

EASTERN CARIBBEAN SUPREME COURT  
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

Claim No. BVIHCV 2016/0147

BETWEEN:

PAULETTE MADURO

Claimant

-AND-

ELLIOT WALWYN BREWLEY  
Purported Executor under the Will of Gene Schubert Maduro [Deceased]

Defendant

Appearances: Ms. Elizabeth Ryan and Ms. Ruth-Ann Richards, for the Claimant  
Ms. Pauline Mullings, for the Respondent

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2018: June 7  
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JUDGMENT

[1] Ellis J.: This Claim concerns the estate of Gene Schubert Maduro who passed away on 1<sup>st</sup> April 2015 (Mr. Maduro). There followed contentious probate proceedings which commenced with BVIHCP No. 48 of 2015, in which the Defendant in these proceedings applied for a grant of **probate in Mr. Maduro's estate**. The Claimant lodged a caveat and following the issuance of a warning, the Defendant filed a Fixed Date Claim Form BVIHCV No. 33 of 2016, seeking a grant of **probate in Mr. Maduro's estate**.

[2] The Claimant applied for a stay of these proceedings, alleging that she holds a legal or equitable **interest in Mr. Maduro's estate and that her interest in the estate should properly be separated from the Estate before the grant of probate can be issued.**

- [3] After protracted legal proceedings, the Application for a stay was dismissed and the Fixed Date Claim Form was withdrawn and discontinued. The Court directed that the Defendant be allowed to make the necessary application for the Estate to be admitted to probate, thus enabling the Defendant to take up representation in the Estate.
- [4] By a further Fixed Date Claim Form filed in 2016, the Claimant now seeks the following relief:
- i. A declaration that she has an interest in the matrimonial home.
  - ii. A declaration that Mr. Maduro held the matrimonial home on a constructive trust for himself and the Claimant.
  - iii. **A declaration that the Claimant has an interest in the Mr. Maduro's estate.**
  - iv. **A declaration that Mr. Maduro's estate is held in trust for the Claimant.**
  - v. An order that the **Claimant's interest in Mr. Maduro's estate be determined and valued.**
  - vi. Costs.
- [5] The factual grounding of this Claim is heavily contested. However, it is not disputed that on 21<sup>st</sup> November, 1979, the Claimant and Mr. Maduro were lawfully married. The Claimant petitioned for divorce on 18<sup>th</sup> August, 2014. She later discontinued her Petition in November, 2014. However, Mr. Maduro initiated divorce proceedings in October, 2014 on the ground that the Parties had lived separate and apart for a period of 5 years. **Both the Claimant's petition and Mr. Maduro's petition** alleged that the Parties had lived separate and apart since 1984. This Petition was uncontested and on 19<sup>th</sup> February, 2015, the Court pronounced decree nisi.
- [6] Sadly, on 1<sup>st</sup> April, 2015, prior to the grant of the decree absolute and the resolution of ancillary relief proceedings and the division of the matrimonial assets, Mr. Maduro passed away. The Claimant contends that at his death, his Estate comprised of 9 parcels of land in the Territory, bank accounts, vehicles, yachts, boats, fixtures and furnishings and china.<sup>1</sup>

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<sup>1</sup> Statement of Claim of the Claimant filed on May 4, 2016 paras 32 – 33 at page 10 of the Trial Bundle; Witness Statement of Paulette Maduro filed on November 11, 2016 paras 25 – 26 at page 39 of the Trial Bundle

[7] Save for these agreed matters, the Parties maintain very different views of the relevant factual background. These very divergent positions inform the issues which arise in this case and are summarized below.

### **THE CLAIMANT'S CASE**

[8] At the time the couple began their union in 1979, Mr. Maduro worked as a civil servant and also engaged in construction work on a part-time basis. **In the early years and due to Mr. Maduro's** express wishes, the Claimant was confined to performing the duties of a house wife. She asserts that she provided moral and other support in the construction business as well as in the management and maintenance of the assets of the said business.

[9] The Claimant contends that at the time of their marriage, the matrimonial home consisted of land and a building which housed a 2 bedroom, 1 bathroom apartment. They continued to live in the home which was gradually developed and extended such that it now houses various apartments.

[10] The Claimant asserts that the assets acquired during the marriage were used for their mutual benefit and that at all times, Mr. Maduro promised to make her happy and to "give her everything".<sup>2</sup> As a result of this expressed intention, the Claimant abided by **Mr. Maduro's** wishes when he stymied all her attempts to improve herself and to earn her own living. As a result, she accepted the role of house-wife and support for her husband and she relied on his word that she would be part owner of all they acquired.

[11] The Claimant asserts that they both worked together for the betterment of the marriage and, by reason of their collaboration, their business flourished, the matrimonial property was further developed and they enjoyed a life of luxury marked by frequent travel and luxury items.

[12] The Claimant asserts that there came a point in the marriage when they chose to enjoy an open marriage. With the full knowledge of the Claimant, Mr. Maduro enjoyed the company and favors of

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<sup>2</sup> Statement of Claim of the Claimant filed on May 4, 2016 paras 3 – 4 at page 6 of the Trial Bundle; Witness Summary of Christine Francoise-Sainté filed on November 4, 2016 paras 4 – 6 at page 46 of the Trial Bundle; Witness Statement of Paulette Maduro filed on November 11, 2016 paras 3 – 5 at page 6 of the Trial Bundle

various mistresses. The Claimant contends that at all times, she was introduced to his mistresses and was aware of their status. Mr. Maduro always introduced the Claimant to them as his wife and, compelled them to acknowledge their subordination her as his wife. She asserts that although Mr. Maduro enjoyed the sexual favors of his mistresses, he continued to treat her as his wife, periods of frostiness notwithstanding. In fact, the Claimant maintains that until August 2014, Mr. Maduro continued to enjoying the benefits of married life to the Claimant but because of his unpredictability, she chose to work to support herself.<sup>3</sup>

- [13] Mr. Maduro set the tone for the contributions that he desired from her from the very beginning of their relationship. She was always relegated to the position of home-maker and supporter of her husband as he preferred to be the sole bread-winner and so their fortunes were tied together. The Claimant states that they continued to mutually enjoy the assets of the marriage and to collaborate concerning same.
- [14] The Claimant submits that the Court has jurisdiction to grant the orders sought pursuant to its statutory and/or inherent jurisdiction and the jurisdiction conferred upon it by the Rules. The Claimant contends that all of the ingredients for constructive trust have been established and she invites the Court to declare her interest in the matrimonial assets as ranging between 25% and 50%.
- [15] Counsel for the Claimant pointed to the Claimant's **evidence that** at the very beginning of their union, Mr. Maduro made it plain that he would "*give her the world and do everything to make her happy.*" She also maintained that Mr. Maduro told her that he was working for both of them, and that what he had was hers. She alleged that some of these representations were made at the very beginning of the union, during and prior to the intervention of third parties in marriage.
- [16] Counsel urged **the Court to accept the Claimant's evidence that Mr. Maduro** made certain promises to her concerning his property. She pointed out that notwithstanding his proclivities; there is

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<sup>3</sup> Statement of Claim of the Claimant filed on May 4, 2016 paragraphs 28 at page 9 of the Trial Bundle; Witness Statement of Paulette Maduro filed on November 11, 2016 paragraph 21 at page 38 of the Trial Bundle

evidence that the couple enjoyed their properties together consistent with Mr. Maduro's express oral declarations.

- [17] Counsel concluded that the manner in which Mr. Maduro conducted himself throughout the marriage is consistent with an intention to share the interest in the matrimonial assets with the Claimant. Counsel for the Claimant adopted the formulation cited in the case of *Abbott v Abbott* [2007] 2 ALL ER 432 and submitted that "*independently of any interference 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 was [at any time] prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially.*"
- [18] Counsel submitted that the fact that the Parties both took lovers and had children outside of the marriage is of no consequence since Mr. Maduro maintained his ties to the Claimant, irrespective of his mistresses. Notwithstanding the volatility of the relationship, he ensured that the Claimant was abreast of all acquisitions during the marriage and enjoyed the fruits of their marriage with him. She submitted that such conduct is consistent with the intention he expressed at the very beginning of relationship **that "he would give her everything and make her happy."**
- [19] Counsel further argued that even if the Defendant wished to posit that the Claimant was no wife to Mr. Maduro after the first 5 years of their union, he has at least conceded that they had a 5 year union which further buttresses the general submissions of the Claimant. The Claimant concedes that the degree and nature of the support required by her husband would have evolved over time but what remains certain, is that she remained faithful to the role relegated to her.
- [20] The Claimant submits that her claim is not defeated by reason of the fact that she enjoyed a life of luxury with her husband initially and, at various points, throughout the marriage or by the fact that she was not living under the matrimonial roof at all times. She argued that she contributed to the development of the matrimonial property, which was a major income earner for Mr. Maduro. In legal submissions filed on 2<sup>nd</sup> March 2017, Counsel argued that on this basis and applying the ratio in the case of *Paul Webster v Lois Dunbar* AXAHCV No. 62 of 2009, the Court can safely find

**that the Claimant's** interest in the matrimonial assets to be no less than 25% but no greater than 50%. In her closing arguments however, Counsel inexplicably submitted that on the same basis, **the Court may safely find that the Claimant's interest in the** matrimonial assets is approximate to 30% of the value of the Estate.

[21] Finally, Counsel for the Claimant submitted that the fact that the Claimant paid the price of her own personal development and financial independence and remained dependent on Mr. Maduro, proves her **detrimental reliance on her husband's representations**. She recounts that when she met Mr. Maduro, she was a young woman with dreams of bettering herself but that her attempts to do so were all aborted by him. The Claimant accepted the role of home-maker and wife and she supported him in the construction business and played second fiddle to him.

[22] Although there came a time when the Claimant relocated to the United States, in order to achieve her own personal goals, she returned to the Territory **(on Mr. Maduro's request)** to what had become an open relationship to continue her role as home-maker, care-taker and support. She reiterates that she remained with Mr. Maduro throughout the marriage, even when their union became an open marriage.

### **THE DEFENDANT'S CASE**

[23] **The Claimant's case was trenchantly opposed by the Defendant who denied that the Claimant and Mr. Maduro ever enjoyed an "open relationship" as she described.** The Defendant asserts that the preponderance of the evidence in this case, including sworn evidence of the Claimant in related matrimonial proceedings, all speak of the fact that the Claimant and Mr. Maduro shared a maximum period of togetherness of five (5) years, although legally married for thirty-five (35) years.

[24] Indeed, Counsel for the Defendant pointed to the fact there were two divorce petitions; one by the Claimant on 18<sup>th</sup> August, 2014, and the other filed by Mr. Maduro on 14<sup>th</sup> October 2014. Both petitions cited 1984 as the year of separation.<sup>4</sup> She reminded the Court that although the

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<sup>4</sup> See paras 6, 7, 8 of the Financial Provision Affidavit – Exhibit EWB1 to the Defence

**Claimant's petition was** later withdrawn divorce proceedings nevertheless proceeded on the basis **Mr. Maduro's petition which was uncontested.**

[25] The Defendant placed much reliance on the Financial Provision Affidavit of the Claimant, the Mr. **Maduro's** Affidavit In Support of his petition for divorce as well as his Affidavit of Means which all indicate that:

- a. **Mr. Maduro solely raised the couple's two children** – Gaelle and Krystle Maduro after **the Applicant's departure to the United States in or about 1984.**
- b. There was no cohabitation or consortium existing between the parties after 1984.
- c. The Claimant shared relationships with and had children for other men. Mr. Maduro likewise had other children and shared a long standing relationship with another woman.
- d. Mr. Maduro allowed the Claimant to live with their daughter Krystle in one of his apartments for the sole purpose of granting Krystle assistance with raising her children.
- e. **The Claimant's only request at the time of the dissolution of the marriage was that Mr. Maduro maintain or support her financially.** There was no claim to any legal/equitable interest in the matrimonial home or other property owned by him.

[26] Counsel **for the Defendant submitted that the Claimant's assertions** of a common life, open marriage, continued consortium and 35 year union form part of an evolving false narrative being presented to **the Court conveniently after Mr. Maduro's passing** and simply to lay hold on his assets. Counsel noted that prior to his passing, divorce proceedings make no mention of the fact that the Claimant and Mr. Maduro resumed cohabitation at any time after 1984. The import of such failure is particularly damning given that it would have assisted the Claimant (then Petitioner) in persuading a court to grant her financial aid, which Mr. Maduro sought to do in 2014.

[27] The incontrovertible fact is that Mr. Maduro died leaving a will in which he named Elliot Walwyn Brewley as executor and in which he carefully devised all of his estate making specific bequests which included a relatively small gift to the Claimant of the sum of \$1000.00.

[28] Counsel for the Defendant submitted that there is no legislative framework in the British Virgin Islands which allows for any restrictions on the testamentary disposition of the testator, nor has the validity of the **Mr. Maduro's will been impugned**. Legal interest in all the property bequeathed/devised under the will is vested in him and he has great latitude in disposing of his property as he deems fit. The question therefore becomes whether the Claimant can establish that she holds an equitable interest in the estate.<sup>5</sup> Counsel for the Defendant submitted that if the Claimant is to succeed, she must pursue and establish a claim in keeping with the principles of constructive trust or proprietary estoppel.<sup>6</sup>

[29] Counsel submitted that the doctrine of constructive trusts arises out of an express agreement between parties and overlaps substantially the doctrine of proprietary estoppel. In both doctrines, there must have been a promise or agreement, reliance on such promise and the claimant must have acted to his detriment in reliance on an assurance that he would have an interest in property.

[30] Counsel for the Defendant submitted that the Claimant's pleadings and evidence continuously reference the fact that her husband promised to take good care of her and to give her the world. Counsel argued that this is not an enforceable promise or agreement because there is a rebuttable presumption that between family members there is no intention to create legal relations. In support of this submission she relied on the case of *Jones v Padavatton* [1969] WLR 328.

[31] Counsel for the Defendant further submitted that any plans which the Claimant and her husband had were loose plans which are more appropriately called dreams. This would be common for every couple who intend to start a life together. Such dreams could not be enforced as this would open the floodgates of litigation. Counsel submitted that if the Court were to uphold promises made by every husband and wife in post nuptial bliss, every marriage, barring none, would be the subject of litigation. Counsel argued that in any event these alleged promises after thirty (30) years

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<sup>5</sup> The UK House of Lords in *Stack v Dowden* (2007 UKHL 17 paras 3, 4) stated **"English Law has always distinguished between the legal and beneficial ownership of land. Where sole legal ownership exists, sole beneficial ownership is the starting point and thus the onus is on the party who wishes to show that he has any beneficial interest at all and if so what that interest is..."** The Claimant here therefore has both a legal and evidential burden to discharge.

<sup>6</sup> The difference between the two is that proprietary estoppel is discretionary, whereas in the case of constructive trusts, the Claimant is entitled to the agreed benefit. Counsel relied on the judgment in *Oceana Williams v Michael Richardson* SVGHC2012/0273.



of being unenforced cannot now be relied upon by the Claimant. The Defendant therefore also relies upon the doctrine of laches.

[32] The Defendant also disputed the **Claimant's contention that** she is entitled to a share in her **husband's** estate by virtue of her non-monetary contributions to the family as home maker and mother and that this was done with the express understanding that she would be adequately provided for and rewarded. Counsel for the Defendant submitted that there has been no credible **evidence to this effect advanced on the Claimant's behalf.** On the contrary, Counsel submitted that there is uncontroverted evidence that while their daughters, Krystle and Gaelle were babies, the Claimant abandoned the children and left them in the care of their father. It was therefore Mr. Maduro who became homemaker and child rearer until he eventually found himself a companion who assisted him with raising the children.

[33] The Defendant further asserts that because there was no promise, there can be no reliance. The Defendant also contends that **there was no trade off or compromise for the family's sake as the** evidence clearly shows that if the Claimant performed any such duties, they were not connected to or for the benefit of Mr. Maduro or their family. He submitted that the Claimant is now trying to blame Mr. Maduro for her personal failure or inability to improve herself professionally. The evidence shows that she started dating Mr. Maduro when she was 20 years old and they lived together as man and wife for a period of 5 years. This left the Claimant with an entire lifetime when she was neither homemaker nor a child rearer, to equip herself with what she needed to navigate through life.

[34] Counsel for the Defendant asks the Court to reject the narrative advanced by the Claimant and to consider the facts of the case which reveal that although they were legally married, the couple essentially led separate lives for the majority of their marriage. Both parties were patently aware of this and this awareness led the Claimant and later Mr. Maduro to apply for the marriage to be dissolved. During the span **of the couple's short period of togetherness (five years) and the entire** marriage, the Claimant made no meaningful contributions as home maker or child-rearer that **would vest her with a share in the "matrimonial home" or any other** property acquired by Mr. Maduro during his lifetime. Counsel submitted that to allow the Claimant to succeed would be

manifestly unfair to Mr. Maduro as he acquired property through his own industry and effort. He concluded that the last will and testament of Mr. Maduro should be taken as a clear indication of the manner in which he intended his estate to be distributed.

#### ANALYSIS AND CONCLUSION

- [35] **It is common ground between the Parties that at the time of Mr. Maduro's death he was legally** married to the Claimant, notwithstanding that divorce proceedings between them had progressed to the decree nisi stage. The ramifications which arise from this are significant because the **question of one's marital status becomes** most critical upon death. It is now accepted law that if decree absolute has not been granted and one a spouse passes away before the final divorce decree, then the marriage will end on their death. A decree absolute cannot be granted when one spouse is deceased.
- [36] Moreover, the recent case of *Robert v Woodall*<sup>7</sup> has made abundantly clear that a person cannot bring a financial claim under the Matrimonial Proceedings and Property Act against a deceased spouse. That case concerned a renewed application for leave to appeal the strike out, by Registrar Jones, of a claim by a trustee in bankruptcy under the English Matrimonial Causes Act 1973, made on behalf of a deceased bankrupt spouse against his former wife. The dispositive issue, was whether the intervening death of the bankrupt spouse terminated any claim under the Matrimonial Causes Act.
- [37] The Court took time to consider the nature of matrimonial proceedings and confirmed that the wording of Act makes it clear that such claims could only be made by a party to the marriage (or child) for the benefit of a party or child. The Court relied on the appellate decision in *Harb v King Fahd Bin Abdul Aziz*<sup>8</sup> which confirmed that the consistent interpretation of matrimonial causes legislation is that applications by spouses ceased when one of them died. That Court concluded that matrimonial proceedings constitute a personal jurisdiction created by statute. **In the Court's** judgment, the wording of sections 23, 24 and 27 of the Act reinforced that conclusion, there being

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<sup>7</sup> [2016] EWCH 2987

<sup>8</sup> [2005] EWCA Civ. 1324

no distinction between them. The learned judge therefore rejected the suggestion that a court could have regard to the section 25 factors.

[38] In *Harb v King Fahd Bin Abdul Aziz*, the wife sought to continue her claim for ancillary relief despite the death of her husband, the former King of Saudi Arabia. The English Court of Appeal held the claimant's claim abated on the death of the King, and could not proceed. Wall LJ observed:

“A claim for financial provision between living spouses or former spouses is not a cause of action under section 1 of the 1934 Act which survives the death of either spouse. Unlike rights of action at common law, the rights enjoyed by spouses or former spouses to make claims for financial relief against each other are exclusively derived from statute, and wholly dependent for their prosecution on the status of the applicant as spouse, or former spouse whose marriage has been dissolved by judicial decree and who has not re-married.”

[39] It follows that in the circumstances of death before decree **absolute, the deceased spouse's estate** will be distributed according to either their will, if they had one, or otherwise under the rules of intestacy. If, a deceased spouse did make a will which disinherited or made inadequate provision for the surviving spouse, then they could find themselves in difficult circumstances because they are without the benefit of making a claim under the Matrimonial Proceedings and Property Act. Moreover, the legislative framework within the Virgin Islands does not include an Inheritance (Provision for Family and Dependents) Act so that the surviving spouse is unable to bring a **claim against the deceased spouse's estate** on the basis of inadequate provision.

[40] The only appropriate recourse and one which was pursued here, is for the surviving spouse to seek to advance a claim in equity. **The Claimant's case is grounded in law of constructive trusts** and she seeks a declaration that her husband held the matrimonial home and his estate in trust for her benefit. The Claimant maintains that she has a beneficial interest in the matrimonial home and the wider estate of Mr. Maduro and she seeks to have such interest determined and valued by the Court.

[41] In the case at bar, it is not disputed that the property which falls within the estate is registered **solely in the name of Mr. Maduro's**. Counsel for the Defendant has submitted, (and this Court

agrees) that as a starting point, legal interest **in all the assets comprised in Mr. Maduro's estate** is vested solely in him. In *Stack v Dowden*<sup>9</sup>, the House of Lords stated:

“Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.”

[42] This dictum is also consistent with the finding of the Court of Appeal in the case of *Burns v Burns*<sup>10</sup> where it was held that the *prima facie* inference of sole beneficial ownership in cases of sole legal interest may only be displaced if the Court could impute from the conduct of the couple down to the date of separation, a common intention that the non-owning party was to have a beneficial interest in the property. In that case, Lord Justice Fox concluded that even though they lived together and she carried out domestic duties, there was “*no indication at all that they thereby intended to alter the existing property rights of either of them*”.

[43] This position has been somewhat relaxed in later cases to account for the non-monetary contributions of the home maker and child-rearer who may have given up their professional pursuits in order to care for the family or work in the family business. This contribution must however be substantial and referable to an interest in the property.<sup>11</sup>

[44] In the case at bar, the Claimant has advanced that based on the principles of constructive trust she has a beneficial interest in the matrimonial home and in **Mr. Maduro's estate**. Constructive trusts are trusts that may be implied in the absence of a declaration of trust, where the trustee has induced another to act to their detriment in the belief that if they do so act to their detriment, they would acquire a beneficial interest in the property.

[45] The legal foundation for the doctrine of constructive trust arises from the case of *Gissing v Gissing*<sup>12</sup>. In that case, the English House of Lords held that a claimant must prove that the legal

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<sup>9</sup> [2007] UKHL 17

<sup>10</sup> [1984] Ch. 317, [1984] 1 ALL ER 244

<sup>11</sup> *Eves v Eves*; *Grant v Edwards*

<sup>12</sup> [1971] AC 881

owner of the land induced him to believe they would be entitled to a share in the ownership. He may prove this by demonstrating an (i) express agreement or (ii) contribution to the acquisition. In addition, the claimant must have acted to his detriment. If these requirements are demonstrated, the defendant will be considered to hold the property on a constructive trust for themselves and the claimant. The court will then calculate the respective shares in the **property either by a 'holistic'** examination of the whole course of dealing between the parties or, where no clear intention can be found, imputing what is fair in the context.<sup>13</sup>

## COMMON INTENTION

[46] The relevant legal principles have been restated in *Lloyds Bank Plc v Rosset*<sup>14</sup>. In that case, the House of Lords made the central issue that of common intention. Lord Bridge of Harwich explained the position in the following terms:

"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 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 sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage instalments, will readily justify the inference necessary to the creation of a constructive trust. But, as I read the authorities, it is at least extremely doubtful whether anything less will do." Emphasis mine

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<sup>13</sup> *Jones v Kernott* [2011]

<sup>14</sup> [1991] 1 AC 107

[47] Lord Bridge in *Lloyds Bank Plc v Rosset*<sup>15</sup> also went on to state:

“We must also consider the principles set out in other authorities such as *Grant v Edwards* which say that where there has been no express or written declaration or agreement or any direct provision of part of the purchase price so as to give rise to a trust, the Claimant must establish a common intention between herself and the Defendant acted upon by her that she should have an interest in the property.”<sup>16</sup>

[48] The Court went on to draw a distinction between an express common intention and an inferred common intention. An express common intention requires evidence of a written agreement or express discussions between the parties which demonstrate that the property is to be shared beneficially.

[49] In *HSBC Bank Plc v Dyche*<sup>17</sup> Lord Bridge considered the earlier cases of *Eves v Eves* [1975] 1 WLR 1338 and *Grant v Edwards* [1986] Ch.638 as outstanding examples of constructive trust created through an express common intention. In the former case, an unmarried couple moved into a house registered in the sole name of the defendant who told the claimant that it was to be their house and a home for themselves and their children. He also told her that it would have been registered in their joint names but for the fact that she was under the age of 21. In the latter case, the defendant purchased a house in his own name to provide a home for himself and the claimant. He told her that he would not purchase it in their joint names because it would prejudice her in divorce proceedings.

[50] In the absence of an express written or oral agreement, a common intention may be inferred from the conduct of the parties.<sup>18</sup> This may involve a court considering matters such as direct and indirect financial contributions to the purchase price or mortgage installments of the property, payment for repairs or improvements to the property or, in exceptional circumstances, non-financial contributions (such as raising children and looking after the household).<sup>19</sup> In such cases, it is critical that a claimant demonstrate that underlying such contributions is a common unspoken intention for the property to be shared.

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<sup>15</sup> [1999] 1 AC 167

<sup>16</sup> Page 646 per Nourse LJ

<sup>17</sup> [2009] EWHC 2954; in *Lloyds Bank v Rosset*, it was termed an ‘express bargain constructive trust’

<sup>18</sup> Referred to in *Lloyds Bank v Rosset*, as the ‘implied bargain constructive trust’

<sup>19</sup> *Burns v Burns* [1983]

- [51] As regards inferred intention, the court in *James v Thomas*<sup>20</sup> has held that an intention cannot be inferred from the parties' expectations arising from their relationship. In that case, the defendant, Mr. Thomas, owned the cottage in dispute as the sole registered proprietor. Mr. Thomas had inherited this property on the death of his parents; he had subsequently bought the remaining shares from his siblings. Three years later, he had formed a relationship with Ms. James and she moved into the cottage. He also ran his business from the cottage. Ms. James had worked with the defendant for his business without receiving payment. In addition, Ms. James had given the defendant £5,000 towards a mortgage repayment for the house. Mr. Thomas had made **assurances to the complainant that she would be 'well provided for' in his will and that the work she carried out on the cottage would 'benefit them both.'**
- [52] The trial judge had dismissed the claim of beneficial interest under section 14 of the Trusts of Land Act. On appeal, the court dismissed the appeal and held that the complainant did not have a beneficial interest in the property, as there was no common intention for a constructive trust to be created nor could there be a claim of proprietary estoppel. The Court found that the assurances **that her work would 'benefit us both' and that she would be 'well provided for' if something happened to Mr. Thomas,** were not enough to succeed with a claim for common intention. In addition, her contribution to the mortgage payment was not enough to find common intention for the property.
- [53] While the evidence needed to support a common intention fell short of that needed to support a finding that there was a legally binding contract, *James v Thomas* **demonstrates that a judge's aim** should be to find an agreement that the parties made rather than to impute an agreement to them.
- [54] The difference between inference and imputation is critical because in drawing an inference, the court is attempting to determine what the parties actually decided even if this is not expressly spelt out. In the case of imputation, the court determines what the parties should have taken to have decided having regard to all the circumstances and courts have repeatedly held that a judge cannot ascribe intentions which the parties never had.

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<sup>20</sup> [2007] EWCA Civ. 1212

[55] The practical application of this legal principle has however presented some difficulties because a court is essentially called upon to devise an agreement from scraps of conversations between the parties and construing their words outside of context. This is particularly problematic because **many couples ‘deal with each other more by trust and collaboration than by organized thinking about their respective rights’ and** they rarely consider what will happen to their property if they split up.

[56] Where the property was acquired before the relationship began, the cases disclose that it is much more difficult to establish an inferred common intention.<sup>21</sup> Where a claimant asks the court to infer an agreement from contributions to the acquisition or improvement of the property made after the date of purchase, courts have been increasingly more flexible, crediting indirect financial contributions to the payment of household expenses which have permitted the owner to make mortgage payments.<sup>22</sup> However, it is also clear that the mere fact that a financial contribution has been made does not guarantee that a common intention will be inferred. No constructive trust will arise if the contribution is made in circumstances that demonstrate that there was no intention on the part of the contributor to obtain an interest in the property. A common intention will not be inferred if the parties merely do what spouses or partners would ordinarily do. In *Pettitt v Pettitt*<sup>23</sup> Lord Diplock explained the position at page 826:

**“It is common enough nowadays for husbands and wives to decorate and to make improvements in the family home themselves with no other intention than to indulge in what is now a popular hobby and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or baths the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion would enter their heads.”**

[57] Non-financial contributions including where a person undertakes domestic responsibilities, bears children and provides child care and looks after sick or elderly parents are factors which can also be taken into account in determining the extent of the beneficial interest that will arise under a

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<sup>21</sup> *Morris v Morris* [2008] EWCA Civ 257; *Aspden v Elvy* [2012] EWHC138

<sup>22</sup> *Le Foe v Le Foe* [2001] FLR 970

<sup>23</sup> [1970] AC 777 at page 826



constructive trust established on the basis of common intention inferred from a direct financial contribution.

- [58] In the case at bar, **the Claimant's contention is that there was an express common intention** that she would have a proprietary interest in the matrimonial home and all of the other property and assets acquired during the course of her marriage to Mr. Maduro. In support of this contention, she advanced that at the beginning of their marriage; Mr. Maduro made express oral representations to her to the effect that he would give her everything and would do everything to make her happy and she asserts that he did precisely that for the first part of their relationship. She also maintained that he represented that he was working for both of them and that what was his was hers.
- [59] Having had a chance to observe the Claimant in oral examination on the witness stand, the Court was left with significant doubt about the reliability and the veracity of her evidence. In several **respects the Claimants' evidence was inconsistent with that of her witness statements and** previous evidence which had been filed in this Court in related proceedings and which was relied on by the Defendant. **In the Court's judgment, the Claimant's evidence was more often than not** exaggerated and contrived to fit the narrative of her claim. The Court has no doubt that she was prepared to and did in fact stretch the truth considerably in order to buttress her position. For that reason, the Court has serious doubts that the parties ever had such express discussions upon which the Court could impute a common understanding or intention that the Claimant would have a legally enforceable beneficial interest in the property.
- [60] **The Court was similarly unconvinced by the testimony of the Claimant's mother, Mrs. Christine Francois-Sainte.** In her witness summary, she stated that during the time when he was essentially courting the Claimant, Mr. Maduro visited her at her residence in Tortola, pledged his love for the Claimant and promised to take care of her and to give her the world. Even if the Court were to find that Mr. Maduro made such express declarations during discussions with the Claimant, in the **Court's judgment such platitudes could not reach the threshold of legally enforceable** representations. **In the Court's judgment** such representations would be too vague or uncertain to give rise to a common intention.

[61] The Court finds support for this conclusion in the several cases commencing with *Layton v Martin*<sup>24</sup> where the deceased, a married man asked the claimant to live with him offering “what emotional security I can give, plus financial security during my life and...after my death.” In reliance of this statement, the claimant provided various domestic services until the deceased’s death. Her claim for financial provision based on proprietary estoppel was dismissed on the ground that the deceased’s representations did not relate to any specific assets. In the words of Scott J:

“But all these cases, of whichever type, involve an inferred or actual common intention directed to specific property. They involve contributions to the acquisition or preservation of specific property. This feature is not just an incidental circumstance. It lies at the heart of the circumstances which create the claimant’s equitable interest in the specific assets in question.”

[62] After referencing a number of judicial authorities dealing with constructive trusts the learned judge observed:

“...these cases establish a principle as applicable to assets already owned by one of the parties before the commencement of the marriage or quasi-marriage as to assets acquired thereafter. This may, as a general proposition, be so. But the principle established by these cases concerns equitable rights in specific property. It has, in my view, no application whatever unless the common intention (actual or inferred) is a common intention formed in relation to specific assets. An agreement by one party to pay the other, say £5,000 a year, or a lump sum of £15,000, is enforceable, if it complies with the requirements of contracts, as a contract. It does not create any equitable interest in any assets of the promisor. An agreement to pay an unspecified amount can obviously not be in any better state to create an equity in the promisor’s assets. Nor can an agreement in such general terms as ‘to make provision’, or ‘to provide financial security’ create any equity in the promisor’s assets.”

[63] And in considering the case made out for proprietary estoppel, the learned Judge concluded:

“A representation that ‘financial security’ would be provided by the deceased to the plaintiff, and on which I will assume she acted, is not a representation that she is to have some equitable or legal interest in any particular asset or assets. ...What assets? His assets for the time being, answered counsel for the plaintiff. The proposition has only, in my view, to be put to be seen to be untenable.”

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<sup>24</sup> [1986] 2 FLR 227

[64] In *Lissimore v Downing*<sup>25</sup> the Court held that unspecific statements made by the defendant that “she would never want for anything”, that “he would take care of her” were insufficient because they were not expressed in terms which enabled any objective assessment to be made of what was being promised.

[65] In the case of *James v Thomas* where the assurances said to have been relied upon was that “whenever the parties discussed carrying out improvements to the property and matters relating to the business, the Defendant would say to the Claimant **‘this will benefit us both’**” the Court in that case observed:

“It must be kept in mind that that was said by Mr. Thomas at a time when he and Miss James were living together at the property as man and wife; and in circumstances in which (on the evidence) there was no reason for either of them to doubt that they would continue to do so for the foreseeable future. In that context it is, to my mind, at least as likely that the observation “this will benefit us both” (in relation to improvements to the property) was intended to mean – and was understood at the time to mean – that the improvements would have the effect that the property in which they were living as their home would be more comfortable and more convenient: or, to put the point another way, that the improvements to the property would be reflected in an improvement to the quality of their life together. It is, I think, unreal to suggest that an observation in those terms, made in that context, was intended or understood to be a promise of some property interest, either present or in the future. Confirmation that it was not so intended – and was not understood to be so intended – is found in the judge’s observation (in the final sentence of paragraph [54] of his judgment) that “when, on the Claimant’s evidence, she raised the issue of putting the Property in joint names, the Defendant was evasive and, she accepted, unwilling.”

34. Nor, as it seems to me, can it be said that the observation “this will benefit us both”, when made in the context of a discussion of matters relating to the business, was intended or understood to be a promise of some property interest in The Cottage. Given that the outgoings of both parties were funded by the receipts of the business – and that, from about 1999, the business was carried on in partnership – there is no reason to think that the observation “this will benefit us both” (in relation to the business) was more than a statement of the obvious: what was of benefit to the business was of benefit to both Mr Thomas and Miss James, for whom the business was their livelihood.” Emphasis mine

[66] In *Caines v Caines*,<sup>26</sup> Belle J held that the Claimant’s assertions that a clear agreement existed that the parties would share equally in the businesses and properties were false as she was not

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<sup>25</sup> [2003] 2 FLR 308

<sup>26</sup> 2009 High Court Judgment SKBHCV 2008/0055 at paragraph 41

able to recall any conversation or intimation to support this other than the declaration that the respondent would take care of the family.

[67] In Findlay v Findlay<sup>27</sup> Sykes J (as he then was) **rejected the wife's application for a** beneficial share in the matrimonial home in which she claimed inter alia that the defendant had told her that **"all he had was hers"**. The learned Judge expressed doubts as to whether these words were uttered at all and in any event he found that the words were far too vague and imprecise.

[68] The Court is guided by these authorities.

[69] The Claimant advanced no further evidence to corroborate or support her contention that the Parties had express oral or written agreement or arrangement. Having considered the totality of the evidence in this case, the submissions of the Parties and the cases cited herein, this Court is unable to impute a common intention on the basis of these alleged express representations.

[70] By way of alternative argument, the Claimant has advanced that the Court may infer a common **intention from the couple's** conduct during the course of their marriage. The evidence before the Court does not disclose a direct financial contribution to the purchase price or mortgage installments of the property or to payment for repairs and improvements to the property. Instead, the Claimant contends that she made indirect financial contributions, without which Mr. Maduro would not have had the means to acquire or construct the property.

[71] The Claimant has sought to rely on the role which she played as a housewife and caregiver. She indicated that she stayed at home, cleaned house and cooked and baked for her husband and cared for their children. She was also **Mr. Maduro's support system, ensuring that they had a well-**kept, comfortable home thus freeing him to devote his attention to his business. She further stated that for the first five years of their marriage they were very happy and worked together as couple to develop the business, to care for the family and to expand and improve the matrimonial home. According to the Claimant, during the renovations she made certain decorative suggestions and would cook and bake for the workmen.

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<sup>27</sup> 2008 Supreme Court of Jamaica Judgment HCV 723 of 2004

- [72] In her witness statement, the Claimant also asserts that her husband trusted her in his business affairs. However, her evidence revealed that her role was limited to making bank deposits. Her witness statement also reveals that she would get up early in the morning in order to be there with her husband and help him while he was fixing his trucks and backhoes. This was the extent of the indirect contribution which the Claimant recounts in her witness statement. However, when she was examined under oath, **the Claimant's role** in the business had mushroomed to that of a bookkeeper and her evidence that Mr. Maduro had employed someone to teach her bookkeeping skills plainly conflicted with her evidence that he had stymied all of her efforts at professional development.
- [73] The Claimant concludes that there was a common intention that she would have a beneficial interest in the matrimonial home and it was in reliance of this intention that she continued to manage the home and take care of the family.
- [74] The English Court of Appeal in *Grant v Edwards* concluded that indirect evidence of common intention could be inferred by the conduct of the Parties when such conduct on the part of the claimant is directly referable to the purchase of the property and could only be explained by reference to a person acting on the basis of having a beneficial interest in that property. This position has since been qualified and in that regard the Court is also guided by the learning in *Pettit v Pettit* and more recently by the Privy Council decision in *Abbott v Abbott*.<sup>28</sup> Somewhat similar to this case, the wife gave up working early in the marriage and remained a homemaker for the majority of the marriage. In **delivering the Privy Council's** judgment, Baroness Hale emphasized **the fact the parties'** whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership. In that case, the court favoured the reasoning of the trial judge Mitchell J, who relied heavily on the fact of the parties joint and several liability to repay the mortgage supported by their life insurance policies and also that fact that their income went into a joint bank account in concluding that the Parties had equal beneficial interests in the home.

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<sup>28</sup> [2008] 1 FLR 1451

[75] However, what is clear is that the indirect financial contribution must be in excess of what would be expected as a normal contribution. In *Jackson v Jackson*<sup>29</sup> the wife had made no direct financial **contribution to the property which was registered solely in the husband's name**. She relied on the fact that the search for a matrimonial home had been a joint search and that she made substantial financial contributions to the family home. In rejecting her claim, the Court held that her contribution amounted to no more than that of an average housewife. In *Button v Button*<sup>30</sup>, Denning MR stated the position in this way:

“This is the first case, I think, to come before us where the wife has done work on the husband's house but has made no financial contribution. I think that similar principles apply as when it is the other way about. The wife does not get a share in the house simply because she cleans the walls or works in the garden or helps her husband with the painting and decorating. Those are the sort of things which a wife does for the benefit of the family without altering the title to, or interests in, the property. Take the present case. The wife was economical in spending on the housekeeping, as most wives are. She helped with the decorating and improvements to the house, as many wives do. It no doubt improved the value of the property. I was inclined during the argument to accept that her work was so great as to entitle her at least to a share in the house. But after discussion with my brethren, I have come to the conclusion that the proper inference from the evidence is that it was the ordinary kind of work which a husband or wife may do on the matrimonial home without **giving the other a share or interest in it.**”

[76] Non-financial contributions must therefore be sufficiently significant so as to lead to the inevitable conclusion that there was as common intention at the outset that there was a shared intention that the Claimant was to acquire a beneficial interest.

[77] This Court has considered the totality of the evidence presented **in support of the Claimant's case** and in so doing the Court has also taken into account the whole course of the Parties' conduct in relation to the matrimonial home and the other assets which fall into the estate. In that regard, the Court notes that the matrimonial home was essentially given to Mr. Maduro by his father for his own benefit prior to the marriage. It has not been represented that there was any continuing legal or other impediment to Mr. Maduro taking steps to register or transfer assets into **the Claimant's** name and it is clear that during his lifetime, he took no steps to do so.

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<sup>29</sup> 2010 Jamaica Supreme Court Judgment

<sup>30</sup> [1968] 1 WLR 457 at 462

[78] The Court has also noted that there is no evidence that the Claimant bore any of the family expenses. Indeed, although there is evidence that she received some of the proceeds from her **mother's lottery winnings, there is no evidence that any part of this was applied to the matrimonial** home or to the payment of household expenses or to the businesses or any other assets acquired during the Parties marriage. In the **Court's view, making banking deposits**, cooking for the workmen and providing decorative suggestions would *without more* not suffice to ground a claim.<sup>31</sup>

[79] Indeed, apart from the bare assertion, the Claimant advanced no cogent evidence of an indirect financial contribution which would have better abled Mr. Maduro to acquire his properties or to develop the same.

[80] **In the Court's judgment there is little evidence** upon which the Court can ascertain the **Parties'** shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it. Instead, the Court is persuaded that for the majority of their marriage, the Parties lived separate lives in every sense.

[81] During the early period of their marriage when the Parties actually cohabited, the evidence reveals that Mr. Maduro was the obvious breadwinner who kept his assets and his accounts separate and registered solely in him name.

[82] Moreover, is now trite law that the mere fact that a claimant can demonstrate conduct which may amount to an indirect contribution does not guarantee that a common intention will be inferred. No constructive trust will arise if the contribution is made in circumstances that demonstrate that there was no common intention to share ownership of the property. A common intention would not be inferred if the parties have merely done what spouses would normally do. In the words of Chadwick LJ in *James v Thomas*:

“The true position, as it seems to me, is that she worked in the business, and contributed her labour to the improvements to the property, because she and Mr Thomas were making their life together as man and wife. The Cottage was their home: the business was their livelihood. It is a mistake to think that the motives which lead parties in such a relationship to act as they do are necessarily attributable to pecuniary self-interest.”

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<sup>31</sup> This view concurs with the conclusions drawn by the House of Lords in *Lloyd Bank Plc v Rosset* [1997] 1AC 107 at page 131

[83] This view was also reiterated in *Pettit v Pettit* at page 826 of the judgment:

**“It is common enough nowadays for husbands and wives to** decorate and to make improvements in the family home themselves with no other intention than to indulge in what is now a popular hobby and to make the home pleasanter for their common use and enjoyment. If the husband likes to occupy his leisure by laying a new lawn in the garden or building a fitted wardrobe in the bedroom while the wife does the shopping, cooks the family dinner or baths the children, I, for my part, find it quite impossible to impute to them as reasonable husband and wife any common intention that these domestic activities or any of them are to have any effect upon the existing proprietary rights in the family home on which they are undertaken. It is only in the bitterness engendered by the break-up of the marriage that so bizarre a notion **would enter their heads.”**

[84] **So that, even if the Court were to accept the Claimant’s testimony, in the Court’s judgment her** actions could only support a conclusion that she was supporting her husband and establishing a thriving family life. The Claimant has failed to demonstrate that underlying, her alleged conduct was an unspoken intention for the ownership of the property would be shared.<sup>32</sup>

[85] Further, having considered the evidence of Phyllis Inniss, Krystle Maduro and Gaelle Maduro all of whom provided convincing testimony which corroborated each other in material ways, the Court is satisfied that the contributions alleged to have been made by the Claimant during the early part of the marriage would be negligible at best. It is apparent to the Court that the Claimant very early into the marriage voluntarily left her two daughters to be raised by their father when they were just 1 and 3 years old. Later, when he commenced a cohabiting relationship with Ms. Inniss, it is clear that it was she who performed the role of home maker and child-rearer.

[86] **The Court has no reservation in rejecting the Claimant’s evidence that she enjoyed an open** marriage with Mr. Maduro. It seems to the Court that this contention was wholly self-serving and inconsistent with the posture adopted by the Claimant in earlier proceedings. The Court similarly has no reservations in rejecting the Claimants evidence that at some point the Parties later resumed cohabitation and lived as a married couple. **The Claimant’s evidence in this regard was** at times contradictory and unreliable. It is clear to the Court she was offered accommodation in one of her husband’s **apartments purely to facilitate her** assisting their adult daughter. The Court finds that the Parties enjoyed a relatively brief period of marital bliss and cohabitation

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<sup>32</sup> Jackson v Jackson [2010]



(approximately 5 years) after which the marriage broke down and the Parties assumed separate lives.

[87] There is no evidence that the Parties maintained joint accounts or that they jointly held assets, insurance policies or business interests. A most telling **fact in the Court's view** is the fact that the Claimant never sought to assert any beneficial claim to the assets in previous proceedings before this Court. Indeed, while he was alive, the only claim for relief which she sought to advance was a claim for maintenance on the ground of hardship.

[88] The Court therefore finds no credible evidence of a sufficient indirect contribution by the Claimant **to the acquisition, or improvement or maintenance of the property standing in Mr. Maduro's name** as at the date of his death from which a court could infer that there was a common intention that the Claimant would have a beneficial interest. Moreover, the paucity of the evidence and the contradictory and implausible way in which it was advanced significantly eroded the cogency and reliability. **At its best the Claimant's case discloses a unilateral and quasi-moral view** that since she shared 5 years of married life with Mr. Maduro that she should share in his estate. The Court has considered the whole course of the **Parties' conduct in relation to Mr. Maduro's** property and finds no basis upon which it can be concluded that there was a shared intention as to its ownership.

[89] Having drawn this conclusion, it is not necessary for the Court to go on to consider the factors of reliance and detriment. However, in the event that the Court is wrong on this anchor issue, the Court has gone on to consider these factors.

#### DETRIMENT

[90] The constructive trust arises because it would be inequitable to allow the legal owner to refuse to give effect to the intention when the claimant has acted in a personally detrimental manner. Therefore where a claimant has successfully established that there was a common intention, he or she then needs to establish that they have acted to their detriment in reliance of such common intention.

[91] Typically, the level of detriment required is less where express common intention is alleged than where a court is asked to infer a common intention. As Lord Bridge indicated in *Lloyds Bank v Rosset*:

**“...it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.”**

[92] The case law has repeatedly demonstrated that detriment is not to be regarded as a narrow or technical concept. It is now settled law that detriment required in the case of constructive trust based on express common intention is analogous to that required to a claim to sustain a remedy under the principle of proprietary estoppel.<sup>33</sup> Where, on the other hand a common intention is inferred rather than express, the conduct leading to the inference will generally suffice to demonstrate detriment.

[93] It is clear that the detriment need not consist of the expenditure of money or other quantifiable financial detriment. It must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances. However, the detriment must be substantial. To qualify as substantial the activity undertaken must be such that there can be no there reasonable explanation for the claimant performing the relevant acts other than they were in reliance of the fact that she was to share in the subject property.<sup>34</sup> Detriment involving expenditure may include contributing to the purchase price or funding repairs and improvements to the property, while other forms of detriment may take the form of providing services or foregoing services elsewhere.

[94] Although detriment is not to be viewed as a narrow concept, it must be considered within the broader context of unconscionability. At page 232 of the judgment in *Gillett v Holt*, Walker LJ held:

"The issue of detriment must be judged at the moment when the person who had been given the assurance seeks to go back on it. Whether the detriment is sufficiently substantial is to be tested by whether it would be unjust or inequitable to allow the

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<sup>33</sup> *Lloyd's Bank Plc v Rosset* at page 132; *Grant v Edwards* at page 656

<sup>34</sup> *Gillett v. Holt* [2000] 2 ALL ER 289, per Robert Walker LJ

assurance to be disregarded – that is, again, the essential test is one of unconscionability. The detriment alleged must be pleaded and proved".

- [95] In the case at bar, Counsel for the Claimant submitted that the Claimant acted to her detriment because all of her attempts to better herself and secure independent employment were repeatedly aborted by her husband. The Claimant therefore accepted her role as housewife and homemaker and she also supported him in his construction business and played second fiddle to him. She went on to state that following her relocation to the United States to pursue her personal goals, she returned to the BVI at his request to continue her role as home maker and caretaker and she remained with him even after the marriage evolved from an exclusive relationship to an open one. Counsel submitted that the Claimant acted to her detriment because she paid the price of her own personal development and financial independence and remained subject to Mr. Maduro.
- [96] The claim of detriment was strongly resisted by the Defendant who argued that after thirty (30) years of leading separate lives it would be unjust for the Claimant to rely on her failure to do anything to improve herself personally and professionally. She cannot therefore use this to ground a claim of detriment.
- [97] Counsel further submitted that the Claimant has concocted evidence after the passing of her husband to establish an interest in the property. According to Counsel, the Claimant has sworn evidence a mere year apart which sets out contrasting versions of her marriage to Mr. Maduro with a view to laying claim on the property which the deceased acquired as a result of his independent industry and creativity.
- [98] Finally, Counsel argued that in cases where the period of togetherness is short, the Court must consider whether the contributions relied upon the claiming party are sufficient to vest them with a legal/equitable interest in the estate of the deceased. The Claimant submitted that even if the Claimant did contribute to the running of the home at any point during this five year window, her contributions do not warrant her obtaining a share in the estate.
- [99] While direct financial contributions to the purchase price or the payment of mortgage installments would be evidence of detriment this is not alleged in this case. Instead, the Claimant contends that

she has made indirect contributions as home maker and source of support to her husband. She has also sought to demonstrate that there was a significant change in her position in that she did not pursue professional development and employment in reliance on the common intention.

[100] In *Grant v Edwards* the Court made it clear that in order to succeed on this ground, a claimant must have done something which she could not reasonably be expected to have done unless she was to have an interest in the property.<sup>35</sup> However, at page 657A-B, Sir Nicolas Browne-Wilkinson V-C, set out the following qualification:

**“As at present advised, once it has been shown that there was** a common intention that the claimant should have an interest in the house, any act done by her to her detriment relating to the joint lives of the parties is, in my judgment, sufficient detriment to qualify. The acts do not have to be inherently referable **to the house.**” Emphasis mine

[101] In evaluating whether the acts in question amounted to a sufficient **alteration of a claimant's** position to her detriment in reliance on a common intention, a judge is entitled to have regard to the entirety of the relationship, and to alleged promises made by Mr. Maduro during the course of it.

[102] In *Parris v Williams*<sup>36</sup> the Court observed that:

“In any given case the claimed acts of reliance may be too trifling to enable the establishment of the claimed constructive trust: *Rosset* shows that. Whether in any particular case the claimed acts of detriment are or are not sufficient is essentially a matter of judgment for the judge concerned to hear the matter. That will involve a consideration of all the circumstances.”

[103] The question of detriment must therefore turn on the facts of each case. The evidence in the case at bar reveals that while the Parties had been married for a period of 36 years, in reality they had only cohabitated as man and wife for a period of 5 years before the Claimant left the matrimonial home and her family. The Court finds that following this separation the Parties never resumed their marital union and lived separate lives although it appears that there were times when the husband provided some small measure of support to the Claimant. It follows that for a period of at least 30 years, the Claimant lived her life essentially as a single woman and eventually she did obtain employment and managed to support herself. The reality of this separation is further made out in

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<sup>35</sup> *Grant v Edwards* per Nourse LJ

<sup>36</sup> [2008] EWCA Civ 1147 at paragraph [47]

the fact that for the majority of the marriage the Parties engaged in extra marital relationships which produced offspring. **The Court found the Claimant's allegation of a happy and open marriage in which Mr. Maduro's partners recognized their subordination to her to be wholly implausible in the light of the forthright and reliable evidence presented by Ms. Innis and the Claimant's daughters.** The Court also has no hesitation in rejecting her evidence that she was involved with and informed of the acquisition of assets which her husband continued to acquire throughout the marriage.

[104] **In the Court's judgment,** it would be unreasonable in these circumstances to conclude that the **Claimant's decision not to pursue** professional development and employment amounted to an alteration of the **Claimant's position to her detriment.**

[105] For the entirety of the period when they cohabitated, the Claimant was unemployed and made no direct contribution to the mortgage, improvements and maintenance of the property to the expenses incurred in the household and the upbringing of the children. The Court found the **Claimant's evidence regarding indirect contributions to be exaggerated** at best and untruthful at its worst.

[106] The Claimant claims that she was involved in the expansion of the matrimonial home while living together with her husband. The Court is satisfied that this evidence is exaggerated at best and generally unreliable. Miss Innis who had a common law relationship with Mr. Maduro between 1983 and 2005, testified that upon moving to the premises at Fort Hill, there was a concrete structure which was incomplete and uninhabitable. Her evidence is that together with Mr. Maduro, she and the children occupied the wooden house which was eventually broken down altogether and the concrete structure later completed to replace it. Unlike the Claimant, Ms. Innis was able to speak in detail to the transformation of the home from a wooden structure to a complete concrete structure and arrangements made to finance the same. The Court found Ms. Innis to be a truthful witness who erased any doubt that the expansion of the home substantively occurred after the Claimant and her husband had separated.

- [107] With similar clarity and candor, Ms. Innis was also able to detail that other property forming part of Mr. Maduro's estate was purchased cash, sometimes in installments from the funds which came from his various enterprises, including the laundromat, superette and the apartment rentals. The intricate knowledge of Mr. Maduro's affairs which she demonstrated convinced the Court that it was Miss Innis and not the Claimant who stood as partner to Mr. Maduro when he undertook his many business ventures. It is therefore not surprising that Mr. Maduro provided her with a generous settlement once their relationship terminated.
- [108] Further, the Claimant's evidence as regards her role as homemaker and child-rearer was robustly disputed by her own children. Gaelle and Krystle both testified that the female figure in the household from their earliest childhood memories into adulthood was Ms. Innis. They both testified that it was Ms. Innis who taught them to cook, to clean and take care of themselves. Under cross examination by Counsel for the Claimant, these witnesses admitted to not always being happy living with their father and step mother but maintained that they were taught key skills at managing life and being a woman by Ms. Innis. Remarkably it was the Claimant's disclosure which revealed school report cards for Krystle naming Ms. Innis as parent/guardian.
- [109] This evidence was corroborated by Ms. Innis who testified that she raised the Claimant's children until they finished school and in the case of Krystle a few months before graduation from the Elmore Stoutt High School. The Court is satisfied that Ms. Innis acted as home maker and child-rearer from 1983 until 2005. It appears that even after the Claimant returned to Tortola, the children's living arrangements remained largely unchanged although it appears that she have had access to them at irregular intervals usually spanning the weekend.
- [110] The Claimant's evidence is that she and her husband resumed cohabitation sometime after 1984 and that their cohabitation ended in August 2014.<sup>37</sup> Surprisingly however, none of the Claimant's children, or Ms. Innis who lived in the home with Mr. Maduro could corroborate this evidence and given the preponderance of evidence the Court finds that this contention is highly unlikely. While

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<sup>37</sup> Paras 18 and 19 of the Claimants Witness Statement "the deceased and I continued living together and up to August 2014, I was cooking and cleaning for the deceased and being intimate with him"

she may have been permitted to reside in one of the apartments on the Property, this was not doubt intended to facilitate her rendering assistance to her adult daughter with child care.

[111] There is no indication that the Claimant bore any of the financial responsibilities of sustaining the **family, to enable her husband to better meet any of the family's outgoings or other expenses** or taking care of the children or to allow her husband the financial or other freedom to take on other projects. **In the Court's judgment, any contributions made by the Claimant in the capacity of child rearer and home maker** in the early years of the marriage would be negligible. Having regard to the fact **that the property forming part of her husband's estate would have been acquired after they** were separated and when he had other partners.

[112] When the Court considers the entirety of the relationship between the Parties, it is apparent that at the material times when the assets were acquired, the Parties conducted themselves as distinct individuals with different partners, different financial affairs, different goals and lives. Moreover, in assessing whether there is indeed a constructive trust established, a court is obliged to make a determination of the credibility of the witnesses. This determination did not favour the Claimant. This **Court finds that the Claimant's** narrative including her contention of a continued and longstanding relationship with her husband to be largely fictitious and for the reasons set out herein the Court finds that the Claimant failed to prove the establishment of a constructive trust to requisite degree of proof.

[113] It is therefore ordered as follows:

- a. That the Claimant's Claim is dismissed.
- b. Costs to the Estate of Gene Schubert Maduro to be assessed on a prescribed basis if not otherwise agreed.

Vicki Ann Ellis  
High Court Judge

By the Court

Registrar