in the determination of this matter. In that case, the issues concerned

the apportionment of beneficial interests in a house which was held jointly by the parties. I wish to take this opportunity to emphasize the main distinction between that case and the case at bar, which to my mind, has significant ramifications for the resolution of this dispute, which were not considered by the learned judge. Their Lordships' extensive analysis of ownership in that case revolved around the difference between "single legal ownership" and "joint legal ownership". This is not surprising since legal ownership of land in England could no longer be held as tenants in common after the passing of the Law of Property Act 1925. Ownership of land as tenants in common, in England, now only takes effect in equity. Therefore, caution should be taken when relying on cases from that jurisdiction that deal with "single" or "joint" ownership, in the determination of matters relating to "equal" legal ownership, as is the case in a tenancy in common.

[74] The case of **Robert Stephenson v Carmelita Anderson** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 55/2000, judgment delivered 12 June 2003, addressed an arrangement similar to the one in this matter. In that case, the parties were in a common law relationship at the time of the acquisition of the property. Miss Anderson who sought to claim the whole beneficial interest in the property, insisted that the parties had never lived together. The judge accepted her evidence that she was the sole purchaser of the property and that Mr Stephenson had only assisted her by consenting to be joined as her co-mortgagee so that she could qualify for the mortgage.

[75] The court, therefore, sought to ascertain the beneficial interests of the parties. In their review of the law, reference was made to Lord Justice Slade's dicta in the case of **Goodman v Gallant** [1986] 1 All ER 311, after which Forte P had this to say at page 8:

> "The learned Lord Justice there makes a distinction between circumstances where the conveyance contains a declaration of the beneficial interests and circumstances where it does not. In the former, the declared beneficial interest cannot be challenged but in the latter, the presumption of a shared interest can be rebutted. This is also the case, where the title for example is registered in one name only.
>
> In the instant case, the property is registered in the names of both parties as tenants in common. The legal interest

> therefore rests in both of them. In addition, that fact also raises the presumption that at the time of the acquisition they intended that the beneficial interest would also be shared. The evidence, however, which was accepted by the learned judge disclosed that the appellant made no contribution to the purchase of the property, and became registered on the title as a matter of convenience, necessitated by the respondent's inability to secure the mortgage on her own. …"

[76] I will pause here to point out that unlike that case, the learned judge in this case, accepted the evidence that the appellant contributed to the acquisition and maintenance of the subject property. Moreover, she was the one who resided in the property. Also, there was no evidence to suggest that she was named as a co-mortgagor out of necessity. Accordingly, the learned judge rejected the respondent's evidence that the appellant's name was on the title out of convenience.

[77] Harrison JA (as he then was) also made comments in **Robert Stephenson v Carmelita Anderson**. He referred to the finding of the judge at first instance that, "there was never any agreement or understanding between them that the property was to be jointly acquired and [Mr Stephenson] should get any portion of this property." He then stated at page 11 that:

> "…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.** In addition, it also means that there is no right of survivorship on death. Therefore, where property is bought by parties the proportionate holding of each party in the beneficial interest where the legal estate is held as tenants-in-common is dependent on the agreement of the parties at the time of acquisition or evidenced by their respective contribution." (Emphasis supplied)

[78] I wish to note here that whereas in that case the property was registered in the names of the parties as "tenants-in-common" simpliciter, in this case, the registration was as "tenants-in-common in equal shares". The latter expressly states the distribution of the undivided shares in the property, that is a 50% interest to each party. In my view,

that can be said to be "an express declaration" of how the legal and beneficial interests are to be shared.

[79] Ultimately, the majority judgment of this court was that Miss Anderson was entitled to 100% interest in the property. Bearing in mind the aforementioned differences between the circumstances of that case and the present one, it is understandable why in the former, the court had to look beyond the registration on the title, in order to ascertain the proportions of their legal and beneficial interests. In this case, however, there was an express declaration of the apportionment of the interests in the property, that is "in equal shares", which was supported by the evidence of both parties as to their common intention at the time of acquisition (see paras. [93] to [103]).

[80] Smith JA, in delivering the dissenting judgment in **Robert Stephenson v Carmelita Anderson**, examined the characteristics of joint tenancies and tenancies in common. He prefaced his examination of the law by referring to section 65 of the Registration of Titles Act, which he said recognizes the separate titles of tenants-in-common, it states:

> "65. Two or more persons may be registered under this Act as joint tenants, tenants in common or coparceners of any land. In all cases where two or more persons are registered as tenants in common or as coparceners of any land one certificate for the entirety or separate certificates for the undivided shares may be issued; but in the case of persons registered as joint tenants, one certificate only shall be issued."

[81] Further to that section, Smith JA at pages 19 and 20 articulated the following:

> "A joint tenancy arises whenever land is conveyed or devised to two or more persons without any words to show that they are to take distinct and separate shares or to use technical language 'without words of severance' – see 'Cheshire's Modern Law of Real Property' 11th Edition p. 328. From the point of view of their interest in the land the joint tenants are united in every respect- title, time, possession and interest.

> If on the other hand the conveyance of land contains words of severance that is words showing an intention that the persons are to take separate and distinct interests (for example that they are to take 'equally' or ('in equal moieties') the result is a creation not of a joint tenancy but of a tenancy in common (**ibidem**). … The tenants in common are united in their right to possession but their union may stop at that point, for they may each hold different interests and they may each hold under different titles and acquire their interests at different times- p 335 **ibidem**. Each has a share and his share is undivided in the sense that its boundary is not yet demarcated but never-the-less his right to a definite share exists.
>
> The **jus accrescendi** principle has no application to tenancies in common, so that, when a tenant in common dies his share passes to his personal representatives and not to the surviving tenant in common. A co-tenant may sell his undivided share without the consent of the other co-tenant- see **Leiba v Thompson** [1994] 31 JLR 183."

[82] He concluded at page 28:

> "…In my view a conveyance to persons as tenants in common indicates a binding common intention that the persons should be legal and beneficial owners of their separate shares. **Such a title is direct evidence of the common intention and the question of constructive, resulting or implied trust does not arise.** There is nothing in the evidence to suggest that the choice of tenancy in common was not informed and deliberate on the part of the parties. The registration of the property as a tenancy in common is material in the determination of the common intention at the time of acquisition. …" (Emphasis supplied)

[83] Notwithstanding, Smith JA's judgment being a dissent, the accuracy and relevance of the legal principles he distilled, to the understanding of the significance of a registration under a tenancy in common, cannot be disregarded. I am, however, mindful that those principles could not be utilized to resolve the issues in that case on account of the absence of an express declaration of the parties' respective interests. On the other hand, based

on the factual circumstances of this case, those principles hold significant weight in the determination of the issue at bar.

[84] Taking into consideration the foregoing authorities, it is my understanding that whosoever owns the legal interest in a property has a right of control, whereas the owner of the beneficial interest enjoys the benefits of the property. When property is co-owned as joint tenants or even tenants in common without the explicit declaration of their respective interests (as in the **Robert Stephenson v Carmelita Anderson** case), the court would certainly need to discern the intended apportionment of the interests of the co-owners, before the property could be dealt with. However, where the co-ownership is stipulated as tenants-in-common in specified shares, each party is entitled to control and benefit from the property in relation to their distinct interest without the consent of the other co-owners. This, in my view, can only occur by virtue of an express declaration of, not only the legal, but also the beneficial interest in the property.

[85] It is, therefore, my opinion that, in the absence of allegations of mistake or fraud, an express declaration of distinct interests in property evinced by the registration of the parties as tenants-in-common in equal shares cannot be easily challenged. It was the learned judge's determination, however, that where it is proven that the subject property was being held on trust for the rightful beneficial owner then the court could look behind the title. Accordingly, notwithstanding my preliminary view, I will also consider her finding that the legal interests delineated by the registration of a tenancy-in-common in equal shares was not to be treated as an express declaration of the parties' beneficial interests, but rather a presumption.

The presumption

[86] Where the legal title is in the joint names of the parties, it means that there is a presumption that both parties are beneficially entitled, unless the contrary is shown. In **Stack v Dowden**, Baroness Hale observed at para. 68 that:

> "**The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and**

> **in what way.** This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms…." (Emphasis supplied)

[87] Accepting the law as stated in **Stack v Dowden**, that the starting point in determining the existence of the beneficial interest in land is the assumption that beneficial ownership of real property follows the legal title, then the onus of displacing such a presumption, in this case, was cast upon the respondent. I observe that although the learned judge correctly stated that the burden of proof rested on the respondent, during the course of her judgment, she made certain utterances that, in my view, lend credence to the appellant's complaints that the learned judge fell into error in reversing the onus of proof onto her. I have identified at para. [67] of the judgment, where the learned judge made a finding that "…Miss Johnson has failed to prove that she has complied with the agreement between herself and Mr. Boswell, in respect of the ownership of the subject property". At para. [74] the learned judge concluded that "… the Court finds that Miss Johnson has failed to prove that her conduct in the course of her dealing with the subject property, entitles her to an equal share in same". This beyond doubt indicates that although the learned judge correctly identified at the beginning of her analysis that the burden of proof was cast on the respondent, she nonetheless disregarded her own observation. In so doing, the learned judge fell into error.

[88] As previously stated, the registration in both names gave rise to the presumption of equal interests. That presumption can be displaced by evidence to the contrary, of an agreement that the title was to be held in trust or by an examination of each party's contributions to the acquisition, upkeep, and improvement (see **Stack v Dowden** and **Galloway v Galloway** 1929 SC 160). The question is, therefore, was there evidence of an agreement as to how the property was to be shared?

*The issue of credibility*

[89] For the purpose of rebutting that presumption, the respondent's credibility was critical. This was especially so since there were clear contradictions between the parties'

cases. Also, in the absence of documentary evidence in some instances, their evidence ought to have been properly assessed and determined by the learned judge. It is well established that the court of review has jurisdiction to assess the sufficiency of the evidence adduced in the trial.

[90] I agree with counsel for the appellant that the learned judge, in several instances throughout her judgment, outlined the case of each party without indicating whether or not she accepted their case or any part thereof. It cannot be overemphasized that, having seen and heard the witnesses, the learned judge was duty-bound to indicate her acceptance or rejection of their evidence. In assessing whether the respondent's onus was discharged, it was entirely within her purview as the trier of the facts to reject parts of his evidence as inaccurate or unreliable and to act upon the parts which she accepted as true. Nonetheless, it was necessary for her to look at the impact that the rejected evidence had on the evidence that was accepted, in light of the numerous inconsistencies. This was required in order to determine whether the accepted evidence could sufficiently support her conclusion that the presumption was indeed rebutted. I also observe that the learned judge failed to give reasons for her overall findings or for her preference for one witness' evidence over the other in areas of dispute.

Mindful of the learned judge's failure to give a definitive finding on the respondent's credibility, I will now consider whether the evidence in this case was sufficient to establish the displacement of the presumption.

Was there any evidence of a common intention?

[91] The first order of business was for the learned judge to decide whether there was any evidence, express or implied, that demonstrated a discussion leading to an agreement or understanding as to the proportion of the beneficial interest each party was to obtain, if any (see **Lloyds Bank plc v Rosset** [1991] 1 AC 107 at para. 132). The learned judge had determined that there was no evidence before her capable of supporting such a conclusion. On this point, the learned judge made the following findings:

> "[70] It is Mr. Boswell's contention that Miss Johnson's name was added to the Certificate of Title for the subject property out of mere convenience, because he was resident abroad and because of his love for her. **Miss Johnson, on the other hand, asserts that there was no need for that to be done because she ensured that the documents requiring Mr. Boswell's signature were sent to him**.
>
> [71] **The Court accepts Miss Johnson's evidence in this regard but finds that the fact of adding Miss Johnson's name to the Certificate of Title, in light of the whole course of conduct between the parties in respect of the subject property, does not demonstrate a mutual intention between them that each would benefit equally from the subject property.**
>
> [72] **This Court is of the view that, although Miss Johnson's whole course of conduct in respect of the subject property indicates that she has some interest in the subject property, it is not sufficient to demonstrate that she is equally entitled with Mr. Boswell**." (Emphasis supplied)

[92] In my view, there is evidence that both parties may have harboured, and, to a certain extent, expressed to each other their individual expectations. Undeniably, the appellant did so. The appellant related that during one of their discussions, she told the respondent that she was "desirous of acquiring a home" and that he "encouraged the idea and advised me that when I find the home he would assist me with the purchase". She further asserted, in her affidavit evidence, that during her search she identified a property that was for sale, one which she had admired from her childhood days and informed the respondent of same. She described the property to him, and it was her evidence that he "liked the property too and he promised to send the deposit to commence the purchase of the property for both of us". In her further affidavit evidence, the appellant averred, "I will say that my name was added to the Title as I was also a purchaser and the property was intended at all material times to belong to both of us in equal shares". At a later point in her affidavit evidence, the appellant also averred that "at the start of the transaction we both intended to equally benefit from the home". In cross-examination, she disagreed that it was the common intention that if she failed to

live up to her "responsibility – NHT contributions, mortgage, rent [her] name would appear on the Title as a matter of convenience". She asserted that "Mr. Boswell and I had a relationship. Through that relationship we did all transactions together".

[93] Although the respondent sought to disavow any notion of a common intention of equal interests in the subject property, during the course of his cross-examination, he made a number of telling statements that lend credence to the appellant's assertions and which could properly have been utilized by the learned judge to ascertain the common intention of the parties. For example, the respondent agreed that "we are both to benefit equally from the title". This was in sharp contrast to his pleadings asking the court to make an adjustment of not only the beneficial interests but also the legal shares of the parties in the subject property, notwithstanding that the title was "in the names of [the respondent] and [the appellant] as tenants in common in equal shares…". The respondent further agreed that he had intended for the appellant to "own the house with me" and was not forced to put her name on the title as an equal co-owner. Although the respondent had advanced several reasons why the appellant's name was put on the title, the learned judge, in her findings of fact, had clearly rejected his averment of convenience and trust in the appellant as the reasons for so doing and had accepted the appellant's explanations instead. Taking into consideration that significant inconsistency and the learned judge's rejection of his averment, it is unclear how the learned judge arrived at her conclusion that the appellant was not entitled to an equal beneficial share in the property. This would have certainly gone to the root of the respondent's credibility.

[94] The respondent had further testified that "it was important that both of us like the property". Additionally, it was his evidence that one of the reasons why he had put the appellant's name on the title was out of love and affection and that it was the intention that both parties would equally benefit from the title. The learned judge seemed to have placed little to no weight on that admission. The respondent's belated claims that he did not intend for the appellant to use the subject property as a home, or have an interest in it, fly in the face of common sense when scrutinized against an expressed intention that they both should like the property. The respondent contradicted himself repeatedly,

apparently in a bid to deny that there was indeed an intention on his part to share the subject property equally with the appellant and to make it a home.

[95] Having regard to the foregoing excerpts from both the appellant's and respondent's testimonies, it is my view that their evidence was replete with assertions that were capable of supporting an inference that there were discussions leading to an actual agreement, arrangement or understanding between the parties that the property was to be shared equally for their benefit. In the face of the appellant's largely uncontradicted evidence, it was therefore, unlikely that the respondent could have intended to purchase the house to do business or for his sole use and purpose.

[96] To my mind, the inescapable inference to be drawn here is that, it was important that both himself and the appellant would have similar utility for the subject property and have mutual interests in it. This is buttressed by the fact that the parties had gone further than discussing this intention and had registered the title in both their names as tenants-in-common in equal shares. That is empirical evidence of such a common intention.

[97] To displace that expression of their equal interest, more is required than the respondent's bald assertions that there was no intention that the appellant should benefit equally from the subject property. Although the learned judge seems to have relied heavily on the case of **Stack v Dowden**, it is my opinion that the factual circumstances are different, and as pointed out by Lord Hope of Craighead at para. 3 of that judgment "[t]he key to simplifying the law in this area lies in the identification of the correct starting point. Each case will, of course, turn on its own facts".

[98] Another distinction between **Stack v Dowden** and the case at bar is that in the former case, there was no evidence that the parties intended that the beneficial interest should be shared equally. In this case, there is evidence to buttress the intention of both parties to benefit equally from the subject property, and no evidence to establish that such an intention had changed by agreement or understanding, expressed or implied.

[99] The same approach as commended by Lord Hope of Craighead was also the approach taken by Arden LJ in **Fowler v Barron** [2008] EWCA Civ 377. Lord Justice

Arden, allowing the appeal and awarding a half interest in the property to Miss Fowler, at para. 47, having referred to **Stack v Dowden**, and having differentiated the facts, stated that, "[a]ccordingly, subject always to the strength of the presumption arising from legal ownership in joint names, the result may, depending on the facts, be different in different cases". Again, I say, based on the foregoing authorities, the respondent has not displaced the presumption of an equal share in the legal and beneficial ownership of the subject property arising from legal and beneficial ownership in joint names.

[100] There is also no evidence of a discussion at a later date, exceptional though that situation would be, as to a change of the common intention. Based on the testimony of both parties and the stance taken by the respondent, it appears that the appellant only became aware of the respondent's change of heart when he telephoned her sometime in 2014, and told her to "get the hell out of his house". By that point, the relationship between the parties had apparently come to an end. Moreover, the appellant only became aware that the quantum of each party's beneficial interest was an issue when the claim was filed by the respondent in the court below, based on a unilateral decision taken by the respondent.

[101] I, therefore, do not agree, with the learned judge's findings insofar as she indicated that there was no evidence of a discussion between the parties demonstrating an express agreement or arrangement or understanding as to the apportionment of the legal and beneficial interest each party was to derive from the subject property. It was the duty of the learned judge to assess the evidence of both the appellant and the respondent as to any discussions, agreements, or understandings between them, in order to determine if it gave rise to the finding of the parties' common intention. The learned judge gave no indication why she had discounted the appellant's evidence of a discussion that the subject property was to benefit the parties equally, nor what use she made of the respondent's evidence elicited in cross-examination which tended to support such an inference. She did not assess the respondent's reasons or lack thereof for adopting the voluntary course of action in having both his and the appellant's names endorsed on the title as tenants-in-common in equal shares. It is difficult to see how the learned judge

came to the conclusion that she did in the face of the respondent's specious excuses and lack of credibility. There was no reasoned rejection of the appellant's evidence in that regard or reasonable basis for concluding that there was no evidence of a common intention. The learned judge was, therefore, in error.

The conduct of the parties

[102] Having determined that there was no common intention discernible or expressed by the parties herein, the learned judge elected to determine the issue of the parties' respective beneficial interests as per their conduct. Her analysis of the evidence and her findings therefrom also fall to be scrutinized in the face of the appellant's complaints. The principles distilled in the decision of **Jones v Kernott** [2011] UKSC 53, provides useful guidance in matters of this nature. That case involved an unmarried couple who had taken conveyance in their joint names without an express declaration of their beneficial interest in the house. The court outlined as one of the applicable principles in determining beneficial interest in the property, that the parties' actual common intention was to be deduced or inferred objectively from their conduct. Further, that the whole course of dealing in relation to the property should be given a broad meaning, enabling a similar range of factors to be taken into account as might be relevant to ascertaining the parties' actual intentions.

[103] In examining the whole conduct of the parties, in the instant case, the learned judge considered several factors, such as: (a) the intention of the parties when acquiring the subject property, (b) the completion of the acquisition of the subject property, (c) the mortgage payments, and (d) the subsequent renovations of the subject property.

[104] The further discussions that ensued between the parties after the subject property was identified by the appellant, but prior to its purchase, seemed mainly to have focused on the intention to acquire, the act of acquisition and the source of funding. As regards the parties' intention to acquire the subject property the learned judge had this to say:

> "[62] It is agreed between the parties that it was Miss Johnson who discovered the subject property and that it was being sold. It is also agreed between the parties that, having

> identified the subject property, Miss Johnson brought it to Mr. Boswell's attention. **This is indicative of an intention that both parties would acquire the subject property but it sheds no light on the interest to be held by each of them**." (Emphasis supplied)

[105] The respondent, in his affidavit evidence, had initially given the impression that the identification of the subject property, its acquisition, and funding, were due to his sole efforts. It was only during his cross-examination that he reluctantly conceded that the appellant had played an integral role in the acquisition of the subject property. He admitted that it was the appellant's industry and diligence that led to him becoming aware of the subject property and further that she was responsible for making contact with the vendor's attorney-at-law. Additionally, he averred that he raised the deposit money by means of tapping into his savings, and sent it to his attorney-at-law. The arrangement, he later admitted, was that the deposit sum of $800,000.00 was in fact sent to the appellant who made the payment to the vendor's attorney-at-law. The respondent, as it turned out, did not even have an attorney-at-law acting for him nor did he communicate with the vendor's attorney-at-law at the time of the purchase.

[106] In his affidavit evidence, the respondent said that he had discussed with the appellant his intention that when payment for the subject property was completed, he would retire and move back to Jamaica to live. This was in keeping with the appellant's contention that it was the intention of the parties to utilize the subject property as a home for both of them. In cross-examination, for the first time, the respondent said he had intended to operate a bed and breakfast business, not make a home of the subject property with the appellant. The learned judge clearly rejected the respondent's contradictory utterances as a recent concoction, as she noted that he had not made that assertion in any of the affidavits filed. This was the only instance where the learned judge attempted to address an inconsistency in the respondent's evidence, as pointed out by counsel for the appellant. Having accepted that the respondent was untruthful when he said the purpose of acquiring the subject property was for an investment and profit-

making enterprise, she gave no reason for rejecting the alternative reason given by the appellant that the subject property was intended to be a home.

[107] The conduct of the parties, during and after their relationship, was of relevance in determining their common intention. They both agreed that they were engaged in an intimate, albeit visiting relationship. From all appearances, it was the best they could manage owing to the geographical distance between both of them since they lived in separate countries. Notwithstanding that there was no cohabitation, in the sense of being spouses, they were not strangers dealing with each other at arms-length, nor were they engaged in a commercial enterprise, such as, business partners or persons involved in an enterprise for profit. This factor, in my opinion, supports the view that the beneficial interests in the subject property were to be held equally.

[108] I have carefully scrutinized the evidence and indeed there is ample evidence supporting the position that both parties had exerted much effort, and executed various actions to acquire the subject property.

*The parties' financial contributions*

[109] The learned judge also relied heavily on the financial contributions made by the respondent as a determining factor as to the parties' intended beneficial interests. She, however, found that both parties contributed to its acquisition. At para. [65] she specifically enunciated that:

> "[65] Miss Johnson's NHT benefits amount to fifteen percent (15%) of the total cost of acquiring the subject property. **This is a factor that the Court can properly consider, in seeking to determine the intention of the parties**." (Emphasis supplied)

[110] At paras. [66] - [68] of her judgment, the learned judge then went on to examine the mortgage payments made by each party. Of relevance are her findings at paras. [67] and [68], where she said:

> "[67] The Agreement for Sale in respect of the subject property, was completed in early 2008. Miss Johnson

has produced in evidence receipts which indicate that monthly mortgage payments began in July 2014. Mr. Boswell indicates that this was about the time when he stopped sending money directly to Miss Johnson. Miss Johnson testified that she has no other receipts showing the payment of mortgage. **In the absence of any evidence in this regard, the Court finds that Miss Johnson has failed to prove that she has complied with the agreement between herself and Mr. Boswell, in respect of the ownership of the subject property.**

[68] In any event, on Miss Johnson's account, Mr. Boswell would be responsible for contributing Fifty-Three Thousand Dollars ($53,000.00), while she would contribute Twenty-Seven Thousand Dollars ($27,000.00), towards the monthly mortgage payments in respect of the subject property. **This disparity between the amount that each party was to pay towards the mortgage, as well as, Mr. Boswell's sole contribution towards the deposit, the Court finds, is not indicative of an agreement between the parties that each was entitled to an equal share in the subject property.**" (Emphasis supplied)

[111] A number of issues arise for discussion based on the above findings made by the learned judge. Firstly, it appears that the learned judge accepted that there was indeed an agreement between the parties and the appellant had failed to uphold her end of such an agreement. There is no indication as to the evidence or thought process which led to the learned judge arriving at that conclusion, bearing in mind that the appellant had stridently denied the suggestions put to her by counsel representing the respondent. As previously stated, the appellant had denied the suggestion that "it was the common intention of both of you that if you did not live up to your responsibility – NHT contributions, mortgage, rent, your name would appear on Title as a matter of convenience". Bearing in mind also, that the respondent himself had given no evidence that there was such an agreement, I am unable to discern the evidential basis on which the learned judge made such a finding. I would say that in the absence of any such evidence demonstrating an express agreement to that effect, the learned judge should

not have utilized the suggestion to rebut the strong indication on the title. Also, even if her finding that there was such an agreement were to be accepted, there is no evidence that it was breached.

[112] Secondly, the appellant's evidence was that the mortgage was acquired in the names of both parties. The respondent agreed that this was so. Further, the statements in respect of the JNBS mortgage for the period May 2008 to October 2017, were in both names. I understand this to mean that the appellant was a co-mortgagor for the loan extended by JNBS. When a person co-signs on a mortgage upon purchasing property he or she becomes a co-borrower to secure the loan and in essence is pledging to pay the monthly mortgage payments, which *prima facie* means you are buying the property alongside the other borrower(s). Being a co-mortgagor means he or she will be responsible for the loan if the other borrower defaults and the mortgagee will hold both parties jointly and severally responsible for the mortgage debt. Co-mortgagors are taken to have assumed all the risks and liabilities of a mortgage as well as all the benefits of the property.

[113] The legal significance of the appellant being a co-mortgagor seems to have eluded the learned judge. The only assessment that she made in respect of the mortgage was in relation to the respondent making a larger payment on the monthly instalments. There was no consideration given to the evidence of the appellant that she co-signed in the capacity of an equal co-owner and co-mortgagor.

[114] I appreciate that in some instances the *prima facie* significance of joint mortgagors can be rebutted, but such a rebuttal will only arise where there is clear evidence that in fact a co-mortgagor will never likely be asked to meet the mortgage payment. Therein lies the distinction between the instant case and the circumstances which obtained in **Laskar v Laskar**. In that case, the trial judge had determined that the property was purchased as an investment and it was intended to be let for rental income and the said income was to be utilized for servicing the mortgage. Neither of the parties resided in the house and the whole house was so let. In the instant case, the appellant had been residing in the subject property with her children from 2008 when the purchase was

completed. She had made it her home and according to her evidence, made mortgage payments to the tune of $27,000.00 per month to NHT.

[115] Thirdly, there is the evidence of the appellant that she had contributed her NHT benefits towards the acquisition of the subject property. NHT benefits are intended to assist contributors to the scheme to acquire home ownership. Considering that the appellant did not already own a home and was renting premises prior to the purchase of the subject property, I find it to be peculiar that she would have used her benefits towards the purchase of a property that she did not have a significant beneficial interest in, let alone one that was intended to be used in a commercial enterprise. The grant of NHT benefits, as far as the evidence goes, meant that the appellant was liable to pay a mortgage in respect of those benefits.

[116] The evidence regarding the mortgages, as I understand it, is that the appellant was solely responsible for one of the mortgage payments, and the other, she was jointly and equally responsible for alongside the respondent. Hence her evidence that the monthly mortgage was $70,000.00. The respondent had voluntarily assumed the payment of $53,000.00 per month referable to the joint mortgage obtained from JNBS and the respondent was responsible for paying $27,000.00, referable to the NHT mortgage. It seems to me that insofar as the respondent's financial contribution was greater, this was because his income and ability to repay the JNBS mortgage was greater than that of the appellant's. In the circumstances of the relationship that existed between the parties at the time of the purchase of the subject property, it could be properly inferred that the respondent acted from the "love" he professed to have had for the appellant in undertaking the mortgage payments on both their behalf.

[117] With regard to the evidence of the NHT contributions, there was no reasoned assessment of it by the learned judge. Her very brief reference to the NHT contributions was to find that its value amounted to 15% of the purchase price, which largely represented the appellant's beneficial interests in the subject property. I feel constrained to state, however, that I am not certain of the evidential basis upon which the learned judge accepted the appellant's evidence that she had a mortgage with NHT for the

balance of $1,200,000.00. This reservation is on account of the absence of any NHT mortgage registered on the title, especially since the only mortgage registered is for $6,000,000.00, in favour of JNBS.

[118] That peculiarity is exacerbated by the absence of any documentary evidence to support the existence of the NHT mortgage as well as the appellant's evidence that she began paying same from 2009. However, since the respondent had initially indicated he had no knowledge of the appellant's NHT contribution but later when cross-examined he said he assumed that she made such a contribution, it stands to reason that he was not responsible for the payment of that NHT mortgage or the balance of the $1,200,000.00. I will rest, therefore, on the inference that the balance, irrespective of the uncertainties surrounding the source, would have been paid by the appellant and represents a direct financial contribution to the purchase price.

[119] The inconsistency in the respondent's evidence in that regard was also not resolved by the learned judge. He asserted that the appellant was not working at the time of acquiring the subject property and, therefore, was not in a position to service the mortgage. Then he admitted that up to the time of signing the documents the appellant was employed. Even more significant, in cross-examination, it was suggested to the appellant that her name was put on the title on the condition that she would keep up with her share of the mortgage.

[120] Although the learned judge seemed to have accepted the appellant's evidence that she had utilized her NHT benefits towards the purchase of the property, in resolving the claim in favour of the respondent, she appeared to have placed much reliance on the fact that the appellant had produced no evidence of any JNBS mortgage receipts prior to 2014. The learned judge seemed to have equated this to mean that the appellant had not commenced making mortgage payments until 2014. She had not indicated why she rejected the appellant's evidence that she had started paying her mortgage in 2009. I note that the respondent had also not produced any receipts prior to August 2014. I, therefore, do not grasp the significance of this finding and would say that, in my view, the learned judge's reliance on that piece of evidence was misplaced.

[121] Another aspect of the evidence which merited careful assessment was the appellant's manual contributions to the refurbishment of the subject property. There was no dispute that the house was in a bad condition when the parties took possession of it. Also not disputed was that it was the appellant who had overseen the refurbishment process. The learned judge ascribed a value of 5% to the appellant's indirect contributions to the property.

[122] The contributions made by the appellant, I find, were of a substantial nature, she was not merely contributing to household expenses for her own use and benefit. In those circumstances, the appellant's contribution towards the upkeep of the property was not purely nominal, although treated as such by the learned judge.

[123] The appellant was forthright in saying that the money to make those improvements was largely provided by the respondent, but not all of it. She had also made purchases from her own meagre funds to buy material to effect some repairs. The respondent himself recognized that the appellant had made a contribution in this regard. In cross-examination, he admitted that the appellant assumed repairs and upkeep of the subject property, "I don't deny that she did most of the work on the property".

[124] The appellant specified that she had built a garden and planted a hedge. She planted flowers and fruit trees and in 2014, erected a fence around the garden area. She paid for landscaping and maintaining the grass at a cost between $5,000.00 to $6,000.00 every four to six weeks. She solely bore the cost of fixing a portion of the roof following the passage of hurricane Sandy and all other consequential damage done to the house after the passage of the hurricane. Finally, she said she had painted the house "in recent times", I take this to mean after the period of 2008 to 2009 when the initial painting was done.

[125] As it relates to the subsequent renovation of the subject property, the learned judge stated that:

> "[69] Miss Johnson asserts that since the acquisition of the subject property, she has effected various repairs to it and has renovated it. Mr. Boswell accepts this assertion but

> maintains that these repairs and renovations were financed by him. This assertion has not been challenged by Miss Johnson.

[126] Contrary to what the learned judge indicated, the appellant did assert that some repairs and some renovations would have been carried out at her own expense, such as the fixing of the roof, landscaping and maintenance of the grass, and the painting of the walls "in recent times." All this effort made by the appellant would have been geared towards enhancing the value of the subject property and not merely executed for her personal comfort and benefit. Here again, the learned judge would have failed to make any proper analysis of the worth of the appellant's efforts and how this would have translated as conduct entitling her to equal beneficial interests. The learned judge contented herself by saying that whilst this conduct on the appellant's part "indicates that she had some interest in the property, it is not sufficient to demonstrate that she is equally entitled with Mr. Boswell". There was no indication as to what acts the learned judge would have considered sufficient to demonstrate equal beneficial interests, especially since there was no prior arrangement between the parties as to their respective obligations towards the subject property. In the circumstances, the minimizing of the appellant's efforts was unreasonable.

[127] At para. [73] she enunciated that:

> "[73] In concluding, the Court finds that it is impossible to ignore the fact that the contributions which the parties made to the purchase of the subject property were not equal. **The relative extent of those contributions provides the best guide as to where their beneficial interests lay, in the absence of compelling evidence that by the end of their relationship they did indeed intend to share the beneficial interests equally**." (Emphasis added)

[128] In my view, the learned judge was wrong in her claim that the best guide in this case was the extent of the parties' contributions. The best guide was actually the distinct interests stated on the title. This is because where the parties are joint owners and are jointly liable for the mortgage, the inferences to be drawn from who pays for what may

be very different from the inferences to be drawn when only one is the legal owner of the home (see **Stack v Dowden** at para. 69). The fact that one party may have made a greater financial contribution, should not necessarily reflect the intended beneficial interests. The reasonable inference to be drawn from the state of the title and the evidence presented in the case at bar, is that the appellant and the respondent intended that each should contribute as much to the financing of the acquisition of the subject property as they reasonably could and that they would eventually benefit or be burdened equally.

Did a constructive trust arise on the evidence?

[129] The thrust of the appellant's contention is that the learned judge ought not to have altered the legal interest as stated on the certificate of title nor indeed awarded her a less than equal beneficial interest because, at the time of acquiring the subject property, it was the parties' common intention to have an equal legal and beneficial interest. On the other hand, counsel for the respondent argued that the learned judge, in the circumstances of the case, was not precluded from looking beyond the endorsement on the certificate of title and she properly applied the principles governing constructive trust, so the orders made by the learned judge should stand.

[130] As far as I am able to discern, there is no dispute as between the parties that the relevant law under the court's purview is constructive trust. I say this because no dissent was raised by the appellant as to the learned judge's finding of a constructive trust and neither has the appellant sought to raise this on appeal. Both the appellant and respondent have heavily relied upon the same cases dealing with the principles of constructive trust. I nonetheless question whether there should have been a preliminary determination as to the relevance of the law of trust. I raise this issue because although counsel for the respondent had correctly itemized that the ingredients necessary to establish a constructive trust were: (1) there is a common intention; (2) there is detrimental reliance; and (3) there is an unconscionable denial of rights; counsel has not presented any argument that all of these ingredients were in fact established on the

evidence of the respondent or on the totality of the evidence that was before the learned judge.

**Conclusion**

[131] The bone of contention between the parties was whether the respondent was entitled to a greater legal and beneficial interest in the subject property than that which was evinced on the certificate of title. As already established, the onus was on the respondent to prove his assertions of a greater entitlement. In my view, the contradictions and inconsistencies in the evidence were either difficult or impossible to reconcile and therefore, I cannot see how the learned judge could have properly arrived at her conclusion based on the state of the evidence. Having carefully reviewed the respondent's affidavit and oral testimony, I am of the view that he was totally discredited as a witness, and there was not one significant aspect of his testimony that withstood cross-examination. There is no indication that the learned judge had made a reasoned assessment of his evidence and therefore, I am minded to say that her finding in his favour was against the weight of the evidence.

[132] Having thoroughly examined the analysis of the learned judge, it is clear that she erred in law and fact, therefore warranting the intervention of this court. The evidence, in my view, clearly supports a finding that the parties had a common intention, at the time of the acquisition of the subject property, to take the legal and beneficial interests in equal shares. For the respondent to successfully prove his entitlement to a greater share, he had to present clear and cogent evidence, which he failed to do. In the circumstances, therefore, the learned judge had no evidential basis for finding that a constructive trust had been established in favour of the respondent for 30% of the appellant's 50% legal shares in the subject property. The evidence does not support the findings of the learned judge that the respondent had displaced the presumption that the parties held equal beneficial and legal interests.

[133] For the foregoing reasons, I find that the appellant is entitled to a 50% legal and beneficial interest in the subject property. Therefore, I propose that the appeal be allowed and that the decision and orders of the learned judge, made on 7 February 2019, be set

aside. In light of that proposal, it is imperative that I also consider the concomitant consequential orders. It is also my view that since the interests of the parties have now been declared to be equal, the appellant ought to be given the first option to purchase the respondent's 50% interest and retain the subject property. This is on the basis that she has resided on the subject property with her family since its acquisition. The respondent, on the other hand, does not reside in this jurisdiction and his living arrangements would be unaffected by the sale of his interest.

[134] I therefore propose that it be declared that the appellant is entitled to a 50% interest in the subject property, that it be valued by Cohen & Cohen within 42 days of the date hereof and that the appellant be given the first option to purchase the respondent's share. In the event that the appellant fails to execute an Agreement for Sale, in exercise of the option to purchase within 180 days of the date hereof, then the respondent shall be at liberty to purchase the appellant's share in the said property. If no action is taken by either party to execute an Agreement for Sale, in exercise of the option to purchase, within 360 days of the date hereof, then the said property is to be sold on the open market and the net proceeds of the sale are to be divided equally between the parties. The Registrar of the Supreme Court is empowered to sign all documents necessary to give effect to the Orders made herein, in the event that either party refuses or neglects to do so. Relative to the rental income generated from the subject property, the appellant, within 120 days of the date hereof, is to provide the respondent with an accounting for the period of January 2014 to the date hereof, and further within 180 days of the date hereof the appellant is to pay to the respondent 50% of the rental income generated from the rental of the said property for the said period.

**EDWARDS JA**

**ORDERS**

1. The appeal is allowed.

2. The judgment and orders of Nembhard J (Ag) (as she then was) made on 7 February 2019 are set aside and the following orders are substituted therefor:

   (i) It is hereby declared that the appellant and the respondent are each entitled to 50% legal and beneficial interest in the property located at Lot 5, White River, in the parish of Saint Ann being land comprised in certificate of title registered at volume 1172 folio 45 of the Register Book of Titles.

   (ii) The said property is to be valued by Cohen & Cohen Realty, as agreed by parties, within 42 days of the date hereof. The cost of the Valuation Report is to be equally borne by both parties.

   (iii) Upon a determination of the market value of the said property, the appellant has the first option to purchase the respondent's 50% interest in the said property.

   (iv) Should the appellant fail to execute an Agreement for Sale, in exercise of the option to purchase pursuant to paragraph (iii) of this Order, within 180 days of the date hereof, then the respondent shall be at liberty to purchase the appellant's 50% interest in the said property.

   (v) Should the respondent fail to execute an Agreement for Sale, in exercise of the option to purchase pursuant to paragraph (iv) of this Order, within 360 days of the date hereof, then the said property is to be sold on the open market and the net proceeds of the sale are to be shared equally between the parties.

   (vi) The Registrar of the Supreme Court is empowered to sign all documents necessary to give effect to the Orders made herein in

the event that either party refuses or neglects to do so, either by himself or by his Attorney-at-Law.

(vii) Within 120 days of the date hereof, the appellant is to provide the respondent and/or his Attorneys-at-Law, with an accounting of the rental income generated from the rental of the said property for the period of January 2014 to the date hereof.

(viii) Within 180 days of the date hereof the appellant is to pay to the respondent 50% of the rental income generated from the rental of the said property for the period of January 2014 to the date hereof.

(ix) Liberty to apply.

3. Costs of the appeal and in the court below to the appellant to be agreed or taxed.