**IN THE EASTERN CARIBBEAN COURT**

**HIGH COURT OF JUSTICE**

**COLONY OF MONTSERRAT**

**(CIVIL)**

**CLAIM NO. MNIHCV2011/0007**

**BETWEEN:**

**MILDRED AGNITA KIRWAN** **CLAIMANT**

**AND**

**NEVILLE SYLVESTER KIRWAN** **DEFENDANT**

**Appearances:**

**Mr. David Brandt for the claimant**

**Mr. Karl Markham for the defendant, Miss Gerald with him**

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**2011 October 21**

**2012 January 19**

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**JUDGMENT**

[1] **REDHEAD J. (Ag)** The parties to this action were married in 1985 after living together for about 12 years. The relationship produced three children, two of whom are adults and one is 16 years old. At the time of the marriage the parties lived in a one bedroom house at Harris. The claimant in her affidavit swore that they were very poor. They worked very hard because they wanted to improve their lot in life. They did not want their children to go through what they had gone through. In other words, she and the defendant wanted their children to have a better life than they had when they began their lives together.

[2] The claimant swore in her affidavit that at the beginning of their lives together neither of them had a trade or profession. The defendant began to learn a trade as a plumber. The defendant disputes this assertion and swore that he began his trade as a plumber at the age of seventeen years and was working as a plumber since 1973.

[3] I make the observation that the parties got married on 30th March 1985. If they lived together for twelve years before marriage they would have been living together in or about 1973. In 1973 the defendant would have been about 24 years.

[4] The claimant swore that she and the defendant cultivated plots of land during week days. They planted vegetables, some of which they consumed and the rest she sold at the Public Market. The money earned from the sale of the vegetables was used for the payment of household expenses. The balance was saved in a bank account which was in the sole name of the defendant.

[5] They, in addition to their cultivating crops, reared animals which were slaughtered and sold some of the meat. Mrs. Kirwan swore that some of the money from the cultivation, along with some help from fellow villagers, they built a house at Harris. From 1978 she began employment with the government of Montserrat and from 1979 with the Montserrat Electricity Services as a clerk. She

swore that she and the defendant saved together and from their savings bought a bar at Harris in which alcoholic beverages were sold. After their regular hours of work, they took turns at running the bar which remained opened up to midnight at times. She also sold snacks and drinks at public functions. With the monies derived from the sale of drinks at the bar, they replenished the stock, the balance was saved. They never paid themselves a salary. They bought a fishing boat from their joint savings.

[6] In 1982 they brought a plot of land, Block 3/1 Parcel 52. In 1983 they built a house on the said parcel of land. They obtained a mortgage to finance the building of the house. The conveyance of the plot of land was taken in the defendant's name. The house was rented to students of the American University of the Caribbean (AUC). The house comprised of an upstairs and downstairs. The upstairs was rented for US$600.00 per month and the downstairs was rented for US$400.00 per month.

[7] In her affidavit, the claimant swore that the rental was from about 1985 to about 1989. The money went to the Building Society to pay the mortgage on the house. The parties then moved to occupy the upstairs of the matrimonial home. The downstairs was then rented for EC$450.00 for about 8 to 10 years. Mrs. Kirwan swore that the EC$450.00 rental was used to finance the mortgage payments on the house, the balance was put in a bank. The claimant said that she personally met the household expenses from her income in accordance with an agreement between her and the defendant.

[8] In 1996 the parties purchased a parcel of land Block 12/4 Parcel 84 at Olveston and built a matrimonial home on this lot because according to Mrs. Kirwan, she and the defendant had to vacate the matrimonial home at Amersham on account of the volcanic eruptions. Mrs. Kirwan swore that the funding for the building of the house at Olveston was made possible from their savings, rent from the

Amersham house, hurricane settlement insurance claim, sale of agricultural produce and maroon type help from their friends.

[9] The dwelling house in Olveston is rented through an agency, Tradewinds Real Estate. The rental agreement was entered into with Trade Winds by the claimant and her husband. The monies collected by the agent for rental were given to the claimant who deposited into a bank account number 0116250 at the Bank of Montserrat after deductions for services and agency fees as agreed to by the parties. There is a lease agreement between Trade Winds and the parties to that effect dated 1st January 2008 (Exhibit 2). The claimant averred that she used to collect the proceeds from the rental of the said property after the deductions and deposited the balance into an account no 7084790 in Bank of Montserrat in the joint names of her and the defendant. On June 8, 2008 she went to collect the rent from the agency when she was presented with a letter from the agent signed by the solicitor instructing the agency to discontinue making payments to her. From then, the defendant alone controlled the rental for the said house.

[10] In that letter the solicitor wrote in part as follows:

> "Mrs. Susan Edgecombe
> Tradewinds Real Estate Limited
> P.O. Box 365
> Olveston
> Montserrat
>
> Dear Mrs. Edgecombe,
> ……. I confirm that Mr. Kirwan is the sole owner of the property, located at Olveston recorded in the Land Register as 12/4/83 Beachettes, with respect to which Tradewinds has been engaged to act as a rental agent. Mr. Kirwan has instructed me to confirm to you that all rents collected by you from the tenants thereof must be paid to him personally and no other person…
>
> Yours sincerely
>
> John C. Kelsick"

[11] I have difficulty in appreciating how solicitor for the defendant could make the determination that the property in question, that the defendant is the sole owner of the property. Particularly in light of the fact of exhibit 2, the lease agreement which stipulates in part:

> "This lease is renewed this 1 day of Jan 2008 between Tradewinds Real Estate, agent for Mr. and Mrs. Neville Kirwan, lessor…"

This to my mind raises a presumption that the property belongs to both parties.

[12] The claimant swore that by agreement she and the defendant purchased a parcel of land Block 13/22 Parcel 055 Lawyers Mountain on June 18, 1999 to build a house for speculation. At first the land was used for agricultural purpose until sometime in March 2008. The defendant re-registered the said land in the names of his aunt Olivia Kirwan and himself. The dwelling house was eventually built on the said land funded by a loan from Bank of Montserrat, from their joint funds and funds collected from the rental of the house at Olveston.

[13] On 13th September 2001, the claimant and defendant formed a company, Kirwan's Plumbing Services. She was the manager of the company and performed administrative duties. The main business of the company was the sale of solar heaters and plumbing services. A joint account number 0111767 at the Bank of Montserrat in the names of the defendant and the claimant was opened in relation to Kirwan's Plumbing Services. The claimant swore that the defendant closed the account for the Plumbing Account without her prior knowledge and withdrew the funds, to the best of her knowledge.

[14] The claimant swore that from their joint savings, she and the defendant bought shares in the Bank of Montserrat in or about 1988. In 2001 the defendant had the

shares re-issued-I suppose that she meant re-registered- to reflect changes as follows:

> Neville Kirwan and Mildred Kirwan 400 shares – February 2001
> Neville Kirwan and Lyndon Kirwan 500 shares – February 2001
> Neville Kirwan and Jeshree Kirwan 500 shares – February 2001
> Neville Kirwan 90 shares – November 2007
> Neville Kirwan 100 shares – January 2003.

[15] The claimant deposed that the defendant has collected the dividends paid on all of the above-mentioned shares and has converted some of the dividends into other shares without her knowledge.

[16] The claimant averred that she and the defendant invested the sum of EC$500,000.00 with CLICO International in 2003 from funds acquired from business sales, balance from insurance settlement claim from the dwelling house in Amersham personally deposited at St. Patrick's Credit Union. The principal and interest were re-invested each year as it matured. The claimant also swore that she and the defendant invested EC$50,000.00 with British American from profits derived from their joint business enterprise.

[17] The claimant swore that on 27th March 2008 the defendant wrote to CLICO to request CLICO to transfer the funds to his personal bank account number 7008137 at Bank of Montserrat. The letter is in the following terms:-

> "Chairman
> CLICO International Life Insurance Ltd.
> CLICO Building
> Whitepark Road
> P.O. Box 713C
> Bridgetown
> Barbados
>
> Dear Sir,

Policy #AIP000054Neville Kirwan and/or Mildred Kirwan

I write in respect of the above policy with your insurance company. I wish to surrender in full the said policy with immediate effect. I am aware that the full interest will not accrue because of this action.

Kindly forward the funds to my account No. 700-8137 held at Bank of Montserrat Ltd, Brades Montserrat.

I enclose a copy of the renewal certificate for ease [of] reference.

Yours truly
Neville Kirwan"

[18] Mrs. Kirwan deposed that from their joint endeavours they placed $40,000.00 of which there is $25,000.00 presently on a fixed deposit at Bank of Nova Scotia in Antigua.

[19] The claimant has been employed by Montserrat Electricity Services for the past 31 years and has risen to the position of Administrative Assistant at a salary of $5,246.00 per month. The claimant on oath said that by agreement with the defendant part of her salary was used for the maintenance of the home, support of the children and the balance saved and later used along with contributions from the defendant to purchase real estate and to construct building thereon and then make other investments named herein.

[20] The claimant swore that they have acquired the following properties which are located in the unsafe zone:

| **Location** | **Description** | **Year** | **Value at Purchase** |
|---|---|---|---|
| Block 3/1/52 | Land and Building | 1982 | $8,500.00 |
| Block 10/12/70 | Land | 1995 | $25,064.55 |
| Block 10/12/71 | Land | 1994 | $16,765.50 |
| Block 7/9/68 | Land | 1993 | $39,200.00 |
| Block 10/12/72 | Land | 1991 | $14,083.20 |

| | | | |
|---|---|---|---|
| Block 16/13/6 | Land | 1982 | - |

In addition the claimant said that they also own a two bedroom house at Manjack Montserrat on leased land.

[21] The defendant in his affidavit admitted cultivating crops with the claimant on a small scale before he and the claimant were married but swore that it is not true that the claimant used the income derived from the sale of crops in the manner described by the claimant. He said while he and the claimant sold some of the vegetables from the cultivation and **may** have used the funds derived from sale towards household expenses, they did not make sufficient money from growing seasonal crops which enabled them to effect savings. He swore that he and the claimant had no joint savings.

[22] I do not accept the testimony of the defendant in this regard as the claimant swore that they had help from other persons in cultivating the plots. If this is so, and I accept that evidence, then the crops produced would have been much more than required for the family consumption.

[23] The defendant swore that he recalled keeping animals and periodically slaughtering for personal consumption. It is not true that income from the meat, when sold, was saved.

[24] The defendant swore that during the early 1980s, prior to his marriage, he purchased land at Amersham, Montserrat Block 3/1 parcel 52. The claimant did not contribute towards the purchase of the land. The said land is registered in his name alone and the dwelling house which was built with a loan of $97,650.00 that he personally obtained and serviced from the Montserrat Building Society and he swore that it is not correct that he and the claimant bought the land and built the house.

[25] The defendant said on oath that he bought a bar in Harris but denied that the money for the purchase of the bar came from monies saved by him and the claimant, but rather he purchased it from his own funds. The purchase of the boat was also from his own funds.

[26] The defendant admits that he and the claimant lived upstairs in the house at Amersham while the downstairs was rented. He swore that the rental for the downstairs went towards paying for the loan at the Montserrat Building Society. He denied that the claimant met the household expenses from her income. He swore that throughout the marriage he entrusted the claimant with his income which was either delivered to her for paying the household expenses or deposited in a bank account to which she had unlimited access.

[27] The defendant swore that following the mandatory evacuation caused by the volcanic crisis in Montserrat, he purchased land at Olveston registered as Block 12/04 parcel 083 from his personal funds and built a house thereon. Mr. Kirwan swore that Mrs. Kirwan did not contribute towards the purchase of the land or the building and furnishing of the house and it is untrue that funding was derived from sale of agricultural produce and savings belonging to the claimant and him.

[28] The defendant swore that following the claimant's return from the United Kingdom in or about 2002, he purchased lands at Palm Loop, Woodlands described as Block 12/1 Parcel 126 for $15,000.00. The claimant did not contribute towards the purchase price. The defendant said that the property was purchased from his own personal funds. He instructed the claimant to put the property in her name and his name but the claimant expressed the opinion that the property should be put in her name, his name and the name of their eldest son, Lyndon Kirwan. In or about 2011 he became aware that the property was registered in the name of the claimant only.

[29] The defendant also swore that without his knowledge and consent the claimant instructed the acting Registrar of Lands to cancel the initial registration of Block 12/1 Parcel 126 which was in his name, his wife's and his eldest son's names and to register her name only as absolute owner.

[30] The defendant in his affidavit averred that after purchasing the land at Palm Loop, Woodlands he and the claimant decided to build a house on the land. The claimant borrowed $100,000.00 from her former employer Montserrat Electricity Services to assist in the construction of the house. The charge in favour of the Montserrat Building Society in the sum of $100,000.00 which is dated 21st day of October 2005 is exhibited.

[31] The defendant swore that he and the claimant lived in the newly constructed house at Olveston for approximately three years before the claimant left for England with their daughter Nadia Kirwan and their son Jershery Kirwan in or about 1997. Their first son Lyndon Kirwan had already left for England. He subsequently agreed with Tradewinds to manage and lease his dwelling house.

[32] I have some difficulty in understanding this bit of evidence as the sequence in which it is given suggests that it was after the defendant's family left for England he entered into the lease agreement with Tradewinds. However, as observed, the lease is in both the names of the claimant and defendant.

[33] Mr. Kirwan in his affidavit swore that after the claimant and their children left for England, he leased property at Manjack from one James Harper and constructed a dwelling house on the property. On the claimant's return from England, he and his family lived in the said house. Subsequently they moved to Palm Loop, Woodlands and occupied the house there.

[34] The defendant on oath said that during or about the year 2008 he left the matrimonial home at Palm Loop, Woodlands after it became increasingly difficult to live with the claimant and he hastily built a two bedroom house on lands

situated at Lawyers Mountain. The house was built from his personal funds and money borrowed from Bank of Montserrat. He is presently repaying that loan. This property is registered in his and his aunt's name.

[35] The defendant in his affidavit admitted that he and his wife formed a company known as Kirwan's Plumbing and opened an account to which the income from the company was put. The income generated from the company was used to purchase solar heaters; he alleged were his funds. He admitted that the claimant carried on administrative functions in relation to the company.

[36] The defendant denied that he and the claimant bought shares from Bank of Montserrat from their joint savings. Mr. Kirwan claimed that he purchased the shares from his personal funds. The claimant did not contribute towards the purchase of the shares.

[37] The defendant swore that he opened an account with CLICO initially in his name in the sum of $500,000.00 and a personal account with British American in the name of the claimant and himself for the sum of $50,000.00 but both accounts have been adversely affected by the recent debacle affecting CLICO throughout the region.

[38] The defendant also claimed that $25,000.00 from the account opened in his name and the claimant's name at British American derived from the water heater business operated by himself and the claimant. He subsequently added the claimant's name to the account opened with CLICO as it was convenient so to do.

[39] Mr. Kirwan swore that he operated a fixed deposit at Bank of Nova Scotia in Antigua jointly with the claimant in excess of $40,000.00 but the claimant secretively withdrew the entire amount on the account in 2008. The defendant also said that in addition to depleting the sums on the account, the claimant left

an unpaid credit card debt of $8,000.00 with Bank of Nova Scotia which he had to pay. The defendant claimed that the funds invested with CLICO, British American and Bank of Nova Scotia represented income derived from his lucrative plumbing business over the years and do not represent savings with the claimant or investments with the claimant as stated or at all.

[40] I make the observation that the defendant has admitted that the claimant performed administrative functions in relation to the plumbing company. Presumably these were unpaid services as if it was not, then obviously the defendant would have said so in his detailed affidavit. The defendant said that the company was a lucrative venture. The claimant would have contributed towards the success of the company by providing unpaid administrative functions. I shall return to this issue later in this judgment.

[41] The defendant on oath said that throughout the marriage he trusted (I suppose he meant entrusted) the claimant with his money to the extent that her access to the chequing accounts opened in their names was used by the claimant to maintain the children and for the upkeep of the household to include but not limited to the paying of all the utility and other bills.

I reject outright the defendant's assertion that he paid the electricity bills and met the household expenses out of his pocket.

[42] The claimant in her affidavit swore that she is now employed with Montserrat Electricity Services for over 31 years and has risen to the position of Administrative Assistant at a salary of EC$5,246 per month. She also deposed that by agreement with the defendant part of her salary was used for the maintenance of the home, support of the children and the balance saved and later used along with contributions from the defendant to purchase real estate and to construct buildings thereon and then make other investments named herein.

[43] Exhibited is a number of electricity bills which show the claimant as making the payments. At least one of the payments is by cheque in the claimant's name. I accept the claimant's evidence that there was an agreement between her and the defendant that she should use part of her salary for the maintenance of and upkeep of the home.

[44] The defendant swore that he is aware that the claimant operates a small business at Brades trading in apparel and other goods. Mr. Kirwan also said that in 2009 the claimant incorporated a company known as Highlander Properties with Lyndon Kirwan (her son) and purchased lands at Brades,Montserrrat valued in excess of two million dollars Eastern Caribbean Currency. In 2010 the company took a mortgage on the said property to the value of $2,072,821.15 repayable by quarterly installments of $112,057.96.
I make the observation that the purchase of the land was after the defendant left the matrimonial home.

[45] Finally, the defendant swore that given the false allegations made by the claimant of their structuring and organizing their financial affairs before and throughout the marriage, he recently carried out checks and searches at the land and company registries with a view to tracing the claimant's investment activity and learnt that the claimant carried a thriving real estate practice over the years purchasing lands and reselling at a profit. He recently ascertained that in or about year 2004 the claimant purchased lands at Olveston, Montserrat described as Block 12/5 Parcel 34 and registered in the names of Lyndon Kirwan and herself.

[46] I find as a fact that the parties began to live together in 1973 when the claimant was only 15 years old. At that time the couple was impecunious. They lived in a one bedroom house. At present they are blessed with what I consider to be a considerable amount of wealth.

[47] Mr. Markham, learned counsel for the defendant, in his skeleton arguments argued that it cannot be argued that Mr. Kirwan was and is the best plumber in Montserrat. Against that it must be remembered that Montserrat has always been a small community, even more so since the volcanic eruptions.

[48] The claimant and the defendant also reared animals. They would slaughter the animals from time to time. Some of the meat they consumed and the rest they would sell. The money realized from the sale of the meat would be placed in a bank account in the name of the defendant. The defendant admits that they grew crops and reared animals but insisted that that was only for consumption and did not save any money from the crops and vegetables that were sold. On the one hand, the defendant said he did not know how much the claimant made from the sale of the crops. On the other hand, he said she never made enough to manage the house. At another point he said that his wife used the money she made from farming to go on vacation.

[49] It is my view that Mr.Kirwan could not have achieved what he has without arrangement, understanding with Mrs. Kirwan. I shall develop this theme later in the judgment.

[50] I accept the evidence of Mrs. Kirwan that in the early stage of their cohabitation she and her husband farmed three plots of land at Streatham. They grew a variety of crops and vegetables. On Saturday mornings Mrs. Kirwan took the vegetables to market and sold them. The money earned from the sale of the vegetables was used for the upkeep of the household. The balance was banked in a bank account at the Royal Bank of Canada in her husband's name as Mrs. Kirwan said she had no bank account at the time. It is understandable that she would have had no bank account at that time because she was unemployed at the time.

[51] I accept the evidence of Mrs. Kirwan that the bar was purchased from funds the parties had saved. The bar was run by both parties, neither of them taking a salary.

[52] As I said the parties began their lives together in 1973 when the claimant was 15 years old. They got married in 1978. The claimant gained employment in 1985. Before the claimant began employment she cooked and looked after the house and took care of the children. The claimant and the defendant lived together as husband and wife from 1985 to 2008 (23 years) and cohabited together for 12 years before marriage, a total of 35 years.

[53] From Harris where the parties lived in a two roomed house, there was a desire to move elsewhere. In fact, in my view, there was always a desire and determination by the claimant and the defendant to extricate themselves from the poverty which beset them at the beginning of their lives together.

[54] They built the Amersham house. In my considered opinion, this house was built by the joint efforts of the claimant and the defendant that was made possible from savings from the bar which they both operated and without a salary, from monies saved from the sale of vegetables, the sale of meat. The claimant's evidence is that at the time about $700-$1000 per month went into the account in the name of the defendant from the sale of vegetables and meat. In my view, that amount is exaggerated. She said that went on for a number of years. In addition, the defendant swore in cross examination regarding the building of the house at Amersham "friends helped in building the house at Amersham. She would cook for the men, bring food to the house". At this stage I should say that where there is a conflict between the testimony of the defendant and the claimant, I prefer the evidence of the latter.

[55] The defendant said "We were living together in Harris in a one room house". He then sought to deny that he and the claimant were living together. He said, "She

was about 15 years old when we were intimate friends. I do not know about living together". This is in addition to what I have pointed out in paragraph 48 above. I am firmly of the view that the house at Amersham was what I would call the spring board to the parties' success.

**The Amersham Home**

[56] Initially the house was built as the family home but the parties decided to rent it out to students paying a rent of US$600 per month for the upstairs and US$400 per month for the downstairs, according to the evidence of the claimant and the defendant. This rental was for about 4 years. After the parties moved into the house, they rented the downstairs for EC$450 a month. This rental was, according to the claimant, for about 5-8 years. Let us say for 5 years. The parties would have earned a total of no less than, on my calculation, EC$156,600 in rental.

[57] Mr. Brandt, learned counsel for the claimant, in his skeleton arguments submitted that the labour for the construction of the house at Amersham was performed by friends of the parties in a maroon type practice. The claimant cooked food for the persons who assisted in the building and took meals instead of wages. The defendant admitted this. The food which the claimant provided was in consideration of labour costs. **See Isadore Browne v Rosetta Browne[1].**

[58] Learned counsel contended that on the evidence the claimant has contributed substantially to the building of the house and is entitled to half of it. I agree. In addition I have found that the proceeds of sale from the agricultural products, the proceeds from the bar, the claimant having made a substantial contribution to these ventures, all went into the account of the defendant. As the claimant said, it was a collective effort. I agree. This enabled, in my view, the defendant to obtain a mortgage from the Building Society to finance the building of the Amersham

[1] **Civil Appeal No 4 of 1987 Antigua and Barbuda**

home. In my judgment, in that regard the claimant is entitled to half share in the Amersham home.

[59] Before I proceed with the analysis of the Olveston Property I wish to address one vital issue. The claimant swore that she and her husband had an agreement. She said under cross-examination "We worked together. We saved together. We even planned how much [many] houses we wanted to build we had to discuss". Although the defendant denied that there was a shared intention that she would benefit from the properties he purchased in his name or any agreement between him and the claimant or any discussion for that matter in relation to the building of any of the houses. Yet the defendant said in cross examination "We were living in Harris in a one room house. We wanted to move someplace else in Amersham. It is true I wanted to build a house at Amersham where me and my family would live. We discussed wanting to live someplace else. Amersham, that is where I got a piece of land. We discussed, it would be Amersham".

Quite clearly in my mind, when there was a desire to move from Harris there was a discussion between the claimant and the defendant that they would move to Amersham. The defendant bought a piece of land at Amersham where he built the matrimonial home. As I have said above, the claimant is entitled to a half share of the Amersham home.

[60] All the properties purchased by the defendant, except the Palm Loop house, were conveyed in the name of the defendant only. In **Grant v Edwards and Another**[2] it was held that where a couple choose to set up home together and a house was purchased in the name of one of the parties, equity would infer a trust if there was a common intention that both should have a beneficial interest in the property and the non proprietary owner had acted to his or her detriment upon that intention, that there had to be conduct from which that common intention could be inferred and conduct upon the non proprietary owner, whether directly or indirectly referable to the purchase of the property, that could only be

[2] **1986 3 WLR 114**

explained by reference to a person acting on the basis of having a beneficial interest in that property.

**The Olveston Property**

[61] The claimant swore that she and the defendant bought in 1996 a parcel of land 12/04/083. They built a house on the land as their new matrimonial home as they were forced to vacate the house at Amersham because of the volcanic eruptions. Mrs. Kirwan swore that the funding for the construction of the house came from their personal savings, rent received from the Amersham house, insurance settlement from the Amersham house, sale of agricultural produce and maroon type help from their friends.

[62] I have held that the claimant is entitled to a half share in the Amersham house. She would therefore be entitled to half of the insurance proceeds on the house, half of the rent which was received from the rental of the house at Amersham. The claimant would have acquired a proprietary interest in the house at Olveston as these funds would have been used in the construction of the house at Olveston.

[63] Mr. Markham in his written skeleton submissions argued that the land was purchased by the defendant and registered in his name. The dwelling house was built exclusively by the defendant and the defendant maintains that in addition to the legal ownership he owns the beneficial interest in the property as a whole.

[64] Mr. Markham in his written submission referred to a passage in **Abbott v Abbott**[3] in which Baroness Hale opined:

> "Finally, it must be borne in mind that the husband accepted in the course of his evidence that the wife did have a beneficial interest in the home, although he disputed the amount. The Court of Appeal appears to have attached undue significance to the dictum of Lord Bridge in **Lloyds Bank**

[3] **Privy Council Appeal No. 142 of 2005 at paragraph 19**

**plc v Rosset**[4] in particular as to what conduct is to be taken into account in quantifying an acknowledged beneficial interest. The law has indeed moved on since then. The parties' whole course of conduct in relation to property must be taken into account in determining their shared intentions as to its ownership".

I have quoted the whole passage in order to give the true effect to counsel's submission.

[65] In **Ulrich v Ulrich and Felton**[5] Lord Diplock opined:

> "It comes to this: where a couple, by their efforts, gets a house and furniture, intending it to be continuing provision for their joint lives, it is prima facie inference from their conduct that the house and furniture is a 'family asset' in which each is entitled to an equal share. It matters not in whose name it stands: or who pays for what: or who goes out to work or who stays at home. If they both contribute to it by their joint efforts, the prima facie inference is that it belongs to them both equally, at any rate when each makes a financial contribution which is substantial".

[66] I have no doubt that the claimant made a substantial contribution to the acquisition of the house at Olveston through her half share in the proceeds of the insurance on the Amersham house and her half share in the rental realized from the rent of the Amersham home.

[67] The defendant in his affidavit said the cheques paid by Tradewinds Real Estate for rental of the Olveston property were written in the name of the claimant who did his bookkeeping, and the funds were deposited to an account at Bank of Montserrat in the names his son Lyndon Kirwan and himself. Unlike the chequing account which was used to maintain the household, the claimant was not allowed to draw on rental account.

[68] I do not accept that the cheque was written in the name of the claimant because she did his bookkeeping as the defendant seemed to give that impression. I make the observation, as I said above, that the lease agreement was between

[4] **(1991) AC 107**
[5] **1968 1 WLR 180,189**

the claimant, the defendant and Tradewinds Real Estate. Furthermore, I agree with the submission of Mr. Brandt who said that the defendant recognized that the claimant had an interest in the house because both parties entered into a tenancy agreement with Tradewinds Real Estate as landlords for the rental of the house. In my judgment the claimant is entitled to half share in the house at Olveston.

[69] The evidence of the claimant is that from 8th June 2008 when she went to collect the rent from the agency, as she did prior to that date, she was refused the rent. She used to put the money in an account no. 7084790 at Bank of Montserrat. The claimant is entitled to half share in the rental of the Olveston house. The defendant is therefore ordered to present an account of all the rents collected by him on the Olveston house from 8th June 2008 to present, the date of delivery of this judgment. The claimant is entitled to half of the rent from 8th June 2008.

**The Property at Palm Loop, Woodlands**

[70] The defendant swore that he spent $35,000.00 to acquire the lands at Palm Loop from his personal funds. He said that the claimant did not contribute towards the purchase price of the land. The defendant swore that:

> "Sometime after purchasing the land at Palm Loop, Woodlands the claimant and I decided to build a house on the land and the claimant borrowed $100,000.00 from her former employer Montserrat Electricity Services…to assist in the construction of the house".

[71] Mr. Brandt in his skeleton arguments contended that the claimant bought the land at Palm Loop out of her own monies at a Public Auction for $35,000.00. The monies were from the closure of the company's Staff Provident Fund at Montserrat Electricity Services Limited, her employer. The conveyance was taken in the name of the claimant only. I find this is rather unusual because all the lands purchased by the defendant, the conveyance is taken in his sole name.

[72] There is an exhibit NK9 which shows a loan #9500361 granted March 4 1997 to the defendant in the amount of $35,000.00 for the purchase of lands at Woodlands. This loan was fully repaid on April 25, 1997. I do not accept that the defendant purchased the land at Palm Loop. The defendant is a director of the Bank of Montserrat for many years. That letter was dated 30 November 2010, thirteen years after this loan was supposed to have been granted.

[73] Another questionable aspect of this property, is that the Palm Loop property is the only property the defendant alleged that there was co-operation, consultation with the claimant in acquiring it. All the other properties the defendant claims he acquired on his own without any input from the claimant.

[74] Mr. Markham in his skeleton submission argued that in relation to the Woodlands property, the defendant contends that he holds a beneficial interest. He therefore asks the court to make a determination to reflect the claimant's total input of $100,000.00. This Palm Loop house is not one of the properties listed in the claim of the claimant. However, the defendant in his amended affidavit swore:

> "The house at Palm Loop, Woodlands is valued over $700,000 and other than the loan of $100,000.00 which the claimant obtained from her employer, I paid for materials and labour in the construction of the house. I was unable to recover receipts evidencing my entire input into the property but samples of credit invoices with MS Osborne and wage payments with Alphonso Lee are exhibited.

[75] The bills exhibited a total sum of about $25,214.61. This is mostly for materials. This also includes a sum of $11,550.00 to Neville Blake for wages for week ending 2nd October 2008 and casting board and building blocks for roof.

[76] There is no challenge from the claimant to this expenditure by the defendant. I therefore find as a fact that the defendant did make a substantial contribution towards the acquisition of the house at Palm Loop. In my judgment, the defendant is entitled to one-quarter share of the house at Palm Loop, having regard to the contribution he has made to its acquisition.

[77] I turn now to the acquisition of the shares. The claimant in her affidavit swore that she and the defendant invested the sum of $500,000.00 with CLICO International in 2003 from funds acquired from business sales, balance from insurance settlement from the dwelling house in Amersham previously deposited in the St. Patrick's Credit Union. The principal and interest were reinvested each year as it matured. Mrs. Kirwan's evidence on oath said that she and the defendant also invested $50,000.00 in British American from profits derived from their joint business enterprises. The defendant in his amended affidavit swore that he opened an account with CLICO ("initially in my name") in the sum of $500,000.00. The documents, in my view, show otherwise. The receipt dated 4 September 2003 from CLICO International for the deposit of $500,000.00 bears the names of Mildred Kirwan and Neville Kirwan as depositors.

[78] The defendant in his amended affidavit said that he opened a personal account with British American in the name of the claimant and himself for the sum of $50,000.00. In my opinion, it does not matter that the funds invested in British American were his personal funds, the mere fact that her name was on the account shows an intention that she would benefit.

[79] I therefore hold that the claimant is entitled to the benefit of half share in the $500,000.00 in CLICO because I accept that the deposit was made by both parties. She is also entitled to the benefit of half share in the $50,000.00 in the British American Fund.

[80] The claimant in her affidavit swore that by letter dated March 27, 2008 the defendant wrote to CLICO and caused the funds to be transferred to his personal account no. 7008137 at Bank of Montserrat. The letter is referred to (see paragraph 17).

[81] The claimant in her affidavit also swore that by their joint endeavours they placed EC$40,000.00 of which there is $25,000.00 presently on a fixed account at Bank of Nova Scotia, Antigua. Although the claimant swore that there was $25,000.00 remaining on the account, the documents exhibited (NK6) show that the total amount was withdrawn. I therefore make no order in regard to that sum.

[82] Mr. Brandt, learned counsel for the claimant, in his written skeleton submission argued that in this case the following assets should be divided equally and this rule should not be departed from except there is good reason for it. The share put in is irrelevant. I agree with this statement by learned counsel that in determining the respective entitlement to the parties the share put in is irrelevant.

[83] In **Oxley v Hiscock**[6] Chadwick LJ opined:-

"In many cases the answer will be provided by evidence of what they said and did at the time of the acquisition. But, in a case where there is no evidence of any discussion between them as to the amount of the share which was to have and even in a case where the evidence is that there was no discussion on that point, the question still requires an answer. It must be now accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property".

[84] Baroness Hale of Richmond in **Stack v Dowden (supra)**[7] said:

"The approach to quantification in cases where the house is conveyed into joint names should certainly be no stricter than the approach in cases into the name of one only".

[85] Mr. Brandt listed the following properties in that regard.

| **Location** | **Description** |
|---|---|
| Block 3/1/52 | Land and Building - Amersham |
| Block 12/4/083 | Land and Building - Olveston |

[6] **[2004] 3 WLR 590**
[7] **At page 457**

| | |
|---|---|
| Block 13/22/55 | Land and Building – Lawyers Mountain |
| Block 10/12/70 | Land - Molyneaux |
| Block 10/12/71 | Land - Molyneaux |
| Block 7/9/68 | Land – Elberton |
| Block 10/12/72 | Land – Molyneaux |
| Block 16/13/6 | Land – Harris and Bethel |

[86] As I have said above, the claimant began living with the defendant from 1973, when she was about 15 years old. Before the claimant went out to work in 1978 and thereafter she cooked, looked after the home, took care of the children and grew vegetables with the help of her husband and sold the vegetables in the market. These activities greatly assisted the defendant, in that her endeavours released him from expenses which he would have had to make. In that way the defendant was able to purchase the lands which he did. I make the observation that all the properties owned by the defendant were purchased during the marriage.

[87] As I said above, the defendant could not have achieved all of these things by himself. I am of the opinion that the claimant was the driving force behind her husband in his achieving what he has. As Mr. Markham, learned counsel for the defendant, in his written submissions observed: "the claimant is clearly a very intelligent individual with astute business acumen". That astute business acumen, in my view, was put at the disposal of her husband in the management of his affairs.

[88] In **Stonish v Stonish**[8] Saunders J.A. at paragraph 28 opined:

> "In assessing the respective contributions of husband and wife, there was a time when one regarded the fruits of the money earned to be more valuable, more important than the child rearing and homemaking

[8] **Civil Appeal No. 17 of 2002 BVI**

responsibilities of the wife and mother. If the man was reasonably successful at his job and the family fortunes were vastly improved, his contribution was almost automatically treated as being greater than that of the wife who remained at home. Ironically, if the man's business failed, whether through bad luck or ineptitude, the wife invariably shared equally the couple's hard times".

[89] Continuing at paragraph 29, the learned judge said:

> "The court should not pay too much regard to a contribution merely because it is quantifiable in hard currency and too little to a contribution that is less measurable but equally important to the family structure. In the vast majority of cases where these two types of contribution are in issue – that of a homemaker and that of the income earner, it is the wife who has stayed at home while the husband has performed the role of breadwinner. There is therefore an element of gender discrimination in degrading the woman's role…If the husband's skill, initiative, hardwork and drive yield handsome financial rewards, it is entirely unfair to regard those rewards as being any greater in value than those of the wife who might have employed equal skill, initiative and dedication at home bringing up the children and keeping a stable household. In such a case I see no reason why the assets acquired during the marriage ought not to be equally divided. Lord Nicholls states[9], each in their different spheres contributed equally to the family and, as a general guide, equality in the distribution of matrimonial assets should be departed from only if and to the extent that there is good reason for it".

[90] As Baroness Hale in **Abbott v Abbott (supra)** said:

> "The law has indeed moved on in response to changing social and economic conditions. The search is to ascertain the parties' shared intentions, actual, inferred or inputted, with respect to the property in the light of their whole course of conduct in relation to it".

[91] I turn to consider the issue of the ownership of Kirwan's Plumbing Services. The claimant in her affidavit said that she was manager of the company and

[9] **See White v White [2001] 1 AC 596 at 605**

performed administrative duties. The main business of the company was the sale of solar heaters and plumbing services. Mrs. Kirwan swore that she and her husband opened a joint account number 0111767 at the Bank of Montserrat for the said business.

[92] The defendant in his affidavit swore that while it is true that the claimant and him formed a company known as Kirwan's Plumbing and opened an account to which the income from the plumbing company was put, the income generated from the company which was used to purchase solar heaters were his funds. He accepted that the claimant carried out the administrative functions in relation to the company. I have great difficulty in appreciating how the defendant could claim that the funds generated from the company were his. How could this be so when the company was owned by the defendant and the claimant?

[93] Finally I deal with the Lawyers Mountain home. The defendant in his affidavit deposed that during 2008 he left the matrimonial home at Palm Loop, Woodlands after it became increasingly difficult to live with the claimant and he hastily built a two bedroom house. The house was built from his own personal funds and money borrowed from Bank of Montserrat. He is presently repaying the loan. The claimant deposed that by agreement with the defendant they purchased a parcel of land Block 13/22 Parcel 55 at Lawyers Mountain on 18th June 1998 to build a house for speculation.

[94] At first the land was used for agricultural purposes. She said on oath "until sometime in March 2008 when the defendant said that he would discontinue agriculture after we reaped the crops that were on the land. I conducted a search at the land registry which revealed that in September 2008 the defendant re-registered the said land from his name to Neville Kirwan and Olivia Kirwan (who

is his aunt). The said Olivia Kirwan did not contribute to the building of the said house".

[95] From the above, I get the distinct impression that the claimant did not even know that the house at Lawyers Mountain was being built. I am fortified in this view because by 2008 the relationship between the claimant and the defendant had deteriorated to the extent that, as he said, he left matrimonial home sometime in 2008 because it became increasingly difficult to live with the defendant. He hastily built the two bedroom house at Lawyers Mountain. That confirms my view that the claimant did not even know the house was being built.

[96] In that regard, the claimant could not have contributed to the building of the house. I so find, she is therefore not entitled to any share in the house at Lawyers Mountain, as in my judgment it is solely owned by the defendant.

[97] The furniture in the matrimonial home, the defendant deposed that he furnished the matrimonial home at Palm Loop. Exhibited are bills for furniture from Mattress Giant, The Home Depot, Rattan Shack, and receipt from Rattan Shack; all these are in the names of the claimant and the defendant. In my judgment, the furniture is jointly owned by the claimant and the defendant.

[98] In light of the foregoing, it is hereby declared and ordered as follows that the properties listed hereunder are jointly owned by the defendant and the claimant.

Block 3/1 Parcel 52 in Amersham
Block 12/4 Parcel 083 in Olveston
Block 10/12 Parcel 70 in Molyneaux
Block 10/12 Parcel 71 in Molyneaux

Block 7/9 Parcel 68 in Elberton
Block 10/12 Parcel 72 in Molyneaux
Block 16/13 Parcel 6 in Harris and Bethel

[99] The above listed properties to be valued by a reputable property valuer agreed to by both parties. After valuation the properties to be sold by public auction advertised in four issues of the local newspaper. The proceeds of sale are to be applied first for the payment of all costs incidental to the sale. The balance to be divided equally between the defendant and the claimant.

[100] The property listed as Block 12/1 Parcel 126 in Palm Loop to be valued by a reputable property evaluator agreed to by both parties. After valuation the property to be sold by public auction advertised in four issues of the local newspaper. The proceeds of sale to be applied firstly for payment of any costs incidental to the sale. The balance to be divided as follows: one-quarter (1/4) to the defendant and two-quarter (2/4) to the claimant.

[101] The above sales to be postponed for six months until 31st July 2012 to give each party the opportunity to buy out the other's aforementioned interests.

[102] The furniture in the matrimonial is to be divided equally between the parties. In the event that there cannot be an agreement in the equal distribution, the furniture to be sold by public auction. The sale to be postponed until 31st July 2012 in order to give each party the opportunity to buy out each other's share.

[103] It is hereby ordered that an account be taken in respect of the sale by the defendant of all solar systems by Kirwan's Plumbing from 13th September 2001

until the date of this judgment. That the defendant pay to the claimant 50 percent of the profits realized from the sale of solar systems with interest at the rate of 10 percent per annum on that sum.

[104] That the defendant pay to the claimant 50 percent of the dividends which he collected on the following shares after an account of all the sums is taken.

(1) Neville Kirwan and Mildred Kirwan 400 shares – February 2001
(2) Neville Kirwan and Lyndon Kirwan 500 shares – February 2001
(3) Neville Kirwan and Jeshree Kirwan 500 shares – February 2001
(4) Neville Kirwan 90 shares – November 2007
(5) Neville Kirwan 100 shares – January 2003.

[105] It is hereby declared that the claimant is entitled to 50 percent of the shares listed in nos. 1, 4 and 5 above and 25 percent of the shares listed in 2 and 3 above. Interest at the rate of 10 percent per annum on the sums due.

[106] It is hereby ordered that an account be taken of the rental paid to Tradewinds from 8th June 2008 until judgment. The claimant to be paid 50 percent of that sum found to be paid as rental from 8th June 2008 to present with interest at 10 percent per annum on that sum.

[107] It is hereby declared that the $500,000.00 Invested in CLICO which is now in Bank of Montserrat in the defendant's name alone is equally owned by the claimant and defendant.

[108] The $50,000.00 invested in British American belongs to the defendant and the claimant equally. Dividends earned on the $50,000 from 27 March 2008 belong to the defendant and the claimant in equal amounts. The claimant is to be paid 50 percent of that sum from 27 March 2008 to date of judgment with interest at the rate of 10 per cent per annum.

[109] Costs to the claimant in the sum of $25,000.00.

**A.J. Redhead**
**High Court Judge**