

THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ANTIGUA AND BARBUDA

(CIVIL)

CLAIM NO: ANUHCV 2007/0096

In the Matter of the Married Women Property Act, Cap. 267.

and

In the Matter of an application for a declaration of Interest in Property

BETWEEN:

OGDEN BROWNE

Claimant

and

SALLY-ANN BROWNE

Defendant

Registration Section

Central

Block

14 219 OB

Parcel

70

Appearances:

Ms. C. Debra Burnette of Henry & Burnette for the Claimant

Mr. George Lake of Lake & Kentish for the Defendant

.....
2007: November 06

2008: February 15
.....

JUDGMENT

[1] **Harris J:** This is an action brought by a husband/Claimant and wife/Defendant about the beneficial ownership of their matrimonial home. It is brought under the Married Women Property Act Cap. 267 and concerns the parcel of land more particularly described at the

Land Registry as Registration Section: Central, Block: 14 219 OB, Parcel: 70. The parcel of land is registered in the sole name of the Claimant, Ogden Browne.

- [2] The Claimant, Mr. Browne, claims the entire interest in the matrimonial home. The Defendant, Mrs. Browne, by way of her Defence and Counterclaim asserts her interest and entitlement to half of the matrimonial property on the basis of her (i) financial contributions to the construction of the matrimonial home (ii) her domestic endeavour, (iii) a Common Intention between herself and her husband/claimant that she should have a share in the subject property.
- [3] The Claimant purchased the land upon which the matrimonial home was constructed in or about 1988 prior to meeting the Defendant. The parties met and began an intimate relationship in 1990. The parties' relationship then bore its first (1st) child in the same year, 1990 whilst the Claimant was abroad on an academic scholarship. Construction of the matrimonial home which had its D.C.A approval in 1988, commenced in 1993.
- [4] In 1990 the Claimant had received a scholarship and left Antigua to pursue studies in that year, before he had an intimate relationship with the Defendant. The relationship became intimate later that year when the Claimant had returned on his vacation.
- [5] The Claimant had an adequately funded scholarship that provided him with a financial surplus during his tenure as a student until his completion of his studies in November of 1991. During this time he paid the Defendants rent and some other outgoings.
- [6] When the Claimant first met the Defendant, the Defendant was working at *Richardson's Supermarket* for \$175/wk. The evidence is that she became very ill with her first pregnancy with the Claimant's child and stopped working in 1990. She resumed working early in 1993. During this period between 1990 and 1993 the Claimant maintained the child and paid the Defendant's rent, initially, from his surplus scholarship funds and subsequently from his employment income.

- [7] The construction of the foundation of the home commenced in 1993 at a completion cost estimated by the Claimant at \$40,000.00¹. Some construction material was purchased piece-meal over the period from 1993 to completion. After the construction that year no further work was done on the house until 1998. It would have been clear to the Claimant at this stage that he would be unable to comfortably complete the house from his income.
- [8] Substantial quantities of material for the continued construction of the matrimonial home were credited from the Antigua Plumbing and Hardware Centre. Pursuant to a credit agreement with the said Hardware, the Claimant's Land Title Deed was retained by the said Hardware Centre as security.
- [9] In September of 1998 the sum of \$171,000.00 was borrowed from Barclays Bank PLC² with the Defendant as "Co-applicant" and the Claimant as "Main applicant". These funds were used to complete the matrimonial home and for payment to existing creditors such as contractors and the aforementioned Antigua Plumbing and Hardware Centre.
- [10] The Defendant does not claim to have been involved in the purchase of the land but does assert that she, together with the Claimant, at the beginning, discussed their plans for the building of their matrimonial home and that she was subsequently involved in making changes to the approved D.C.A plans. Further, the Defendant asserts, she contributed to the purchase of material and jointly entered into the loan agreement with Barclays Bank³ after discussions with the Claimant.
- [11] This loan/mortgage agreement was evidenced by a copy of a completed application form which represented the Defendant as unemployed and the associated Monthly Budget Analysis represented her income as nil. The Defendant acknowledged this fact in her oral testimony⁴.

¹ The Defendant has not contradicted this estimate

² See exhibit "OB3" pp 9 of the (Core Trial Bundle of Agreed Documents)

³ "*The bank could have come behind me for the money if the loan was in default, yes*", per the Defendant under x-examination.

⁴ "*The bank did not take into account any income I may have had.*" - Defendant.

[12] She asserts that by agreement with the Claimant, following her illness due to her pregnancy, she stayed home to take care of the children and carry out other domestic household activities. The Defendant says that interspersed with periods of domestic endeavour she earned an income from various sources including formal employment and “box hands” all of which were used to make her direct contribution to, the purchase of construction material for the construction of the matrimonial home and, indirect contributions by paying for food, clothing for the family, cable T.V./utilities, school fees and things for the house. Further, testified the Defendant, she obtained financial assistance for the construction of the house from her sister here in Antigua and her father in Dominica.

[13] The Defendant did not stop there, but alleged that from the time the Claimant was intimately involved with her, they had discussions about building a house on the said land for them to have a family home. That he had told her on several occasions that the home was for both of them.

[14] The core of the Defendant’s ‘common intention’ contention is perhaps best encapsulated in paragraph 2 of her Witness Statement/evidence in chief. I think it important enough and certainly convenient for the reader, to set out the relevant part here: “...*At this time we discussed building our family home on the said lands at Lightfoot. We talked about having our children and raising them in our own home. These talks continued over a period of time. Sometime in 1992, after the claimant returned to Antigua, we decided that the time was right to begin building our home. We decided that initially we would try to make a start out of our joint resources without going to the bank. We pooled our salaries, had plans drawn up and approved and began work on the foundation. At all material times it was said and understood by both of us that the house will belong to both of us beneficially and that it would be our family home*”.

THE ISSUES

[15] The following are the issues for determination:

- (i) Whether the Defendant contributed directly and/or indirectly to the construction of the dwelling house on the land earlier described.

- (ii) Whether the Defendant contribution if any, is sufficient to entitle her to a beneficial interest in the property notwithstanding the Claimant's sole legal Title thereto.
- (iii) Whether the Claimant holds the property on a constructive /resulting trust for the use and benefit of himself and the Defendant.
- (iv) What if, any, is the Defendant's share in the matrimonial property.
- (v) Whether the Defendant wrongly lodged a caution on the said property.

THE LAW

- [16] This claim is under the Married Women's Property Act a law that dates back to 1887. There is no modern statute applicable here in Antigua that amends or otherwise impacts on this statute in a manner relevant to this case. According to Baroness Hale of Richmond, in the Privy Council case out of Antigua and Barbuda (P.C. Appeal #142/05) Lynn Anne Abbott v Dane N. L. Abbott), at paragraph 2; *"unlike some other Caribbean countries, Antigua and Barbuda have no equivalent of the wide powers of property adjustment enjoyed by divorce courts in the U.K. Property disputes have therefore to be resolved according to the ordinary law."*
- [17] The law on the Married Women's Property Act is set out in cases of Pettitt v Pettitt [1969] 2 All ER 385 and Gissing v Gissing [1979] 2 All ER 780 HL and continued to be developed in Lloyds Bank plc v Rosset [1991] 1 AC 107 and Stack v Dowden [2007] UKHL 17, [2007] 2WLR 831 and the **Abbott** case.
- [18] The applicable law in the matter before this Court has not changed much. The rights of the parties in these circumstances are defined by the concepts of Resulting Trusts and Constructive Trusts¹. The fundamental question to both trust concepts though, is *"whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement,*

¹ The Privy Council in the Abbot case at para. 4 has expressed that the "Constructive Trust is generally the more appropriate tool of analysis in most matrimonial cases"

arrangement or understanding reached between them that the property is to be shared beneficially” (Baroness Hale of Richmond in Privy Council Appeal #142 of 2005 *Lynn Anne Abbott v Dane N. I. Abbott* at para. 3 of the Judgment quoting Lord Bridge of Harwich in Rosset’s case [1991] 1 AC 107, at 132-3). Lord Bridge goes on to say; *“The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her own detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppels”*

[19] The Resulting Trust is created by payment or a part payment of the purchase price. By operation of Law the resulting trust arises in favour of the party who has provided money for that purchase. It gives effect to the presumed intentions of the parties at the date of the acquisition of the property. To put it another way: *“The time at which the beneficial interest ‘crystallizes’ under the resulting trust is the date of acquisition”* (Elements of Land Law, 4th edit. by Kevin Gray pp 246 (b); London Butterworth’s 1987). However, conduct of the parties subsequent to the acquisition date may be used as a basis for retrospective inference as to the party’s actual intention on the date of acquisition. (Elements of Land Law 4th edit. Gray) ante, see also Judgment of Browne-Wilkinson L.J in Grant v Edwards [1986] Ch. 638 (655)). (but see footnote to para. 21 herein).

[20] In *Button v Button* [1968] 1 All ER at p 1067 Lord Denning MR determined that; *“The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interest in, the property.”* In the case of *Burns v Burns* [1994] 1 All ER 244 a case not decided under the UK Matrimonial Causes Act 1973 an Act which empowers the court to make property adjustment orders, they being unmarried, Fox LJ on the question of housekeeping, domestic duties and Common Intention had this to say; *“That common intention may be*

inferred where there has been a financial contribution, direct or indirect, to the acquisition of the house. But the mere fact that parties live together and do the ordinary tasks is, in my view, no indication at all that they thereby intended to alter the existing property rights of either of them.”

FINDINGS

- [21] I have had the benefit of reading the Defendant's submissions and the submissions of the Claimant both filed on the 16th of November 2007. The said submissions both have comprehensively set out the case and evidence in support of the respective cases. Together with the Statements of Case and the oral and written evidence in this matter, a sufficiently clear picture has emerged to make a determination as to the rights of the respective parties. Only certain aspects of the evidence need be held out for further scrutiny and analysis here.
- [22] The evidence in support of the Claimant's case is; his registered proprietorship, adequacy of his income to meet the mortgage payments and that of the domestic household outgoings and, his denial of; (i) the Defendants direct or indirect financial contribution to the construction of the matrimonial home and (ii) any conversation act or omission in support of a common intention between himself and wife/Defendant that she should have a share in the matrimonial home.
- [23] The Claimant's evidence supports his sustained employment during the subject period 1990 to date, that is, from 1990-1991 during his studies, his scholarship receipts were \$1200/mth; unemployed from November 1991 to May 1992 (Mrs. Browne/Defendant was, on the evidence, also unemployed during that period); from May 1992 the Claimant was employed by the Ministry of Finance at \$1,910.00/mth and *moonlighting* at Banana Cove Hotel at the additional income between \$600-\$700.00/wk; in 1995 received a gift from his father of EC \$5000¹; in July 1993 the Claimant was employed at Antigua Catering Services Ltd at \$3000.00/mth plus allowances totaling \$430.00. A quarterly bonus was also part of his remuneration package; in September 2000 the Claimant applied for and received a

¹ See paragraph 18 of Claimant's Witness Statement at pp 21 of the Core Trial Bundle

voluntary severance package of \$29,600.00 from Antigua Catering and in addition, received a sum of \$6000.00 from his accumulated pension fund. In January of 2001 the Claimant was also employed at Jolly Harbour Villas as a night auditor and from 2002, during the day, as a teacher at St. Joseph's Academy receiving a total income from both jobs, of \$6800.00/mth.

[24] In 2005 Jolly Harbor Villas closed their operations and severed their staff leaving the Claimant with a sum in the region of \$8000.00 as his severance pay.

[25] The evidence-in-chief in the form of the witness statement and the oral testimony of the Claimant do not provide any assistance to the Court with respect to the Claimant's monthly commitments.¹ However, at page 17 of the Core Trial Bundle of Agreed Documents the Barclays Bank PLC, monthly Budget Analysis in support of the mortgage application of 20/8/1998 shows a net monthly income of \$3,425.00 for the claimant and no entry for the wife (Defendant) income and the sum of \$2,616.00 as the total monthly commitment leaving a surplus of \$1,533.00. The types of monthly commitments set out there are inadequate in breadth and are set unrealistically low.

[26] I do not suppose that the Claimant or the Defendant would have sought to leave out any source of income no matter how small² in the effort to secure the mortgage loan. I do find that there is no discernable reason why the apparently '*impecunious*' Defendant would have been required by the Claimant to execute the loan documents with him, unless, as an act of confirmation on the Claimant's part of the Defendant having an interest in the property.

[27] By letter dated 16/3/1999 from 'Barfincor' (Barclays Bank PLC) to the Claimant and Defendant herein, the period of repayment of the mortgage loan as given at 25 years and the monthly installment as \$EC1,615.00. This was the most recent evidence of that outgoing, neither party giving this evidence in their witness statements or oral testimony. I

¹ included items such as rents, repairs/maintenance to property fire Insurance, electricity, telephone, water, car operating cost, school fees, food and clothing etc

do note that by using this figure in the Monthly Budget Analysis (pp 17 of the Core Document Bundle) and making allowance for the falling away of items “7(c)” and “10(c)”, that there is an approximate \$100.00 surplus. A very tight budget that begs for assistance. It would have been clear to the Claimant at this stage that he would require financial assistance regularly if not perpetually.

[28] None of the evidence for the Claimant as to his income or the documentary evidence (see the Monthly Budget Analysis referred to above) of the dollar value of the household outgoings has been refuted by the Defendant. I am however, more inclined to accept as more closely representing the Claimants income, that which is disclosed in the Bank *Monthly Budget Analysis*.

[29] The evidence supports the contention of the Defendant that from 1998 to 2000 her income position improved, she having gained employment at several institutions¹.

Direct Financial Contribution

[30] The evidence regarding the direct financial contribution to the purchase of the land and payment of the mortgage installments are in favour of the Claimant as the sole direct contributor².

[31] In cross examination the Defendant, for the first (1st) time, reveals that sometime in 1993 she had given \$3000 to the Claimant for the deposit on the ‘blocks’ from monies withdrawn from a credit union account³; an account she described as a “...*joint account with my husband*”. This ‘contribution’, if that is what it is, would not go to establishing the *common intention*, that intention, by the Defendant’s evidence, having been established since 1990/1991/1992, but rather, would be evidence of her acting to her detriment on an

¹ See from pp 53 of the Core Trial Bundle of Agreed Documents

² Evidence in support of this includes the Claimant’s testimony in X-examination that: “*I did not pay any monies on the loan*”. This, notwithstanding both parties signing the loan application.

³ pp 28, 29 and 30 of the Core Trial Bundle of Agreed Documents reveal the existence of a Credit Union account in the years endorsed thereon. However, in relation to the household expenses, the Defendant in X-examination testified: “*We did not pay expenses from the joint account at any time*”. The Court notes that there is no evidence that outgoings for the acquisition of the land or construction of the house were paid from a joint account of any description.

existing common intention. On the evidence however, I am unable to accept that the Defendant had this money to contribute at the time. Further, this is critical evidence that was not even raised by her on examination in chief. In any event, if I am wrong, and she did contribute the \$3000.00, I find the contribution by itself, miniscule in comparison to the whole land acquisition and construction cost to the point of being de minimis.

Indirect Financial Contribution

[32] At the onset let me say that I reject the Defendant's evidence with respect to her odd job earnings and family contributions. The Defendant's evidence lack specificity, quantification and inherent consistency sufficient to elevate these assertions from mere bald assertions to evidence satisfying the Civil Standard of Proof. I accept the submission of the Claimant that the Defendant did not work at all for 5½ years of the 13 year relationship. I accept the Claimant's assertions that in any event, the year that the Defendant Claimed that she received her '*box hand*' she on her own accord travelled abroad at her expense, together with her children, thereby negating the extent to which the *box hand* monies could have been applied to the acquisition of an interest in the matrimonial property. This finding is borne out by the evidence in the matter.

[33] The Defendant however, was not without earnings during the relevant period. She earned from Richardson's Supermarket from January 1990 – October 1990 some 42 weeks¹ at the sum of \$175/wk a total of \$7,350.00. Further, from February 1993 to March 1995 at approximately \$190/wk the total sum of \$19,931.00.

[34] Further still, the Defendant's earnings at Yepton Beach Resort from September 1995 to October 1996² at approximately \$1,300/mth amounts to approximately \$13,143.00.

[35] The Defendant's earnings continued at the Weswin Pre-school³ from January 2000 - December 2000. This stint generated earnings of approximately \$8,152.00.

¹ see pp 51-57 of the Core Trial Bundle of Agreed Document

² see pp 57-59 of the Core Trial Bundle of Agreed Document

³ see pp 60-61 of the Core Trial Bundle of Agreed Document

- [36] In the Ministry of Housing and Co-op the Defendant between January 2000 and July 2000¹ earned approximately \$18,000.00.
- [37] In January 2001-March of 2001 again at Weswin Pre-school she generated an income of approximately \$2,100.00².
- [38] From 2004 - 2007(April) the Defendant was employed at the Electoral Office at \$1,600.00/mth in 2004, \$1,712.00/mth in 2005 – 2007 to total of \$19,200.00 in 2004, and \$20,544.00 for each of the years 2005 - 2007.
- [39] All the employment income figures for the Defendant are extracted from the Social Security “EMPLOYEE R5AS REPORT” at pages 51-67 of the ‘Core Trial Bundle of Agreed Documents’. As with the evidence of the Claimant’s formal employment earnings, this evidence was not successfully refuted at trial either³.
- [40] In her evidence-in-chief the Defendant indicated that it was her “...responsibility to purchase the children’s clothes, pay Cable T.V.,⁴ Cable & Wireless bills and purchase food for the family. I understood her evidence here to be that she contributed to these expenses, rather than meeting the whole of these expenses.
- [41] The Defendant, during her income generating years clearly had sufficient funds to make a contribution to those outgoings she claims to have had a responsibility for. The question is whether meeting her contributions to these outgoings entitled her to acquire a share in the property and if so, how much of a share. I accept that she has made contributions to these said outgoings the extent to which I will refer to later.
- [42] The Claimant has not been entirely forthright with the Court. His statement of his income during the relevant period in his evidence is considerably more than that which he stated

¹ see pp 61-62 of the Core Trial Bundle of Agreed Document

² see pp 63 of the Core Trial Bundle of Agreed Document

³ “I accept what the Social Security print-out says” (Claimant’s amplification of para. 31 of his Witness statement.

⁴ “I contributed to Cable T.V in 2000 to 2001” (in cross examination of Defendant)

for the Bank when he was attempting to secure the Mortgage Loan¹. This inconsistency affects the credibility of the Claimant's evidence in certain material particulars. He has not provided documentary or other independent proof of his earnings. His evidence of both versions of his income however does stand uncontroverted.

[43] As I said above, I accept the Defendant's evidence in relation to the type of household outgoings she contributed to.

The Common Intention

[44] Looking at the facts of this case from a resulting trust perspective, the Defendant has not met the requirements for acquisition of an interest in the matrimonial home. From the perspective of a constructive trust I need to determine whether the contributions are referable to the acquisition of an interest in the matrimonial property. Whether there existed a common intention that she would acquire such an interest and that on the strength of these she acted to her detriment in a way referable to such an acquisition.

[45] What then is the parties shared intention and whole course of conduct in this matter?

[46] Is there is an agreement between the parties at the time of the acquisition of the land or the construction of the matrimonial home or thereafter, that the Defendant acquires a share in the property? Whereas in **Rosset's case** [1991] 1 AC 107 (132-3) Lord Bridge of Harwich suggested that direct contributions to the purchase price alone by the non-legal owner will readily justify the inference necessary to the creation of a Constructive Trust, the Privy Council in the Abbott case noted that the law has moved on and the "*parties whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership*"².

¹ See 'Monthly Budget Analysis' pp17 of Core Trial Bundle of Agreed Documents.

² See Lord Walker of Gestingthorpe in *Stack v Dowden* [2007] UKHL 17, at para. 31; and quoted in the **Abbott** case at paras. 5 and 6.

- [47] What then is the parties shared intention and whole course of conduct in this matter? Can the whole of the course of conduct between the parties satisfy a retrospective inference as the actual intentions of the parties at the date of acquisition/construction in favor of Mrs. Browne's contention¹?
- [48] The authorities on the application of the now somewhat outdated Married Women's Property Act suggest that domestic endeavour by itself is not sufficient to found a claim (or determine the quantum) for an interest in the matrimonial home. **Abbotts** case advances the law somewhat and points to considering the "*parties whole course of conduct in relation to the property.*" This would include the joint mortgage application and perhaps Mrs. Browne foregoing a regular income, financial independence, on-the-job growth and development, and the consequent loss of marketability on the job market with the passage of time and doing so with the full knowledge and acquiescence -13yrs. by his evidence - if not insistence, of Mr. Brown. *'The search is to ascertain the parties shared intentions, actual, inferred, or imputed, with respect to the property.'*
- [49] Mrs. Brown/Defendant (after the Court's findings of fact) relies on that of a small financial contribution from time to time to the household outgoings. The other activity she relies on is that of a domestic nature which does not find strong support in the authorities. In **Button v Button** [1968] 1 All ER at p.1067 Lord Denning MR determined that; "*The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interest in, the property.*" In the case of **Burns v Burns** [1994] 1 All ER 244 a case not decided under the UK Matrimonial Causes Act 1973 an Act which empowers the court to make property adjustment orders, they being unmarried. Fox LJ on the question of housekeeping, domestic duties and Common Intention had this to say; "*That common intention may be inferred where there has been a financial contribution, direct or indirect, to the acquisition of the house. But the mere fact that parties live together and do the ordinary tasks is, in my*

¹ See para. 14 above for Defendants evidence of the intention.

view, no indication at all that they thereby intended to alter the existing property rights of either of them.”

[50] The Defendant admitted in examination that her staying home was initiated on each occasion by the onset of illness due to her pregnancy. I accept that. The Claimant's testimony suggests however that the Defendant remained at home unemployed, beyond her periods of illness. The Defendant's admission together with her obvious efforts to gain employment over the period of marriage do not suggest to me any arrangement between herself and her husband/Claimant that she should stay at home to take care of the children and carry out other domestic functions as her sole marital role or her sole contribution toward the construction of the matrimonial home. The Claimant however, did receive and accept the benefit of the Defendant's domestic endeavour during the course of the marriage.

[51] I accept that the Claimant did, at the onset of the relationship, indicate to the Defendant that the matrimonial home was to be theirs and that both the Claimant and the Defendant understood that to mean that she the Defendant would acquire a share in the matrimonial home. I am however, more inclined to believe the evidence presented by the Defendant that she contributed to the acquisition of the matrimonial home. I do not accept that the agreement was for the Defendant to acquire a share by means of her domestic endeavour, but it was to be acquired by dint of earned and contributed income (direct or indirect). The Defendant faltered somewhat on her agreement with the Claimant in that she did not maintain or contribute from a sustained income throughout the course of the marriage¹.

DEFENDANT'S EARNINGS

[52] The Defendants earned income during the course of the marriage is **quantifiable**. The extent of her contribution is less clear. I find that the point at which her contributions attributable to an acquisition of the interest in the matrimonial home would have ceased, to

¹ See para. 40 and paras. 32-38 above

be the end of 2005¹. The Defendant has not quantified her outgoings either. Having regard to the 'adequacy' of the Claimants income-bare as it was - the defendant's contribution referable to the acquisition of a share in the matrimonial property was small in that the claimant's income was sufficient to finance the household outgoings in large part and would only have required a small contribution or "top-up" - as it were - to enable the mortgage to be met along with the other household outgoings. But, I suggest, notwithstanding this imperfection the contribution is capable of quantification.

[53] Using the Social Security print out², the **Defendants** formal employment income is, for the period 1990 -2001, EC\$52,476.00. Her income for the period 2004 -2007 is EC\$80,832.00. The Defendants total income to 2007 is EC\$133,308.00³. The **Claimant** on the other hand, if his testimony is to be believed, reflects an income of EC\$667,760.00 for the period 1990 to 2005. The claimant's income calculation here does not include his employment income from (i) Night Auditor, Jolly Harbour Villas for 2001; no income figure being provided and, (ii) Banana Cove Hotel from May 1992 at EC\$600 - \$700/week; no period of employment being provided or indication if he worked every week or just from time to time. At twelve (12) - four (4) week months his annual income from Banana Cove will be EC \$172,800.00.

[54] The payments to Barclays Bank commenced in June of 1999. From that date to the end of 2005 with Mortgage payments of EC\$1,615.00/month, some EC\$106,590.00 was payable and presumably paid.

[55] The cost of construction has not been provided by either party. A mortgage loan was taken out, for \$171,000.00. The evidence is that part of that loan was used to pay off a Credit Union Loan for medical expenses of the Defendant Mrs. Browne. It appears that it was a

¹ The evidence is, and is not disputed, that the defendant borrowed money (albeit ultimately repaid by the claimant a month before the trial) from her sister as late as 2005 to purchase and install burglar bars / "shutters" on the matrimonial home. Thereafter, the breakdown of the marriage has made it difficult to ascertain the extent of the contribution.

² See Core Trial Bundle of Agreed Documents, from pp 51.

³ The Defendants income for 2000/1, 2004 and 2005 is reflected in the **core bundle** of documents these being the years of her employment falling within the mortgage period 1999 - 2005. See para.52 above for basis of cut off date.

small amount in relation to the loan amount. The cost of the foundation including the blocks for it is accepted by the court as \$40,000.00. The evidence suggests other construction costs were incurred prior to the taking out of the Mortgage loan. However, these costs were not adequately set out for the court and cannot be factored in as a specific calculated figure. Taking in to consideration the non-construction expenses (not quantified by the parties) which were satisfied by the Mortgage loan, this sets the cost of construction at approximately \$200,000.00. The market value of the property at any time, has not been given in evidence. This value would take into consideration the land value. The purchase price of the land is not a significant figure on the evidence.

[57] The Court recognizes that the special nature of the relationship between the husband and the wife inevitably gives rise to difficulties of proof when the marriage breaks down and questions of the quantification of their respective interests have to be considered.

[58] On the issue of quantification, the following passage in **Lord Diplock's** speech in **Gissing v Gissing**¹, provides useful guidance;

"I take it to be clear that if the Court is satisfied that it was the common intention of both spouses that the contributing wife should have a share in the beneficial interest and that her contributions were made on this understanding, the court in the exercise of its equitable jurisdiction would not permit the husband in whom the legal estate was vested and who has accepted the benefit of the contributions to take the whole beneficial interest merely because at the time the wife made her contributions there had been no express agreement as to how her share in it was to be quantified. In such a case the court must first do its best to discover from the conduct of the spouses whether any inference can reasonably be drawn as to the probable common understanding about the amount of the share of the contributing spouse on which each must have acted in doing what each did, even though that understanding was never expressly stated by one spouse to the other or even consciously formulated in words by either of them independently. It is only if no such inference can be drawn that the Court is driven to apply as a rule, and not as an inference of fact, the maxim "equally is equity" and to hold that the beneficial interest belongs to the spouses in equal shares."

[59] Lord Reid warned against this approach later in **Gissing v Gissing**² :

"It is perfectly true that where she (meaning the wife) does not make direct payments towards the purchase it is less easy to evaluate her share. If her payments are direct she gets a share proportionate to what she has paid. Otherwise there must be a more rough and ready evaluation. I agree that this does not mean that would as a rule get a half share. I think that the high sounding brocard "equality is equity" has been misused. There will of course be cases

¹ At page 792 of the judgment

² At page 782-783 of the judgment

where a half share is a reasonable estimation, but there will be many others where a fair estimate might be a tenth or a quarter or sometimes even more than half.”

[60] And Lord Pearson ¹ in the same case **said**:

“No doubt it is reasonable to apply the maxim in a case where there have been a very substantial contributions (otherwise than by way of advancement) by one spouse to the purchase of property in the name of the other spouse but the proportion borne by the contributions to the total price or cost is difficult to fix. But if it is plain that the contributing spouse has contributed about one-quarter, I do not think it is helpful or right for the court to feel obliged to award either one-half or nothing.” (emphasis mine).

[61] On the evidence, it is plain that the Defendant, the *contributing spouse*, has contributed about Ten percent (10%)², so I also “do not think it is helpful or right³ for the court to feel obliged to award either one-half or nothing” as the Defendant and Claimant respectively have sought in this matter⁴.

[62] Further, in the circumstances, I do not find that the Caution lodged by the Defendant on the property on the 18th day of October, 2006 is wrongful.

ORDER

[63] It is Ordered and declared that Claimant Ogden Browne is entitled to a Ninety percent (90 %) share in the matrimonial property and the Defendant to the remaining Ten percent (10%) share in the matrimonial property.

[64] It is further ordered that the claim for Damages for wrongful caution is dismissed.
and Further ordered that as success has been divided, no order will be made in favour of either party as to the costs occasioned by this claim and counterclaim.

David C. Harris
Judge
The High
Court of Justice
Antigua and Barbuda

¹ At page 788 of the judgment

² 15 % of an estimated \$200,000.00 construction - cost property. See para. 55 above.

³ See Lord Pearson in *Gissing and Gissing* in para. 60 above

⁴ In the counterclaim and claim respectively