

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO. ANUHCV2008/0476

BETWEEN:

HAZEL DE FREITAS
AND
ATTLEY DE FREITAS

Appearances: Ms C. Debra Burnette and Ms Stacey-Ann Saunders-Osbourne
Sir Clare Roberts, Q.C. and Ms Tracy Benn for the Defendant

2010: March 23
2011: April 14

JUDGMENT

- [1] **Thomas J:** In a Fixed Date Claim filed on 1st August 2008 the Claimant, Mrs Hazel DeFreitas, is seeking certain declarations in relation to property recorded in the Land Registry as: Registration Section: Falmouth and Bethesda, Block No. 34 2682A, parcel No:97 ("Parcel 97"). Declarations are also sought in relation to furniture and furnishings and the shares of the company registered as Battery Engineering Ltd.

Statement of Claim

- [2] In the Statement of Claim of even date the Claimant pleads her marriage to the Defendant, the child of the marriage, the rental of accommodations by the parties up to the year 2000, the gift of Parcel 97 to the Defendant by his mother, the building of the matrimonial home and the financing

thereof, the furnishings of the said matrimonial home and the pending dissolution of the said marriage.

- [3] The Claimant avers that she is an accountant by profession and the Defendant is a businessman. And further that she commenced working with the Defendant in the business formerly known as Battery Engineering since 1991 after she resigned her job at the Blue Heron Hotel.
- [4] With respect to the company, Battery Engineering Ltd, the Claimant pleads that it was incorporated by the parties in January 2002 and that the said parties were the two directors and shareholders. The Claimant also contends that it was agreed and understood that between the said parties that the share capital of the company of \$10,000.00 was held equally and the dividends delivered from the same were for the use and benefit of the parties.
- [5] In terms of her employment with the company, the Claimant contends that she was paid a monthly salary of \$6,500.00; but by agreement between the parties, only \$3,500.00 was drawn with remainder staying in the business for operations purposes.
- [6] At paragraph 13 of the Statement of Claim, the Claimant avers that she worked with the company until March 2008 at which time the Claimant purported to remove her as a director of the said company, remove her name from the parties joint account, and locked her out of the building in which the business operates.
- [7] In light of the foregoing the Claimant contends that she was forced to seek spousal support since she no longer had access to the funds. Also, detailed is the opening of a restaurant in or about September 2007 which the Claimant contends made no significant profit.
- [8] It is the Claimant's case that the Defendant has no intentions of vesting in the Claimant, any interest in the matrimonial home, the furniture therein or in the company unless so ordered by the Court and she therefore claims the following:
 - (i) A declaration that property situated at Piccadilly in the parish of Saint Paul in Antigua and Barbuda and recorded and registered in the land Registry as follows:

| <u>Registration Section</u> | <u>Block No.</u> | <u>Parcel No.</u> |
|-----------------------------|------------------|-------------------|
| Falmouth & Bethesda | 34 2682A | 97 |

is beneficially owned by the Claimant and the Defendant in equal shares¹.

- (ii) A declaration that the Defendant holds the said land and property in trust for himself and the Claimant in equal shares.
- (iii) An Order that the said property be sold and the proceeds be divided equally between the parties.
- (iv) A declaration that the furniture and furnishings listed in the Schedule attached to the Statement of Claim are the joint property of the parties.
- (v) An order that the said furniture and furnishings be sold and the net proceeds be divided equally between the parties.
- (vi) A declaration that the Claimant is a partner of the Defendant and director of the company known as Battery Engineering Ltd.
- (vii) A declaration that the defendant holds the shares in Battery Engineering Ltd. in trust for himself and the Claimant in equal shares.
- (viii) Interest on any sum found due by the Court to the Claimant pursuant to the Eastern Caribbean Supreme Court Act Cap. 143.
- (ix) Such further or other relief
- (x) Costs.

Defence

- [9] In his Defence the Defendant admits paragraphs 1 to 6 of the Statement of Claim, which relate the marriage of the parties and the pending dissolution thereof, the child of the marriage, the living accommodation of the parties up to 2000, the registration details of Parcel 97 and the agreement by the parties to build a family home. However, in relation to paragraph 4 of the said Statement of Claim the Defendant contends that the parties started living together in 1995.
- [10] At paragraph 2 to 6 the Defendant details the circumstances in which he became the owner of Parcel 97, being by way of a gift from his mother, in his early adulthood. In this regard also the

¹ The matter of the matrimonial home was settled prior to the trial

Defendant says that it was always his dream to build a home on the said lots and planned this over several years. Also, detailed is the construction of the dream home and the financing of the same and the pool.

- [11] With respect to the Claimant in the context of the dream house, the Defendant admits that he held discussions with her concerning the construction of the said house as they were husband and wife. It is the Defendant's contention that the major decisions concerning the construction were made by him.
- [12] It is the Defendant's case that the loans on the house from the construction of the house were not repaid by the company but rather from his salary, and as such denies that such repayments were made jointly by both parties. The Defendant goes further by contending that the Claimant never contributed to the loan repayment even though her name is on the documents at the bank. Further, that he took out a life insurance policy which forms part of the mortgage requirements, and that the Claimant does not have a similar life insurance policy for this purpose.
- [13] At paragraph 10 of his said Defence the Defendant identifies certain items which he is willing to give to the Claimant even though he has an equal share in them; but at the same time the Defendant listed other items which he denies should form part of community property because the Claimant has no share in them or is entitled to benefit from them.
- [14] In relation to the Claimant herself, the Defendant avers that she is not an accountant since he has always known her to be a secretary with some book keeping training, and that it was in this capacity that she was employed. Also, denied is the Claimant's contention that she began working with the company in 1991. Regarding his present business, the Defendant contends that it was started in or around 1987 and styled 'Battery Engineering' and that in 2002 after some discussion with the Claimant it was decided to incorporate the business and to appoint the Claimant and himself as directors. However, the matter of the Claimant being a shareholder is denied. Also denied is any agreement to or intention to divulge any percentage of the shares in the company to the Claimant or any other person, or that the parties were equally entitled to the share capital of \$10,000.00 and the dividends derived there from for their joint use and benefit. The Defendant

therefore maintains that he was at all times the sole owner and shareholder of the company and bears all the responsibility for the said company.

- [15] At paragraphs 14 and 15 the Defendant details the nature of the Claimant's employment with the company. In this connection it is the Defendant's averment that the Claimant functioned as an employee, handled bookkeeping matters and also functioned as the office manager.
- [16] In terms of the Claimant's salary the Defendant contends that the Claimant salary reached \$6000.00 over the years but was reduced to \$3317.50 after she started coming to work when she liked. It is also contended by the Defendant that there was never an agreement where the Claimant would only withdraw \$3500.00 of her salary and the balance would remain in the business for operational purposes.
- [17] The Defendant denies paragraph 13 of the Claimant's Statement of Claim. In this regard he details the circumstances giving rise to the Claimant's removal as a director of the company in March 2008 and her removal as a signatory to the company's account. At the same time the Defendant denies that the Claimant was locked out of the business.
- [18] With respect to Claimant's pleading that the Defendant has no intention of vesting in the Claimant, any interest in the matrimonial home, the furniture therein or in the company unless ordered to do so, the Defendant pleads as follows:
 - (i) The Claimant should not have an interest in the land for the reasons aforesaid; it was a gift to him from his mother and humbly request that no order be made which vest her with an interest in the land on trust for himself and the Claimant and humbly ask that no order for sale be made.
 - (ii) It is difficult for him to give her any interest in the home since she never directly contributed to the acquisition of the home. The mortgage is being repaid from his salary and not hers. He bears all the responsibilities for the daily running and maintenance of the home. She has not invested in the home in any way and does not even do household chores. There is no indirect contribution to vest an interest; the Defendant does all the chores and upkeeps the house. The Claimant should not have an equal share in the home. The Defendant does not hold the house on trust for himself and the Claimant and humbly ask that no order be made or that the house be sold.

- (iii) With the exceptions noted above regarding the Schedule of furniture and furnishings, the Defendant is willing to give the Claimant all the other furnishings listed therein.
- (iv) The Claimant and the Defendant are not partners in the company. The company is owned solely by him. She was legally removed as a director of the company and ought not to be restored. She has never directly or indirectly contributed to the acquisition of the company and its maintenance and upkeep or its daily running.
- (v) The Defendant does not hold the shares in the company in trust for himself and the Claimant; there was never any agreement or intention to do so.

Reply

- [19] In her Reply the Claimant asserts that the following: the parties began to live together in April 1992, the house built on the land given to the Defendant is a fixture, and with respect to the plans for the building of the matrimonial home, she suggested changes to the original plans.
- [20] With respect to the joint loan obtained to build the matrimonial home, the Claimant maintains that the repayments were made from money earned by the business, Battery Engineering and by the same token denies that the repayment came from the Defendant's salary.
- [21] As to the items mentioned at paragraph 10 of the Defence, the Claimant avers that the items, with some exceptions, were purchased with money earned by Battery Engineering; and appliances are owned equally by the parties.
- [22] In terms of her qualifications, the Claimant admits that she only has training as a bookkeeper but says that she functioned as an accountant in the business.
- [23] At paragraph 9 of her Reply the Claimant states that the Defendant was the founder of the business Battery Engineering, incorporated in 2002 by both parties. It is also the Claimant's averment that the parties have joint account at First Caribbean International Bank.

EVIDENCE

Hazel DeFreitas

- [24] In her Witness Statement the Claimant, Mrs Hazel DeFreitas, says that after being persuaded by the Defendant to quit her job she began working with the Defendant's business, Battery Engineering Ltd in 1991. She says further that between 1992 and 1994 she did not take a salary due primarily to cash flow difficulties which went on for some time.
- [25] It is the Claimant's evidence that the parties took a decision in 2002 to incorporate the business and that the Defendant on being asked in her presence, who the shareholders were, the Defendant indicated that it was "both of us" and divided 50/50.
- [26] The Claimant says further that no shares in the company were allotted until 2008, but at a 'family meeting' called on 10th February 2008 she was informed by the Defendant that she was no longer a director of the said company and resolution to that effect was being passed.
- [27] At paragraph 12 of her said Witness Statement, Mrs Hazel DeFreitas speaks to her business activity outside of Battery Engineering, and in this regard contends that she worked daily at Battery Engineering after her restaurant closed.
- [28] At paragraph 15 of her Witness Statement the evidence is as follows:
- "In 2004, the company acquired the property at Independence Avenue from the Defendant. I injected \$20,000.00 of my personal monies which was done via transfer from my checking account. A loan was obtained to complete the purchase. Monies earned from the business paid the loan. All this was done on the basis that I had an interest in the business. The properties, parcels 25, 27, 29 and 30 when purchased, at different time over the years were for the use of the business and were paid for by loans which were repaid by the business. The last and only valuation which was done in 2004 valued three of the parcels 27, 29 and 30 at an aggregate value of \$423,810.00"
- [29] In further evidence on the business Mrs Hazel DeFreitas said that she has no doubt that the Defendant began it when he was a sole trader but what he started was built up by both of them until she was forced out.

- [30] On the matter of her position in the company it is Mrs DeFreitas' evidence that the Defendant never indicated to her that she was a mere employee. According to her, she "participated in all decisions relating to the business even if I may not have been in agreement with some decisions, but went along with the Defendant's line of thought".
- [31] Finally, the witness contends that she is a co-owner of the same as this was the expressed agreement. She says further that the Defendant has never said to her that she has no share in the business until the relationship broke down.
- [32] In cross examination by Sir Clare Roberts, QC Mrs DeFreitas testified that in 1991 the Blue Horizon Hotel was in receivership and that she was the only person there. She went on to say that the hotel reopened before she left.
- [33] In relation to paragraph 4 of her Witness Statement the witness said that the content is true. She also said that these events took place when things were fine between her and the Defendant.
- [34] When it was put to her by learned counsel for the Defendant, Sir Clare Roberts, QC, that she did not take a salary for two years, she responded thus: "It is true. I had just started to work and we had expenses. I have no reason to lie". The witness went on to explain that there were cash flow problems although the business was there.
- [35] With respect to the properties purchased by the company, Mrs DeFreitas testified that the properties were purchased from different persons and she injected \$20,000.00 at the time of purchase as the company did not have the money.
- [36] In relation to paragraph 7 of her (which concerned the meeting with the attorney in relation to the formation of the company) the witness maintained that it is correct.
- [37] It was also put to Mrs DeFreitas by learned senior counsel that the directions were identified but not the shareholders. The response was that there is no document but Mr DeFreitas answered and the lawyer said that "we needed share certificates to be issued".

- [38] It was further put to the witness that the whole conversation is a figment of her imagination. This was denied by Mrs DeFreitas and she added that she did not think of calling the attorney about the share certificates.
- [39] The witness in further testimony about the Defendant said that when she met him he had his business operating from his home and he was a sole trader and did that for many years. She went on to say that she did not know when the Defendant started his business. The witness then gave this further testimony. "I went there as an employee. We operated as one. There was no cut and dry. We did everything together as a whole. I cannot say any year as to when I ceased. I started as an employee then became a shareholder".
- [40] When Mrs DeFreitas was referred to the item "proprietor's capital" appearing at page 5 of the Core Trial Bundle of Agreed Documents she testified that it appears to be Mr DeFreitas' capital. The witness testified further that her salary appears on page 6 of the same document and then there is the proprietor's salary.
- [41] In further testimony on the matter of the shareholding in the company the Claimant testified and said as follows:
- "I do not agree that I am not a shareholder. I do not agree that there was no agreement. I do not agree that the Defendant is not a trustee. Mr DeFreitas and I agreed that I would be a director. We were then together. The matter of share was discussed in the lawyer's office. I left part of my salary in the company and I withdraw part of it. My case is that we both continued to do the business and I am entitled as a result of my contribution. We worked as a unit towards our goal. I did what we had to do for our kids, a future for our kids. It was not just a livelihood as a family".
- [42] It was then put to Mrs DeFreitas by learned senior counsel that her claim for half of the business is ill founded. This was denied. It was further put to Mrs DeFreitas that she believed that because she worked hard in the business she was entitled to a share in the company. She responded by saying that she contributed to the business by doing things to the everyday running.

- [43] There was no re-examination of Mrs Hazel DeFreitas.

Attley DeFreitas

- [44] Attley DeFreitas in his Witness Statement begins by asserting that he is the sole shareholder of the company known as Battery Engineering Limited.

- [45] At paragraph 2 of the Witness Statement the evidence regarding the said company's shareholding is as follows:

"The Claimant is not a shareholder and she has never been a shareholder. There was never any agreement between the Claimant and me that she should be a shareholder or that I would hold any share in trust for her. As the sole shareholder I did appoint the Claimant to be a director but I also revoked her appointment in March 2008".

- [46] At paragraphs 3 to 6 of the said Witness Statement the witness details the history of his business, the death of his mother, his introduction to the Claimant, her employment with him as a secretary/bookkeeper in his business, their marriage, the incorporation of the business and his understanding the shareholding in the company.

- [47] The matter of the Claimant's employment in the company as bookkeeper and office manager and the terms of such employment is addressed at paragraph 8. Also addressed in this paragraph is the matter of an alleged agreement for the Claimant to withdraw only part of her salary. The Defendant's evidence in this regard is this: "I deny that there was ever an agreement for the Claimant to withdraw only \$3500.00 and that the balance would remain in the business for operational purposes. The Claimant was never called upon to do any such thing nor was there any such agreement. She withdrew all her salary each month and more".

- [48] In the remainder of his Witness Statement the Defendant gives the reason for the Claimant's removal as a signatory to the company's account. This is coupled with a denial by the Defendant that he locked out the Claimant. The Defendant goes on to say that he eventually changed the locks to the business but he never stopped the Claimant from coming to work.

- [49] At the trial the Defendant was granted leave to comment on the evidence of the Claimant. In this regard in relation to paragraph 4 of the Claimant's Witness Statement, Mr DeFreitas said that the Claimant had expenses.
- [50] In relation to paragraph 7 of the said Witness Statement, Mr DeFreitas said that Ms Clarke did ask about directions of the company but there was no discussion concerning shares. And in relation to paragraph 15 of the Claimant's Witness Statement (which deals, *inter alia*, with money injected by the Claimant into the purchase of property by the company) the Defendant said this:
- "If this is so I did not know about it. I did not put my property in the company. I do not know of \$20,000 in the company. I should be aware. I do not know of \$20,000 being put in by the Claimant".
- [51] In cross-examination by learned counsel for the Claimant, Ms C. Debra Burnette, Mr DeFreitas said that he and the Claimant had a discussion with respect to incorporation and attended Clarke and Clarke in this connection. He went on to say that Ms Clarke would have put what I said in the documents. He said further that he signed a document for incorporation of the company and would have gone over it before he signed it.
- [52] In further testimony regarding the Defendant said: "I know the annual returns would have been filed. I would have gone into Clarke and Clarke and signed. Ten thousand shares were allotted and I assumed the shares were mine".
- [53] On being referred to page 44 of the Core Bundle of Agreed Documents, they testified that it indicated the directors of the company at paragraph 3 and the co-owner at paragraph 5. And in relation to page 45 of the same document, the witness agreed the information would have been given on his instructions. The same was said by the witness in relation to pages 84 to 87 of same document which deal with the returns for the year ending on 31st December 2004 and 31st December 2005, respectively.
- [54] On the matter of ownership Mr Attley DeFreitas, the Defendant said this: "We were working together but not as co-owners. I was operating as owner. I told them that in 2008 things were not good between us. By this time I went to Clarke and Clarke to file the returns".

- [55] On being referred to page 89 of the Core Bundle aforesaid, this is Mr DeFreitas' testimony: "I was issued one share. It was the first time a share was issued. I see it on the document. I see it does not say co-owner. I interpreted the language to mean that she was not a director anymore. I do remember telling them about the co-owner".
- [56] As far as the matter of loans was concerned, Mr DeFreitas said that they had overdraft facilities at First Caribbean International Bank. He went on to testify that other loans were given to the company. He also added that the loans were signed by the directors and that the Claimant had no personal liability in relation to the loans.
- [57] Learned counsel for the Claimant, Ms Burnette next referred the witness to page 92 of the said Bundle. In this regard he explained that these were the terms and conditions of the loans and that Mrs DeFreitas was required to give a guarantee. He also said that he understood the guarantee meant that she was liable on it.
- [58] In making further comment on the Claimant's evidence, Mr DeFreitas said that once you work in the business you contribute which is true for all who work there. Continuing the witness said that he heard the Claimant testify that she worked for the future of our children. He continued thus: "We had a child. She has a son which is not of the marriage. I also have a son. I consider all the children to be family. These are the children".
- [59] With respect to the precise time when the witness met the Claimant, Mr DeFreitas testified as follows: "I know she said I began the business on my own. She came into my life in 1991. It was not 1988. It was in the early 1990's. I met her before my mother's death; Mrs DeFreitas visited my mother before she died".
- [60] On being referred to a letter to one Hazel Went appearing at page 1 of the Trial Bundle of Agreed Documents. Mr Attley DeFreitas indicated that he no longer wished to stand by his evidence at paragraph 4 of his Witness Statement. He also went on to say that prior to 1991 the Claimant was helping with bookkeeping which was while they were seeing each other.

- [61] In the circumstances it was put to the Defendant that it was before 1991 that Mrs DeFreitas became the office assistant. The witness' response was that he is seeing the time clearly. According to him, she left Blue Horizon in 1991 and started with me immediately.
- [62] In the context of the Claimant's performance, it was put to Mr DeFreitas that she organized Battery Engineering in a way that it was not organized before. To this the witness responded by saying that he was impressed to a point. He continued his evidence by saying that he did not want to make her a part of the whole thing.
- [63] In further evidence concerning the Claimant's income and expenditure the Defendant said this:

"Mrs DeFreitas always worked at Battery Engineering and also as an exercise trainer. The money she earned was spent on the home and the children. She wrote cheques for the home and the business".
- [64] It was put to her by learned counsel for the Claimant that both of them were working towards a common goal. In response the Defendant said it was not a fair statement as the Claimant spent her money on other things. The witness went on to say that some of the money came from the business of which he was not aware. He explained further that in 1998, 1999 and 2000 he had his surprises but he continued to work with the Claimant.
- [65] Continuing his evidence regarding the Claimant's business activities, Mr DeFreitas said that she opened a restaurant. "It is near Battery Engineering. It is in plain view. She did it alone. It was opened in 2007 before she was removed as a director in 2008. She opened a few months before March 2008. I ate there and I paid. At this time things were strained. There was a conflict between her and my sister. It was not the first time the conflict took place at Battery Engineering. I did not confront Mrs DeFreitas with a cutlass".
- [66] It was put to Mr DeFreitas that he and Geraldine made it difficult for Mrs DeFreitas to work at Battery Engineering. In response the witness disagreed by saying that his sister was not around and that Mrs DeFreitas worked at night.

- [67] Returning to the matter of shares in the company, Mr DeFreitas gave the following evidence:
- "Up to March 2008 neither of us was issued shares. I never asked for shares to be issued. I did not know that shares had to be issued. I assumed I was the sole shareholder. I did not tell Ms Clarke that the shares were 50/50. I told Ms Clarke that I was the shareholder".
- [68] It was put to Mr DeFreitas that he and Mrs DeFreitas operated as co-owner of the business. Mr DeFreitas disagreed.
- [69] It was further put that it was intended that both parties would have equal shares. Again, Mr DeFreitas disagreed. The Defendant also went on to reject the further suggestion that he and Mrs DeFreitas operated as a partnership.
- [70] In re-examination the Defendant gave as the real basis for his action in relation to the Claimant as being her failure to do her work and the taxes being behind by several months.

THE ISSUES

- [71] Issues for determination are:
1. Whether the Defendant holds the shares in Battery Engineering Ltd in trust for himself and the Claimant in equal shares.
 2. Whether the Claimant is entitled to any shares in Battery Engineering Ltd.
 3. Whether the Defendant is the sole owner of all the shares in Battery Engineering Ltd.

ISSUE NO.1

Whether the Defendant holds the shares in Battery Engineering Ltd in trust for himself and the Claimant in equal shares.

Admissions

- [72] Findings of fact are especially critical in this case. For this reason the admission on both sides will be highlighted.

[73] In the Claimant's pre-trial memorandum the following admission is made: "The Claimant does not dispute the fact that the Defendant began the enterprise as sole trader, but contends that she contributed to its growth on the basis of the common intention shared between the parties as a couple".

[74] On the part of the Defendant the following are the details of the admissions:

1. That the Defendant commenced the business as a sole trader in the early 1980's until it was incorporated in 2002.
2. The Claimant was appointed a director along with the Defendant upon incorporation.
3. The Claimant co-signed as a director on a loan obtained for the business to assist with its day to day operations. The loan continues to be repaid from the income of the business and not from any personal funds of the Claimant.
4. The Claimant was removed as a director as of February, 2008.
5. The Claimant no longer works for the business.

Submissions

[75] Under the Rubric "Law and Submissions" the following is advanced on behalf of the Claimant:

"10. It is the contention of the Claimant that there was a common intention between the parties and that the Claimant should have a beneficial interest in the business based on the facts and conduct of the parties.

11. The Claimant further contends that she acted to her detriment in making the contributions both financial and physical to the growth of the company.

12. According to Snell's Equity, Thirty-First Edition, Paragraph 22-37:
*'A constructive trust may arise when land is purchased for the use of two or more persons but where only one of them is registered as the proprietor of the legal estate. The common case is of a husband and wife or cohabitating partners who acquire a house for their joint use. Although it may be agreed between them that the house is to belong to them both beneficially, the legal estate vests in the name of only one of them. A constructive trust may arise which binds the proprietor of the legal estate and which gives effect to the informal agreement between the parties'*².

14. The usual authorities of Petit v. Petit [1969] 2 All ER 417, Gissing v. Gissing [1970] 2 All ER 780 and Lloyds PLC v. Rossett and another [1990] 1 All ER 1111 must be

² Reference is also made to paragraph 22-39 of Snell Equity on the issue of common intention

- considered against the Privy Council authority of *Abbott v. Abbott Appeal No. 142 of 2005* in which Baroness Hale of Richmond indicates that the "law has undoubtedly moved on".
15. Baroness Hale of Richmond in *Abbott v. Abbott* confirms that there are two (2) questions which the Court must ask in determining matters with similar issues as the case at the Bar namely:
- Was it intended that the parties should share the beneficial interest in a property conveyed to one of them only; and
 - If it was so intended, in what proportions was it intended that they share the beneficial interest.
16. Baroness Hale of Richmond further confirmed that "the constructive trust" is generally the more appropriate tool of analysis in most matrimonial cases.
21. In applying the law to the case at Bar, the Honourable Court is urged to find that the following facts would have the consequence of the Claimant being entitled to a declaration that the Defendant holds the shares in the company in trust for himself and the Claimant in equal shares and a declaration that she is a Partner and Director of the Company:
- Prior to the Company's incorporation, the claimant contributed to the growth of the business on the basis of the common intention shared between she and the Defendant as a couple.
 - The Claimant and the Defendant in pursuance of their common intention attended the Attorney's offices for the incorporation of the company.
 - The Defendant communicated to the Attorney that the Claimant was a Director and Co-Owner of the Company and the shareholding of the Company by the Claimant and the Defendant was 50/50. The Company corporate documents confirm this.
 - In reliance on the common intention that the Claimant and Defendant would hold the Company in equal share: (i) the Claimant forego portions of her monthly salary and even did not take a salary during some periods and these sums remained in the company; (ii) the Claimant stood as an unlimited Guarantor in respect of the credit facilities extended by First Caribbean International Bank to the Company; (iii) monies generated from the company were used to liquidate the Company's credit facilities at the Bank; (iv) the Claimant injected \$20,000.00 in the Company to assist in the purchase of property which now belongs to the Company; (v) the Claimant participated in all decisions relative to the operation of the Company and did all tasks necessary to contribute to the growth of the Company.
22. It is submitted further that the Claimant presented herself as a truthful witness whilst the Defendant prevaricated in cross examination. The Court is urged to

prefer the evidence of the Claimant in cases where it conflicts with that of the Defendant.

23. In light of these submissions, the Claimant asks this Honourable Court to grant the relief she seeks in relation to the Company in particular: (i) that the Claimant should be declared a partner of the Defendant; (ii) that the Claimant should be declared a director of the Company and (iii) that the Claimant is entitled to a declaration that the Defendant holds the shares in the Company in trust for himself and the Claimant in equal shares".

[76] The salient aspects of the submissions on behalf of the Defendant are as follows:

1. "There was nothing to indicate that the husband had made himself constructive trustee of one half of the shares. There was no express trust by the husband.
2. The record shows that infact 'unhappy difference' arose as early as October 2002 and the Claimant and the Defendant began sleeping in different rooms. They each had separate businesses – the Defendant renting pool tables and the Claimant operating a restaurant and she was a personal trainer. The Claimant enjoyed financial independence. She had her own bank account and her personal monies.
3. No evidence was led on any 'expressed agreement'. It is submitted that mere mention of an expressed agreement is not proof of same. In any event the Defendant denied any such agreement whether 'expressed' or otherwise.
4. There is no evidence as to the conduct of the parties that would lead to a determination of an interest in the company.
5. There was never any agreement or intention or understanding that the parties were equally entitled to the share capital of \$10,000.00 as the dividends derived therefrom for their joint use and benefit.
6. The Claimant pointed to the fact that she signed a personal guarantee as director of the company for an overdraft for the company. It is to be noted that there was no detriment to her as the guarantee was supported by a charge over the matrimonial property to be transferred to the company.
7. There is no evidence of express discussions between the parties however imperfectly remembered and however imprecise their terms may have been. All that is put before the Court is the mere assertions and nothing more.

8. The Claimant was not always forthright with the Court. A number of critical pieces of information did not arise until the Witness Statements were filed.
9. All the evidence in this case points to the fact that the Claimant was an employee of the business until incorporation when she became an employee of the company. She was also a director of the company until her appointment was terminated in February 2008.
10. Having regard to the entirety of the claim as the evidence presented the Claimant has not proven her claim".

The Law

[77] It is said that³: "Where, usually in pursuance of some informal family arrangement, a person contributes money towards the acquisition or improvement of property, the Court may impose a constructive trust in favour of the contributor in order to satisfy the demands of justice, particularly where the contributor cannot show any entitlement under any other existing principle of equity".

[78] In **Snell's Equity** the matter of constructive trust is taken further. This is the learning in part:

"In the absence of an express trust, a Claimant may nevertheless acquire an interest if she can establish a common intention between her and the Defendant acted on by her, that she should have a beneficial interest in the property. Three related questions arise: first, whether there is an intention that each party is to have an interest in the property; secondly, whether the party not having the legal title has acted to his or her detriment; and thirdly what is the size of the interest party should have".

[79] The road to constructive trusts is well traversed over the decades with additions and variations over that time. In the recent case of **Lloyd Bank PLC v. Rossett**⁴, Lord Bridge of Harwich reasoned thus in the context:

"The first and fundamental question which must always be resolved 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 this acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this

³ Gilbert Kodilinge, Trusts: Text Cases and Materials, 1996 at page 145

⁴ [1990] 1 All ER 1111, 1118

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 the beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her 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".

- [80] In the even more recent case of *Abbott v. Abbott*⁵ Baroness Hale in delivering the judgment of this Court concluded that: "It is now clear that the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases".

Common Intention

- [81] The Claimant's evidence in this regard centers on paragraph 8 of her Witness Statement where this is recorded:

"That was the intention as by now we were consistently doing things together with the intention that we would both have an interest in it. We had built the matrimonial home by then and were heavily indebted to the bank. We had an overdraft as well to run the business. We both had to provide guarantee as well as a charge over the property at Piccadilly and on Independence Avenue to secure the facility".

- [82] In furtherance of her contention that there was a common intention shared with the Defendant with respect to the shares of the company she also relies on the following: the parties began courting in 1988 when the Claimant was employed at a hotel, the Claimant was persuaded by the Defendant to leave her hotel job and become his employee, the admission that the Claimant did not draw a salary between 1992 and 1994 and later only drew half of her salary with the other half remaining with the company for operational purposes; the parties attended a meeting at the office of an attorney-at-law at which meeting the Defendant gave instructions for the incorporation of the business with both parties being shareholders and holding the shares 50/50; the parties had prior discussions regarding the incorporation of the business; the recording of the Claimant as a co-owner on the Notice of Directors and in the annual returns for 2004 and 2005, the Claimant invested \$20,000.00 of her own money into the company to assist in the purchase of property which is now owned by the said company.

⁵ Privy Council Appeal No. 142 of 2005 at paragraph 4

- [83] The matter of common intention is sought to be negated by the Defendant and reliance is placed on the following: the 'things' which the Claimant mentioned in paragraph 8 of her Witness Statement are not referable to ownership of shares in a company, the parties had separate businesses – the Claimant operating a restaurant and personal trainer and the Defendant renting pool table. The Claimant enjoyed financial independence evidenced by her own bank account and personal monies; there is no evidence of "expressed agreement" mentioned at paragraph 20 of the Claimant's Witness Statement; the Defendant had been running his company for eleven years when the Claimant commenced working in the business; the Claimant starting salary was \$3600.00 increased \$4300.00 in 1999; \$5900.00 in 2002 and then \$6500.00 in 2004. In various letters exhibited the Claimant was described as 'Administrative Manager' while incorporation as 'Assistant Manager' while the Defendant was described as Owner/General Manager in 2002 in a letter signed by the Claimant as 'secretary'. Before incorporation the Defendant's salary was shown as Proprietor's Salary whereas the Claimant's salary was lumped in salaries and wages; after incorporation what was Proprietor's Salary became Manager's Salary which the Claimant agreed in.
- [84] Cross examination referred to the Defendant and not to her, she being lumped in 'salaries and wages', the fact that in a document (appearing at page 85, CATS), relating to 'Occupation of Directors', the Defendant is listed as 'Owner/Businessman', and the Claimant is listed as 'Co-Owner/Businesswoman', and in the same document the 'Amount of stated Capital is shown as \$10,000,000.00 when it should be \$10,000.00 is not evidence as to the conduct of the parties that would lead to a determination of an interest in the company; the from 'owner' and 'co-owner' are vague and do not refer to the interest in the company; there was never any agreement or intention or understanding that the parties were equally entitled to the share capital of \$10,000.00 an the dividends derived therefrom for their joint use and benefit.
- [85] It is not challenged that when the Defendant began selling batteries, which later developed into a business called Battery Engineering, the Claimant was not around: It therefore follows that any agreement or common intent would have had to be formed between when the parties started dating in 1988 and 1991 when the Claimant took up employment. In this context it is not without significance that Lord Bridge in developing the concept of construction trust and specifically the

conduct of the parties referred to 'at any time prior to the acquisition or exceptional at some later date been any agreement or understanding reached between them.

- [86] Any such event would have to fall with this exception. In that regard the Claimant points to the meeting at the attorney's office the purpose of which was to discuss the incorporation of the business, Battery Engineering. In this, the Claimant's contention is that the Defendant instructed the attorneys as to the names of the directors of the new company and its shareholders.
- [87] In the face of this contention, evidence in various documents both the Claimant and the Defendant are named as owner and co-owner of the new company; but there was never a person named as a shareholder until 2008. The question which arises is whether the attorney ignored the Defendant's instructions or whether there were never any such instructions. In this context the point has been made that the Claimant did not see it fit to call the attorney to her assistance at this critical time. The further question is why was nothing done legally prior to these proceedings to clarify matters.
- [88] A number of matters or issues are cited in support of the Claimant's contention that there was a common intention arising from an agreement or understanding. But before the Court embarks upon a consideration of these matters it is expedient to pay heed to what was said in **Hack v Rahiemian**⁶:

"When the full facts are discovered the Court must say what is their effect in law. The Court does not decide how the parties might have ordered their affairs, it only finds out how they did. The Court cannot devise arrangements when the parties never made. The Court cannot ascribe intentions which the parties in fact never had".
- [89] The matter includes the fact that the Claimant contributed to the everyday running of the company. This however cannot be construed as a constituent of a common intention. Rather it goes to the fact that the Claimant started as an employee. In turn, the matter of salary levels over the years also become relevant and does not assist the Claimant in terms of a common intention. For one thing the Defendant's salary was always \$15,000.00 while that of the Claimant started at \$3,600.00

⁶ [1977] 27WIR 109

in 1991 and ended at \$6,500.00 in 2004. Indeed, there was one other person⁷ will apply the same line of reasoning to the \$20,000.00 which the Claimant contends she invested in the business. This is the Claimant's forte and yet she falls short on the evidence. In any event the Defendant testified in cross-examination that he was not aware of any such investment.

Conclusion

- [90] In the evidence in the case the matter of common intention could have arisen, as it usually does, at the start of the business or the acquisition of matrimonial property. It could also arise later 'exceptionally', during the course of the Claimant's employment.
- [91] As far as the start of the business is concerned this has been ruled out simply because the Defendant, without any input from the Claimant started importing batteries while he operated a supermarket. He developed the battery aspect into a business which he called Battery Engineering.
- [92] With respect to the later time, being the time of incorporation of the said business, the Court has determined that despite the Claimant's contention as to what the Defendant told the attorney about the directors and shareholders, there is no evidence of the Claimant even being allotted a share and by extension being issued with a share certificate. In the evidence which the Claimant accepts, the only person recorded as a shareholder of this company is the Defendant. This was in 2008 at the time when there were differences between the parties and the Claimant was operating a restaurant, was a personal trainer and Hazel DeFreitas gave way to Hazel Went-DeFreitas⁸.
- [93] In terms of the Claimant's employment, there is nothing to suggest any common intention on giving rise to such an inference. It is therefore the determination of the Court that the Claimant remained an employee from 1991 to the time when she departed, without more.

⁷ The person is L.L. Jarvis, see Inland Revenue Deduction forms at pages 146, 149, 152, 155, 161, 163, 165, 178, 181, 184, 187, 190, 193, 197, 199, 202, 204, 207, 210, 213, 216, 219, 222, 225, and 228 of the Core Trial Bundle of Agreed Documents.

⁸ Core Trial Bundle of Agreed Documents at pages 181, 184, 187, 198, 201, 202, 204, 207, 210, 213, 216, 222, 225 and 228.

- [94] It is the further determination of the Court that there was no common intention arising from any agreement or understanding between the Claimant and the Defendant.

Detriment

- [95] The submissions on behalf of the Claimant are these:

"The Claimant, to her detriment together with the Defendant provided personal guarantees as well as a charge over the matrimonial home at Picadilly, St. Paul and the property at Independence Avenue, St. Johns to secure an overdraft facility. The Defendant under cross-examination wished to state that he was not aware of the Claimant bearing responsibility to the Bank but was forced to agree that the Claimant did after being shown the relevant document. The Defendant confirms under cross-examination that the relevant documents show that the Claimant was required to provide unlimited personal guarantees up to 2009. This is evident in the credit facilities offered by the First Caribbean International Bank exhibited in the Core Trial Bundle of Agreed Documents at "H.D.18" at page 91, A.D.5 at page 112 and A.D.11 at page 124".

- [96] For the Defendant, it is submitted that there is no evidence that the Claimant acted to her detriment. It is further submitted that: "The Claimant pointed to the fact that she signed a personal guarantee as director of the company for an overdraft facility for the company. It must be noted that there was no detriment to her as the guarantee was supported by a charge over the matrimonial property to be transferred to the company".

Analysis and Conclusion

- [97] In a credit document issued by First Caribbean International Bank, dated 2nd August, 2006⁹, in favour of Battery Engineering Limited under the heading "Security", the matters mentioned by the Defendant are to be found. The document indicates that the guarantee and postponement of claim are signed by Attley DeFreitas and Hazel DeFreitas. The following items are critical:

"Registered Caution and Charge stamped to cover \$332,600.00 giving First Caribbean International Bank a first charge were the commercial properties being transferred to the company at Independence Avenue (Block No. 610 1791C Parcels 25, 27, 29 and 30), plus acknowledgment assignment of all perils insurance with loss payable to First Caribbean International Bank as first mortgagee.

Registered Caution and Charge to cover \$301,400.00 giving First Caribbean International Bank a first charge over the residential property at Picadilly plus

⁹ See: Core trial Bundle of Agreed Documents, pages 92-93 and 113-114

acknowledgment assignment of all perils insurance, with loss payable to First Caribbean International Bank as first mortgagee".

- [98] Therefore, the Defendant's submissions are accepted by the Court as not only were there charges over the commercial and residential property, but there was all perils insurance assigned to the mortgagee bank.
- [99] The Claimant's position regarding detriment must also be viewed in the context of what Lord Bridge said in *Lloyd's Bank PLC v Rossett*. He ruled that person asserting the claim must show that "he has or she has acted to his or her detriment or significantly altered his or her position".
- [100] The two limbs cannot be separated and, to the mind of the Court, 'significantly' conjures up a certain threshold that is not trivial and which must be met by the applicant. The further reasoning is that the two limbs must take their context from each other. It cannot be significant creating a high threshold and acting to her detriment at another level. It is therefore the determination of the Court that with all the collateral safeguards in place with respect to the credits at First Caribbean International Bank, the Claimant did not act to her detriment or significantly alter her position. The Court determines that she did not reach the threshold contemplated by the rule examined above. More than that the Claimant had started operating a restaurant in 2007, being the year following the removal of the credits by letter dated 2nd August 2006.

The Trust Question

- [101] It is the determination of the Court that in the absence of a common intention between the Claimant and the Defendant arising from an agreement or understanding; and also the determination of the Court that the Claimant did not significantly alter her position by signing the guarantee, no trust is created whereby the shares in the company are held in trust, for the Claimant and the Defendant.
- [102] The conclusion may also be based on the reasoning that the requirements of common intention and detriment are conjunctive requirements regarding the creation of a constructive trust and as such the absence of one requirement renders the contention nugatory.

[103] Finally, it is important that it be stated that in the view of the Court the case of **Abbott v Abbott** is entirely distinguishable from this case. This rests on the findings by their Lordships in the Privy Council that the parties evinced a common intention in a manner in which they organized their finances in that there was a joint account to which all incomes was paid and all expenses paid therefrom. Added to that the Abbotts journey would have started with their marriage.

ISSUE NOS. 2 & 3

Whether the Claimant is entitled to any share in Battery Engineering Ltd; and whether the Defendant is the sole owner of the shares in Battery Engineering Ltd.

[104] These issues can be dealt with within a very short compass. This is because the Court has found and determined, as a matter of fact and law, that no constructive trust was created in the present circumstances of the Claimant and the Defendant. It is a further finding of fact that the contributions claimed to be made by the Claimant are not substantiated by evidence. Further still, the fact that the Claimant was an employee from 1991 to 2008 and was paid a salary cannot in law entitle her to a share in the company unless there was an agreement to that effect. This the Court cannot find. And to award a person share in a company based merely on a period of employment would run counter to the procedure prescribed by law¹⁰ for becoming a shareholder or being deemed a shareholder of a company.

[105] In the circumstances the Court finds it necessary to detail the Claimant's duties and responsibilities as contained in a letter¹¹ dated 1st July, 1991 offering her the post of Office Administrator:

"Your duties will include the recording of all daily transactions, preparing monthly reports, bookkeeping, typing and filing of all correspondence and generally overseeing the daily operations of the office".

[106] In a subsequent letter¹² also signed by Attley DeFreitas, Owner, Managing Director informing the Claimant of her removal as a director also re-stated her duties and responsibilities continue to be:

"1. Accounting, 2.Information Technology matters, 3. Personnel matters".

¹⁰ See Companies Act, 1995 (A&B) Section 371

¹¹ Core Trial Bundle of Agreed Documents at page 1. The letter is signed by Attley DeFreitas, Manager

¹² Ibid, at page 97

- [107] In the final analysis the Claimant is not in law entitled to any share in Battery Engineering.
- [108] In light of the foregoing it is the further determination of the Court that the Defendant is the sole shareholder of the shares in Battery Engineering Ltd in view of the fact that he is the only person recorded as a shareholder in the annual return of the year ending 31st December, 2006 which was filed on 29th February, 2008.

Costs

- [109] It is the Court's understanding that parties have agreed in accordance with Part 65.5 of CPR 2000 in the amount of \$14,000.00, either way. Accordingly, since the Defendant has prevailed he is entitled to costs in the said amount of \$14,000.00.
- [110] The Claimant is however entitled to \$500.00 in costs upon the Defendant being granted permission to amend his Witness Statement to include a certificate of truth on the day of the trial. This must set off.

Apology

It is common ground that after this judgment and others had been reserved a number of other matters which touch and concern governance, the national interest of Antigua and Barbuda and the Commonwealth of Dominica and international concerns arose and as such were given priority. These included challenges to a Commission of Inquiry set up by the Government of Antigua and Barbuda,¹³ applications to strike out five election petitions filed by members of Parliament in the Commonwealth of Dominica¹⁴ and an application to remove the liquidator of the Stanford International Bank¹⁵. Further, this judge was transferred to another jurisdiction, where a single judge presides, with effect from 1st September 2010 with the foreseeable consequences. In any event since then some fourteen (14) judgments have been delivered. This accounts for the delay. Despite the foregoing a deep and sincere apology is tendered for the delay.

¹³ ANUHCV2009/444 and ANUHCV2009/445

¹⁴ DOMHCV003 of 2010, DOMHCV 004 of 2010, DOMHCV 005 of 2010; DOMHCV006 of 2010 and DOMHCV007 of 2010

¹⁵ ANUHCV 2009/0149

[111] **IT IS HEREBY ORDERED AND DECLARED as follows:**

1. There is no evidence of a common intention which arose out of an agreement or understanding between the Claimant and the Defendant with respect to the ownership of the shares in Battery Engineering Ltd.
2. The Claimant in signing the guarantees for credits to the said Battery Engineering Ltd did not incur any detriment or altered her position significantly.
3. Given that there was no common intention between the Claimant and the Defendant, no constructive trust arose whereby the Defendant held the shares in Battery Engineering Ltd in trust for both parties.
4. The Claimant is not entitled to any share in Battery Engineering Ltd as there is no evidence of investment by her; nor is the Claimant entitled to a share in the said company solely on the basis that she was an ordinary employee for a number of years, just like other employees.
5. The Defendant is the sole shareholder of Battery Engineering Ltd.
6. The Defendant is entitled to costs in the amount of \$14,000.00 as agreed by both sides.
7. The Claimant is entitled to \$500.00 costs by virtue of the Defendant being granted leave to insert a certificate of truth in the Witness Statement at the trial.



Errol L. Thomas
High Court Judge [Ag]