JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 36/89

COR: THE HON. MR. JUSTICE CAREY, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	NEVILLE LYNCH	DEFENDANT/APPELLANT
AND	MAUREEN LYNCH	PLAINTIFF/RESPONDENT

Mr David Muirhead, Q.C. for appellant

Mrs. Margaret Forte for respondent

19th, 20th, 21st, 22nd, 23rd November, 1990
& 4th February, 1991

CAREY, J.A.

We are concerned in this appeal with property 19 Graham Heights in the parish of St. Andrew title to which is registered in the joint names of the parties to this appeal. The parties were married on 12th July, 1975 and the property was acquired in the following year. The marriage was dissolved on 12th December, 1980 but I will, for convenience, refer to them hereafter as the husband and the wife.

By a summons under the Married Women's Property Act, the wife sought (so far as is material) an order -

> "1. That the abovementioned land registered at Volume 1015 Folio 820 be sold and the proceeds of sale be divided equally between the Plaintiff and the Defendant or, alternatively, that the Defendant do pay to the Plaintiff such sums as represent her share in the aforesaid property."

The hearing which was commenced before Walker, J. on 18th November, 1982, proceeded with less than ordinary lethargy reminiscent of Jarndyce v. Jarndyce in Dicken's Bleak House for the next 7 years. He completed hearings on 9th December, 1988 but the precedent having been set, did not give judgment until 16th March, 1989. One must hope that this

scandalous illustration of pathetic inactivity on the part of the attorneys concerned with the matter never again occurs. The judge ordered as follows (so far as is material) -

> "1. That the Plaintiff is entitled to a one half beneficial share in the property registered at Volume 1015 Folio 620 of the Register Book of Titles.
>
> 2. That the Defendant do account to the Plaintiff for the rent and profits accruing in respect of the said property."

The husband has appealed against that judgment and asks for an order that the orders of Walker, J. be set aside and that there be a declaration that he is entitled to the whole beneficial interest in the said property.

A number of grounds of appeal raising questions of fact and of mixed fact and law were argued before us and these I now turn to consider.

The husband had, prior to his marriage to the respondent, been twice married both ending in divorces. At the time of his third marriage, the husband owned a house at 51 Marathon Drive which was rented out. After the marriage, the wife said they decided to acquire their own home, and in pursuance of that decision, the premises in dispute 19 Graham Heights was acquired. There is no question that it was the husband who paid the deposit and indeed all the mortgage payments. The husband stated in his affidavit that at the time of the purchase, the question of the wife being a joint owner was never considered.

But her name was on the registered title. How did this come about? The wife, in her affidavit (dated 22nd September, 1981) deposed that the husband was aware "that she would have to be a party to the transaction" having regard to a letter from the mortgage company, Royal Bank Trust Company to herself and her husband setting out the terms of the loan and secondly,

instructions from the mortgage company to the legal firm of Myers, Fletcher and Gordon (Mr. Shamshudeen being the attorney having carriage of the matter) to prepare the relevant documents. This choice of language is, I think, of significance. That language does not tend to show a consensual situation but rather suggests her being "a party to the transaction" was a requirement of the mortgage company. She had stated in an earlier affidavit that before the purchase, it was agreed that her salary would be used for household expenses while the husband's earnings would be applied to mortgage payments and utility bills. I would think that the fact of her participation in the loan could scarcely derive from letters advising of mortgage approval or from instructions to attorneys but rather from the fact of a joint agreement at the time of or prior to purchase. The learned judge held that on the evidence of the wife which I have outlined that there was at the least a tacit agreement between the parties as to the method of the wife's financial contribution.

But the judge also found that the presumption of advancement was applicable to the circumstances of the case. He relied especially on the judgment of Campbell J.A. in **Harris v. Harris** (unreported) S.C.C.A. 1/81 dated 30th July, 1982. I must now say something about this case which I think is not always understood. It has to do with the manner in which the case was argued before the court in the light of the findings of the judge in the court below. In that case, the property was vested in the name of both parties. The husband endeavoured to show that the presumption of advancement which arose in the circumstances had been rebutted on the basis that the wife who had made no contributions whatever to the acquisition of the property, had signed "for convenience".

The judge found that the presumption had not been rebutted but nevertheless, declared that the parties held as to 1/3 for the wife and as to 2/3 for the husband. The question before the court was whether the judge was entitled to make the declaration he had made in the light of his holding that the presumption of advancement applied. Each member of the court gave a judgment. Both Carberry J.A. and I came to the conclusion that because the intention of the parties was ascertainable, effect should be given to that intention. At p. 8 of the judgment I said -

> "There was, I endeavoured to indicate, evidence of conduct which showed the intention of the parties."

Carberry J.A. at p. 23 stated as follows -

> " In this case the intention of the parties at the time of the transaction was reasonably clear. They contracted to take the house as Joint Tenants. The title, a registered one, was issued to them as Tenants in Common. Nothing indicates other than that they meant not only that the wife should take an interest, but that interest should be an equal one."

Probably some confusion might have crept in because of a statement of Carberry J.A. at p. 23 that -

> ".....(the judge) found that she had a beneficial interest in the premises. Whether it be regarded as a case of acquisition through a common fund consisting of a bank account or bank accounts in the name of the husband only but into which all the wife's salary cheques went, or on the basis of the presumption of advancement, not as strong as it was in older days, but still a valuable guide."

But I suspect the learned Judge of Appeal was here merely demonstrating the view that the judge was not entitled, in doing what was just, to divide the property in the manner he had. Seen in this light, the judgment is perfectly understandable

Campbell J.A. in his judgment does convey the impression that evidence of contribution can strengthen the presumption of advancement. At p. 14 he expressed the opinion that -

> "It is undoubtedly true that the presumption of advancement which arises as a matter of law may be strengthened by showing a contribution by the grantee to the purchase price of the property or by a conduct of pooling of resources by the parties but it certainly is not weakened or negatived by proof of absence of contribution, because this presumption as I have said, unlike the presumption of a resulting trust is not premised on any contribution whatsoever having been made by the person in whose favour the presumption of advancement is raised."

This dictum led Walker J, having found that the wife had made no direct contribution to the acquisition of the property, to conclude that "the presumption of advancement does, indeed arise in this case and I so hold."

With all respect to the judge, I do not think that proposition is supported by authority. There appears in the very extract of the judgment of Campbell J.A. in **Harris v. Harris** (supra) on which the judge relied, the following statement -

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

Pettitt v. Pettitt [1969] 2 All E.R. 385, In re **Bishop (deceased)** [1965] 1 All E.R. 249, **Harris v. Harris** (supra) are all authority for the proposition, that where a husband purchases property in the joint names of his wife and himself a gift to the wife is presumed in the absence of evidence to the contrary. The words underlined are crucial in this connection and cannot

be ignored. Where an intention can be ascertained on the available evidence, then effect must be given to it. This view can be supported by reference to a Privy Council decision dated 4th March, 1985 viz, **Neo Tai Kim v. Foo Stie Wah (m.w.)** (unreported) Privy Council Appeal No. 30/82. One of the properties at issue in that case was No. 44 One Tree Hill. This property was conveyed into the sole name of the wife and was the matrimonial home. After the breakdown of the marriage, the husband and the wife each claimed to be the absolute owner of the house. The husband's case was that he had paid the whole purchase price and the mortgage instalments out of his own funds and that the wife held the house in trust for him absolutely. The wife said that she paid everything out of her savings and a side-line business which was hers. The trial judge found that the intention of the parties was to purchase this house for the wife as the matrimonial home. He accepted that the mortgage instalments came out of the wife's own side-line business. He rejected the husband's claim of a resulting trust in his favour and found the property was the wife's. The Court of Appeal in Singapore dismissed the husband's appeal but in its judgment, made certain statements, with respect to which the Privy Council made observations which are very relevant. The Court of Appeal had stated that -

> ".....although a purchase of property in the name of another gave rise to a resulting trust in favour of the purchaser in the absence of a common intention to the contrary, nevertheless if the purchaser were the husband and the grantee the wife, 'the doctrine of the presumption of advancement comes into play on behalf of the wife to negative the resulting trust in favour of the husband'."

Then their Lordships observed that -

> "it was not appropriate for the Court of Appeal to pray in aid the doctrine of presumption of advancement. The trial judge had found as a fact with which the Court of Appeal agreed, that there was a

> "common intention that the house should be bought 'for the wife as the matrimonial home', which in the context of the judgment of the trial judge meant 'for the wife beneficially as the matrimonial home.' This common intention by itself established the beneficial ownership and precluded the operation of any presumption."

It seems to me absolutely plain that the doctrine of the presumption of advancement operates only where there is no evidence of intention, and one has to be imputed. Thus the true nature of the presumption was explained by their Lordships in these words -

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

Another useful case which was cited to us by Mr. Muirhead was **Grzeczrowski v. Jedynska & anor.** (1971) Sol. Jo. 126 as illustrating the rule that where there is evidence of the intention of the parties, it will rebut the presumption, so as to give effect to the intention found.

Mr. Muirhead next attacked the learned judge's analysis of the evidence to rebut the presumption of advancement which the judge found, arose on the facts. The husband tendered in evidence a transfer by the wife of her interest in the property in dispute in which no consideration was inserted: it was undated but executed by the wife. The wife stated that she had been coerced into signing by reason of her husband's threats. The husband's version of how this document originated

is altogether different. He deposed that the document was prepared by attorneys who were the wife's employers and who acted for the mortgage company. At a meeting with the attorney, Mr. Shamshudeen, at which his wife was present, the attorney suggested that to meet the husband's objections to the wife being made a party to the mortgage, a requirement of the mortgage company, this document would be prepared. It could be executed by him at any time the need arose and he was advised that the consideration which should be inserted, should not be a ridiculous figure.

There was conflict between the parties whether the wife brought the document home signed by her or whether the husband collected it. The judge found the evidence of Mr. Shamshudeen highly relevant on this issue and resolved the conflict by accepting the wife's version because it was corroborated by the attorney. But he rejected the husband's evidence as to the agreement reached with his wife, which was entirely supported by Mr. Shamshudeen.

It is difficult, in my view, to appreciate how the judge could have accepted the evidence of the attorney on an issue of little, if any significance and ignore it on a matter of crucial significance. The judge never said in terms that he rejected this evidence: he remained silent about it and by necessary implication rejected it. But I fear, he could not adopt that course. His finding that he accepted the wife's evidence in this regard can only be regarded as unreasonable.

The judge on this important issue having ignored Mr. Shamshudeen's evidence, asked two questions - "would the (wife) have assumed personal liability under a mortage taken in order to facilitate the purchase of property in which the defendant would have the entire beneficial interest and she none?

He answered in the negative - "I think not." The second question posed was as follows: "Would the plaintiff have voluntarily divested herself of her beneficial interest in the matrimonial home while at the same time retaining liability under a mortgage which had not been discharged?" He responded as before. The terms of the mortgage loan which were contained in a letter to the parties showed that the wife apart from a personal liability, had nothing at risk. Paragraph 2 of the letter in which the terms were set out, was in the following form -

> "The collateral security which we will require is a first legal mortgage over property situated at 19 Graham Heights, Kingston 8 and the building thereon should be insured comprehensively under our Collective Policy with Motor Owners Mutual Insurance Association Limited for $46,000. We will also require the assignment of an insurance policy on your life. We will also require the assignment of your housing allowance which is presently $4,200 per annum and your entertainment allowance which is presently $600 per annum and also that a Caveat be lodged against your Dover property. Other conditions of the loan are as follows:-
>
> a) Should there be any delays and defaults in the monthly payments, any Attorneys' costs, etc. incurred will be for your account.
>
> b) Should this offer be not taken up by the 22nd instant, it will be automatically cancelled.
>
> c) Your banking account should be maintained with the Royal Bank Jamaica Limited.
>
> d) Regardless of the date of disbursement of the loan, repayment will be on the last day monthly. Should the loan be disbursed within the month, interest will be calculated to the end of the month and deducted from the proceeds before being paid over to our Attorneys."

I do not think the learned judge had the relevant facts of the case in mind when he asked the two questions referred to above. He relied, as he himself said, on the opinion of Campbell J.A. in **Harris v. Harris** (supra) who stated that -

> ".....It is inconceivable that a husband would honestly and reasonably expect his wife to sign a mortgage on a property which the husband states quite clearly and unequivocally would be his exclusively. The evidence lacks realism and persuasion that a wife would be so indulgent to a husband to co-sign a mortgage which imposes personal liability on her, merely to provide a house for a husband at a time when the marriage had broken down and where no provision is made for the wife herself in the event that, as would be highly probable, she may be compelled by circumstances as has happened in this case, to leave the very house towards the purchase of which she has, without consideration, incurred financial obligations."

But those words were used against a background of evidence in which the marriage had broken down. Those were not the facts before the learned judge in the instant case. Campbell J.A. would certainly be surprised to learn that his statement of a view he had formed on particular facts was being elevated to a rule of law. It is now a fact of modern economic reality that many building societies require as a matter of policy the names of husband and wife to be joined as parties to a mortgage loan. This fact was appreciated by Lord Diplock in **Pettitt v. Pettitt** (1969) 2 All E.R. 385 at p. 415 when he observed -

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

The fact that a wife agrees to be a party to a mortgage loan granted to her spouse and herself does not inevitably mean that she expects "a piece of the action" if I may be pardoned the use of an Americanism. A great many relatives assist their relations in this way, and I have not the least doubt that no one would say that they expect thereby to have a share in the equity. What is required is evidence of the parties' intentions and therefore all the circumstances must be taken into account. The question which Campbell J.A. posed in **Harris v. Harris** (supra) could be answered in the affirmative because of the facts in that case and not irrespective of those facts. The result of all this is that the finding by the judge that the husband was amenable to the wife's being joined as a party to the mortgage contract and that he approved of the wife being registered as joint proprietor of the house, was in my opinion, an unreasonable finding.

The judge put great store on his finding that the blank transfer was signed in the circumstances which the wife declared. But with respect, the execution of the agreement was not the relevant or significant aspect. The relevant and significant aspect was when, if at all, was agreement reached that the wife would not share in the equity. It was therefore at that discussion when agreement was reached and not when the wife executed the blank transfer. That paper writing was but the manifestation of that agreement; an agreement arrived at, prior to its execution. The judge's focus was, in my view, altogether wrong and amounted to a failure to appreciate the significance of evidence. This Court is entitled therefore to interfere. Both the husband and Mr. Shamshudeen concurred in averring that when the matter of both parties being required

to join in the loan and the divestment of her interest was discussed, she "raised no objection."

These findings necessarily coloured the view which the judge formed of other evidence by the husband in the case where conflicts between the parties occurred. He found as a fact that the wife had contributed financially to the acquisition of the house, firstly by contributing from her earnings to the house-keeping expenses and secondly by paying for some grill work to the house.

It must be said that the judge must have formed a most favourable view of the wife. But her evidence as to her income and financial contribution was largely discredited. In an affidavit she deposed that the grill work which she undertook amounted to $2,000 but had to concede under cross-examination that it cost less than $900 when a document which she herself had prepared was produced to prod her memory. Then despite her assertions that she paid for groceries and other outgoings, was constrained to admit that she used her husband's money viz, rental she collected on his behalf while he was away for a period of nearly a year, to pay the helper, the gardener, and in feeding herself. She set $30 - $35 per month as the maximum she had used to feed herself. Again when her own document was produced, she had to confess that it was approximately $80 per month. For a person who said she had an interest in the property, she displayed a remarkable disinterest when the mortgage payments fell into arrears and the house was put up for auction. She paid nothing to prevent the auction although the mortgage company wrote her several times on the matter. She said that she had done nothing and the reason for her inaction, was that she could do nothing. The judge of course saw and heard the witness and was therefore in a position of advantage but in the face of retractions

on matters of such importance, it is impossible to discover the basis of credit which the judge accorded to the wife's evidence. At the least, her evidence would have to be viewed with suspicious care.

I would hold that the wife had not proved that she had made any contribution to the acquisition of the property by paying the grocery bills. So far as the grill work which she did carry out, she herself conceded that she had grilled the master bed-room and made a grill-gate separating the living and sleeping quarters. This undertaking she had carried out for her own security and without consultation with her husband. That was the extent of her contribution. In my view, that hardly qualifies as contribution to acquiring an equitable interest in the property. The improvement was not of a substantial nature as would enhance the value of the property significantly. Further, there never was any agreement by the husband that the wife would benefit in the property by this minor improvement. As Lord Upjohn in **Pettit v. Pettit** (supra) at p. 410 observed -

> ".....in the absence of agreement, and there being no question of any estoppel, one spouse who does work or expends money on the property of the other has no claim whatever on the property of the other. **Jansen v. Jansen** [1965] 3 All E.R. 363; [1965] P. 478 was a very good example of that type of case. The husband, putting it briefly, spent his short married life making very substantial improvements on the properties of the wife which greatly increased their value as reflected in their sale price. The wife recognised that as between husband and wife he should receive some benefit and instructed her solicitor to draw up an agreement whereby he was to receive monetary recompense from the proceeds of sale of one of the properties he had improved when such sale was effected. The husband refused to accept this so the parties in fact and in law never did agree. In those circumstances it seems to me clear

> "that the husband had no claim against the wife even personally and certainly no claim against the property itself either by way of charge or by way of a share in the property. In my opinion **Jansen v. Jansen** was wrongly decided."

It should be understood that once contribution on the part of the wife was found by the judge, it rendered the doctrine of the presumption of advancement inapplicable. But as I have endeavoured to make clear, this other basis of contribution on which Mrs. Forte attempted to rest the wife's equitable interest and which found favour with the judge in his judgment was unsubstantiated for the reasons stated herein.

In the result, I would allow the appeal, set aside the order of the judge in the Court below and make a declaration that the appellant is entitled to the entire beneficial interest in the said property. The appellant is entitled to his costs both here and below.

WRIGHT, J.A.:

I make only a brief comment as I am in agreement with Carey, J.A. that the appeal should be allowed.

There are among the important aspects of this case, two which stand out with undiminished clarity. Firstly, there is the established fact, on the evidence, that the plaintiff is not a witness of truth and that her untrustworthiness was proved out of her own mouth. She essayed to prove indirect contribution to the acquisition of the house, 19 Graham Heights, by testifying that she relieved the appellant of certain household expenses thus enabling him the better to meet the cost of acquisition. Further, she told of extensive grill work done to the house. However, when the relevant documents were produced it was clearly established that the bills, which she claimed she had met from her own pocket, had, in fact, been paid out of rental which she had collected on behalf of the husband concerning which she had rendered an account showing how the money was spent. Again, her salary, as shown by her bank statements, did not accord with her viva voce evidence in that the salary which was lodged to the bank was less than she had testified. Finally, the grilling was shown not to have been of the extent claimed by her and, in fact, such grilling, as had been done, was solely for her security. This lack of creditworthiness ought to have alerted the trial judge to the grave risk of accepting her unsupported evidence in proof of any question which fell to be decided. To my mind, it was certainly relevant to the important question of how The Transfer, Exhibit 1, came into being.

The other aspect of the case to which I call attention is the fact that the appellant was adamant that his wife,

the plaintiff, should acquire no interest in the house he was then purchasing. He had intended to acquire that house without her involvement. The letter from the mortgage company, dated June 5, 1980, exhibited by her, demonstrates, beyond peradventure, that her name was placed on the record on the mortgagee's insistence and for their security and certainly not as evidencing the appellant's intention to benefit her.

"Royal Bank Trust Company
(Jamaica) Limited
30-36 Knutsford Boulevard
P.O. Box 622, Kingston

June 5, 1980

Mrs. Maureen Lynch
c/o Myers, Fletcher & Gordon
Manton & Hart
21 East Street
Kingston

Dear Mrs. Lynch:

Re: Mortgage - 19 Graham Heights

You asked me to advise you as to the requirements by this company when your husband had applied for a loan in 1976 on the security of the above premises, and particularly whether or not the company had insisted on your joining in the mortgage with your husband in view of the need for additional security other than that offered by him alone.

Our files indicate that during the course of the negotiations with us in October 1976 we informed Mr. Neville Lynch that it was essential that you should be joined in the mortgage to provide for adequate security in respect of the repayment of the loan.

Mr. Lynch accepted this position and on the 15th October 1976 we wrote to your husband and to yourself setting out the conditions under which the loan would be made and Mr. Lynch duly accepted these conditions on the 15th October 1976.

We have always looked to you both as mortgagors and in the event of either of you not honouring the obligation we would move against the

"other. Accordingly, I confirm that your joining in the mortgage was a matter of necessity in order for the loan to be obtained.

Yours truly,

/s/ G. Louis Byles
Managing Director

P.S. We enclose copy of our letter of the 15th October 1976 referred to above."

This very fact was recognized by Lord Diplock in **Pettitt v. Pettitt** (1969) 2 All E.R. 385 at 415 when dealing with presumptions of advancement he said:

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

But the letter does not stand alone in this regard. There is evidence of Mr. Zalil Shamshudeen, an attorney-at-law and an associate at the firm of Messrs. Myers, Fletcher and Gordon, who were the attorneys-at-law for the mortgagees and the employer of plaintiff. The trial judge regarded his evidence as "highly relevant" but obviously missed the point when he came to deal with that evidence. Paragraphs 6, 7 and 8 are as follows:

> 6. That Mr. and Mrs. Lynch attended at my office pursuant to the approval of the mortgage by the Trust Company and instructed us to prepare the Transfer also. During the meeting Mr. Lynch in the presence of Mrs. Lynch stated that his wife had made no financial contribution towards the deposit or purchase price but her name was on the Title in order for him to qualify for the loan. He indicated

> "that his job was taking him out of the Country and stated that in the event they separated he did not want to have any problems arising out of the fact that Mrs. Lynch was on the Title.
>
> 7. Mr. Lynch enquired whether a document could be prepared transfering his wife's interest to him and I confirmed that it was possible. I pointed out that any such transfer subject to the Trust Company's Mortgage would require their consent or he would have to pay off the mortgage. After some discussion on the problems that he may encounter Mr. Lynch advised that he would go back to the Trust Company and attempt to convince them to provide the loan in his own name. He telephoned me several days later and instructed me to proceed to vest title in both names and also to prepare a transfer from Mrs. Lynch to himself. He confirmed that they had to join their incomes in order to qualify for the loan from the Trust Company and could not get the loan alone. The entire discussion took place in the presence of Mrs. Lynch and she raised no objection at all.
>
> 8. That I subsequently prepared the transfer 'in blank' from Mrs. Lynch to Mr. Lynch and Mr. Lynch collected same. He undertook to have Mrs. Lynch execute same and I advised him that if he ever wanted to place that deed on record he would have to go to an Attorney."

What the judge regarded as important was that paragraph 8 contradicted the appellant as to how Exhibit 1 came to him, whereas the point of importance is how that document came to be created. In my view, it strongly supports the appellant that he had no intention of conferring any benefit on the plaintiff.

I think I have said enough to show clearly that the judge erred by finding that the presumption of advancement did arise in this case. There was, therefore, nothing to be rebutted.

GORDON, J.A. (AG.)

I have read the judgment of Carey J.A. and agree with the contents and conclusion. I will add a brief comment.

The evidence shows that the husband was prepared to purchase the house in his name but was obliged by the Trust Company to join the wife in the mortgage. Paragraphs 2 and 3 of the letter from Royal Bank Trust Company dated 5th June, 1980 signed by Mr. Louis Byles and addressed to the wife in response to an enquiry from her and exhibited by her is instructive:

> "Our files indicate that during the course of the negotiations with us in October 1976 we informed Mr. Neville Lynch that it was essential that you should be joined in the mortgage to provide for adequate security in respect of the repayment of the loan.
> Mr. Lynch accepted this position and on the 15th October, 1976 we wrote to your husband and to yourself setting out the conditions under which the loan would be made and Mr. Lynch duly accepted these conditions on the 15th October, 1976".

The husband contended that he only completed the arrangements for the purchase of 19 Graham Heights after he had been assured that in the event of a dispute arising his wife could not claim an interest in this property. To this end he obtained exhibit I, the transfer, signed by her. Mr. Shamshudeen, an attorney-at-law in the firm of Myers, Fletcher & Gordon her employers and her attorneys in the action, told of how exhibit I came into being. He said at page 28:

> "6. That Mr. and Mrs. Lynch attended at my office pursuant to the approval of the mortgage by the Trust Company and instructed us to prepare the Transfer also. During the meeting Mr. Lynch in the presence of Mrs. Lynch stated that his wife had made no financial contribution towards the deposit or purchase price but her

name was on the Title in order for him to qualify for the loan. He indicated that his job was taking him out of the Country and stated that in the event they separated he did not want to have any problems arising out of the fact that Mrs. Lynch was on the Title.

7. Mr. Lynch enquired whether a document could be prepared transferring his wife's interest to him and I confirmed that it was possible. I pointed out that any such transfer subject to the Trust Company's Mortgage would require their consent or he would have to pay off the mortgage. After some discussion on the problems that he may encounter Mr. Lynch advised that he would go back to the Trust Company and attempt to convince them to provide the loan in his own name. He telephoned me several days later and instructed me to proceed to vest title in both names and also to prepare a transfer from Mrs. Lynch to himself. He confirmed that they had to join their incomes in order to qualify for the loan from the Trust Company and could not get the loan alone. The entire discussion took place in the presence of Mrs. Lynch and she raised no objection at all.
8. That I subsequently prepared the transfer 'in blank' from Mrs. Lynch to Mr. Lynch and Mr. Lynch collected same. He undertook to have Mrs. Lynch execute same and I advised him that if he ever wanted to place that deed on record he would have to go to an Attorney."

The learned judge found the evidence of Mr. Shamshudeen 'highly relevant'. On this aspect of the case the learned judge found at page 37:

> "But the true position appears to be, and I do make such a finding, that very soon after the acquisition of the house the parties' marriage began to turn sour and the defendant suffered a change of heart. As a consequence he clearly resolved that the plaintiff should be divested of her interest in the house and he set about achieving that objective. In the course of doing that, exhibit I was conceived and produced to the

> "plaintiff for her signature. I have no doubt that the plaintiff's signature to this document was obtained by threats of violence issued to her by the defendant. Indeed, this type of behaviour on the part of the defendant appears to have been consistent with his natural propensities, it being a fact, as he, himself, admitted."

This finding was not in accord with the evidence. The letter from Mr. Byles refers to the husband accepting the terms of the mortgage on 15th October, 1976. Mr. Shamshudeen said it was in October 1976 that both husband and wife attended on him and the husband spoke on insuring his interest in the house and gave him instructions to prepare the transfer. The agreement embodied in that document, was arrived at in October and the transfer vesting title in both was executed on 4th November and registered on 17th November. The mortgage was signed on 12th November and registered on 17th November, 1976.

The finding of the learned trial judge that the couple went into occupation of the house in "reasonable amity" (on 1st November, 1976) did not contemplate the antecedent events of October and the statement made by the wife in her divorce petition, which was also exhibited, that the first act of cruelty by the husband occurred in October 1976.

The evidence is that the husband would have completed the transaction alone if he could and he only agreed to have his wife's name included for convenience of obtaining the mortgage. This evidence rebuts the presumption of advanc[illegible].