[2016] JMCA Civ 14

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 17/2011

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MISS JUSTICE PHILLIPS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (AG)

BETWEEN	**PEARLINE GIBBS**	**APPELLANT**
AND	**VINCENT STEWART**	**RESPONDENT**

Miss Gillian Mullings instructed by Naylor & Mullings for the appellant

Gordon Steer and Ms Kaye-Anne Parke instructed by Chambers Bunny & Steer for the respondent

12, 13 January 2015 and 26 February 2016

DUKHARAN JA

[1] I have read in draft the judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and I have nothing useful to add.

PHILLIPS JA

[2] I have had the opportunity of reading the very clear and comprehensive draft judgment of my learned sister, McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and there is nothing that I can usefully add.

MCDONALD-BISHOP JA (AG)

[3] The facts of this case do reveal an all too common but problematic feature of spousal property disputes in our courts which entail persons (spouses or former spouses) claiming beneficial interest in property in respect of which none of them holds the legal title or is vested with the legal estate. The salient question that falls to be determined in this appeal is whether in proceedings brought 'in equity', an order dividing the beneficial interest in property in a dispute between former common law spouses, in whom the legal estate for the property in question is not vested, is wrong and should be set aside. The appeal also raises questions as to the nature and quality of the evidence that is required from a person who is claiming, in equity, an entitlement to share in the beneficial interest in property in respect of which he does not hold the legal title.

The background

[4] The circumstances leading to this appeal may be briefly stated as follows: by way of a claim form filed on 5 July 2007 and amended on 14 January 2010, Mr Vincent Stewart, the respondent, commenced proceedings in the Supreme Court against the appellant, Miss Pearline Gibbs, with whom he had shared a common law relationship in Jamaica for, at least, 15 years. According to his amended claim form, he claims against Miss Gibbs "of questions in [e]quity" concerning the ownership of property between them (emphasis as in original).

[5] He sought orders that he is entitled to a 50% share in the beneficial interest in two properties, being two residential parcels of land *situate* in Tucker and Anchovy in the parish of Saint James as well as one-half of a business operated in Negril in the parish of Westmoreland that he said were jointly acquired during the course of the relationship and in respect of which he had made substantial contribution. He also sought consequential orders, including valuation and sale of the Anchovy property and an account in relation to the business in Negril.

[6] Miss Gibbs, by way of her defence and counterclaim filed in response to the claim, had not denied, in principle, Mr Stewart's claim to a 50% share in the property at Tucker although she did not accept all of his pleadings in respect of it. In fact, she had indicated from the very outset that she had agreed that he should get the house at Tucker. She, however, strongly denied that he was entitled to the orders sought with respect to the Anchovy property and the business in Negril. In respect of those, she counterclaimed, for, *inter alia*, a declaration that she was the sole owner. The record of appeal reveals, however, that at the commencement of the trial, it was indicated to the court, by counsel appearing for her, that the counterclaim was abandoned.

[7] On 21 January 2011, the learned trial judge, after hearing the evidence and the arguments presented on behalf of the parties by learned counsel, made the following orders in favour of Mr Stewart:

> "1. That [Mr Stewart] is entitled to fifty percent (50%) of the entire beneficial interest in the properties at Tucker, in the parish of St. James and Anchovy in the parish of St. James.

2. [Mr Stewart] is entitled to one-half of the business in Negril operated by [him] and [Miss Gibbs].

3. That a valuation to be agreed between [Mr Stewart] and [Miss Gibbs] be taken and the costs thereof be shared between the parties equally.

4. That the premises in Anchovy in the parish of St. James be put on sale on the open market by public auction or by private treaty.

5. That the Registrar of the Supreme Court be empowered to sign any and all documents to make effective any and all orders made by this court if either party is unwilling or unable to sign.

6. That [Miss Gibbs] give an account to [Mr Stewart] of the jointly owned business in Negril.

7. There shall be costs to [Mr Stewart] to be agreed or taxes [sic]."

[8] Miss Gibbs is aggrieved by the judgment and has filed 10 grounds of appeal in which she contends that the learned trial judge erred in granting Mr Stewart a 50% share in the properties and business in question and in making the consequential orders that he did. She is asking this court to set aside the orders and to, instead, grant orders in her favour or, alternatively, to set aside the orders and remit the matter to the Supreme Court for a retrial of the issues.

An overview of the evidence at trial

[9] The parties, with the aid of documentary evidence, were their own historians at the trial and were subject to detailed cross-examination. There was no convergence between them on the material aspects of each other's case and so in an effort to

provide the relevant factual background to this appeal, it is considered more convenient and prudent to separately outline the case they each presented at trial. Mr Stewart's evidence, in so far as it relates to the material issues to be determined on appeal, will first be summarized, given that he was the claimant in the proceedings below.

Mr Stewart's case

[10] A synopsis of the prominent features of Mr Stewart's case is as follows: he met Miss Gibbs sometime in 1972 and they lived together in a common law relationship in Jamaica up to 1986 when he migrated to Canada. The union produced three children, two daughters and a son. Since 1978, he would visit Canada for temporary employment on the farm work programme.

[11] Eventually, it was agreed between him and Miss Gibbs that he should seek permanent resident status in Canada and send for the children. In 1986, he married someone else in Canada but the marriage was one of convenience. He subsequently obtained permanent resident status and he eventually sent for the children in 1993, leaving Miss Gibbs in Jamaica. He and Miss Gibbs, nevertheless, remained in communication and continued an intimate relationship. On his invitation, Miss Gibbs visited and stayed with him in Canada in 2001. He would visit Jamaica on his vacations and would stay with Miss Gibbs. His last visit when he stayed with her and they slept in the same bed was in 2003. The relationship ended in 2004.

[12] During the early part of the common law union, they lived together in Tucker in the parish of Saint James on a parcel of land that was leased by them and on which

they initially built a one-bedroom house. This house was later expanded during the course of their cohabitation to three bedrooms to accommodate their growing family.

[13] Before he left for Canada in 1986, he entered into an oral agreement with one, Myrtle Miller, to purchase a plot of land in Anchovy in the parish of Saint James. He had acquired it with the intention to build a larger family home. Both he and Miss Gibbs went to Myrtle Miller to purchase the land. The sale price was $15,000.00. He paid Myrtle Miller in full for the land. He paid no deposit. Before he purchased the land, he went to look on it and he observed that it was hillside land and that there were houses on it. He had no written sale agreement or any other document at trial evidencing this transaction. He had only received a receipt that he had "left…in the hands" of Miss Gibbs.

[14] A house was subsequently constructed on the land over a period of time. Before he left Jamaica in 1986, the foundation for the house had not been laid and he was not in Jamaica when it was done. He had left that aspect of the work for Miss Gibbs to get done. He, however, gave her support to prepare the ground for the construction.

[15] He was working in the construction industry when he met Miss Gibbs and when the availability of work in that industry declined, he decided to pursue a new career in woodcarving. He would make and sell those carvings to tourists in Negril. He later expanded the business and began selling other items such as food, drinks and other souvenirs.

[16] After he started to work in Canada on the farm work programme, he would be absent from Jamaica for months at a time. He left Miss Gibbs to operate and manage the business in his absence. However, when he returned to Jamaica he would assume control of the business and Miss Gibbs would continue to assist him. After he permanently migrated to Canada, Miss Gibbs, with his concurrence, would manage the house and business. He would also send monies and material needed for the construction of the house at Anchovy and to help with the business and the family. He and Miss Gibbs communicated frequently over the years about personal matters as well as about the house and business.

[17] He and Miss Gibbs had agreed that she would live in the apartment above the business in Negril and rent the house in Tucker in order to generate more income to assist with the business and the construction of the house in Anchovy. Each year, when he visited on his vacation, he would diligently work on the house that was being constructed. The house was eventually completed in or around 2003-2004. He and Miss Gibbs had agreed that when the children were old enough and self-sufficient, he would return to Jamaica to live in the house at Anchovy. However, it eventually became clear to him in 2004 that Miss Gibbs had started to take over the business and the house. This led him to commence proceedings to determine his property and business entitlements in 2007.

[18] In support of his claim, he had tendered in evidence some receipts for items he purchased in Canada and shipped to Jamaica as well as receipts in relation to remittances as proof that he was contributing to the house and business while he was

in Canada. He asserted that Miss Gibbs had removed the receipts in relation to his contributions when she visited him in Canada and that has resulted in his inability to produce receipts to prove remittances he had made prior to 1998.

Miss Gibbs' case

[19] The main aspects of Miss Gibbs' evidence in relation to the matters in dispute will now be briefly stated. The relationship with Mr Stewart started in 1971 and ended in 1986 or 1987. She was not in an intimate relationship with him up to 2004, as he had contended. The relationship ended upon his marriage in Canada. She was left alone to support the children, solely, before they left for Canada. He did not send for her to visit him in Canada; she visited her children.

[20] In 1994, after the relationship ended, Miss Gibbs, with the assistance of her daughter, Petrine Stewart, entered into an agreement with one Lascelles Gordon to purchase the land at Anchovy. The sale price was $63,000.00, which they paid in full. Lascelles Gordon had purchased that land from Myrtle Miller in 1987 and was put in possession of the land by Myrtle Miller. He resold it to Miss Gibbs and her daughter in 1994. The receipt she received evidencing this transaction was issued in her name and her daughter's name as co-purchasers. She also had a copy of a signed and stamped sale agreement (which was tendered in evidence) with respect to her purchase of the land from Lascelles Gordon. This sale agreement was signed in 2004 although the land was bought in 1994. The purchase was done without the knowledge, involvement, or contribution of Mr Stewart.

[21] The house at Anchovy, which now forms the subject matter of the claim, was constructed on that plot of land that she bought in 1994 and not on land bought by Mr Stewart from Myrtle Miller in 1986. She started constructing the house in Anchovy in 1997, that was after the relationship between Mr Stewart and her had ended. She bought all the material for the construction of the house and paid the workmen. She received no money or material from Mr Stewart to assist in the construction and he did not assist in any other way with the construction of the house. She was assisted by funds she received from her mother, her daughters, loan from a credit union and her personal savings. The house is unfinished and was not completed in 2003-2004, as Mr Stewart has asserted.

[22] In relation to the business in Negril, Mr Stewart was not the one who had started its operation. In 1976, she began selling fabrics and curios, such as carvings and baskets, in Negril to earn an income to support her family. She rented a spot in Negril from where she sold those items for 16½ years. She was the one who invited Mr Stewart to assist her in the business and she showed him how to make the carvings. She later expanded the business to include the sale of food and drinks.

[23] The shop from which she operated the business was destroyed by Hurricane Gilbert and she asked Mr Stewart to assist her to rebuild it but he refused to do so. In 1992, the premises where the shop was located were sold and she rebuilt the shop at another location with no help or input from Mr Stewart. She continued to operate the business with no assistance from him except for a short period when she was pregnant.

Mr Stewart had not contributed to the business since 1986 and is, therefore, not entitled to a share in it. Furthermore, and in any event, the business has no assets.

[24] The monies and items she received from Canada and which were sent in the name of Mr Stewart (as evidenced by the receipts he exhibited) were actually sent by him to her on behalf of the children. He had sent the sum of $17,000.00 to her but that was to repay a loan of $70,000.00 that he had received from her.

[25] Mr Stewart is not entitled to any interest or share of the business or the property in Anchovy as she had acquired them by herself and with no assistance from him. Also, there is no agreement between them that he would share in them.

[26] She bought a plot of land in Anchovy from Myrtle Miller in 1986 and had received a receipt from Francis Tulloch & Co, attorneys-at-law, in relation to the payment made by her in respect of that parcel of land. Francis Tulloch & Co were Myrtle Miller's lawyers. (She had not explained, however, the connection, if any, between this land that she said she had paid for in 1986 and the land that Mr Stewart said he had bought from Myrtle Miller.)

The findings of the learned trial judge

[27] After hearing the conflicting evidence from both parties, the learned trial judge identified three issues arising for determination by him, which he framed in this way:

> "i) Does [Mr Stewart] have any interest in the property in Anchovy and, if so, what is his share?

ii) Did [Mr Stewart] make any contribution to the business in Negril and, if so, what is his share of the business?

iii) What is the common intention of the parties regarding their share of the property in Anchovy and the business in Negril?"

[28] The learned trial judge, after conducting an analysis of the evidence, found in determining the questions he posed that: (i) Mr Stewart did have a 50% share in the entire beneficial interest in the property at Anchovy; (ii) Mr Stewart did make a contribution to the business in Negril and is, therefore, entitled to a half of it; and (iii) both parties had a shared intention to purchase the property at Anchovy.

[29] In arriving at this conclusion, the learned trial judge opined that Mr Stewart was a credible witness and proceeded to reject Miss Gibbs' evidence on the material issues, describing some parts as being "false and misleading". He, in the first place, found that the relationship between the parties did not end in 1986 as contended by Miss Gibbs but that "some relationship" existed between them "certainly" up to when Mr Stewart wrote the letter dated 31 May 2001, inviting her to visit him in Canada as his wife.

[30] He found also that the Anchovy property was purchased in 1986 "just before [Mr Stewart] left for Canada" for the purpose of the construction of a family home and that Mr Stewart had made contribution to its construction both financially and through the provision of material and his own labour.

[31] He then expressed some critical aspects of his findings in these terms:

> "[10] I accept on the evidence that [Mr Stewart] and [Miss Gibbs] were living together in a common law relationship for a period at least fifteen years. I accept that receipt No. 808 from Francis Tulloch & Co, for the deposit by [Mr Stewart] on the Wiltshire lands, is the same land described as Anchovy. I find as a fact that [Mr Stewart] and [Miss Gibbs] purchased a home together at Tucker and expanded their home by the purchase of land and the construction of a home in Anchovy, St. James. They also contributed to a business together.
>
> [11] From this it is reasonable to infer that [Mr Stewart] and [Miss Gibbs] had 'a shared intention' to purchase the land in Tucker and Anchovy, St James together, and that this was consistent with their relationship in which both would benefit.
>
> [12] I also find as a fact that the decision of [Mr Stewart] to migrate to Canada was a joint decision of [Mr Stewart] and [Miss Gibbs]. This decision enabled [Mr Stewart] to eventually file for the children and to send for [Miss Gibbs] to live with him as his wife in Canada. This finding is supported by the receipts submitted by [Mr Stewart] into evidence, as well as the letter dated 2002 [sic] inviting [Miss Gibbs] to Canada. In my judgment [Mr Stewart] and [Miss Gibbs] built their lives together, and as such are equally entitled to share in the disputed property at Anchovy as well as the business in Negril."

[32] The learned trial judge in arriving at his conclusion that Mr Stewart was entitled to share equally in the disputed property and business relied on a portion of the dictum of Baroness Hale of Richmond in **Stack v Dowden** [2007] 2 A C 432 (at paragraph 60) that:

> "There is no need for me to rehearse all the developments in the case law since **Pettitt v. Pettitt** and ***Gissing v.* Gissing**,…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 imputed, with respect to the property in the light of their whole course of conduct in relation to it."

The grounds of appeal

[33] Miss Gibbs has taken issue with the findings and orders of the learned trial judge and has set out her complaints in 10 comprehensive grounds of appeal, which read:

> "(a) The Learned Judge erred in finding that it was possible to award a beneficial fee simple interest in land to which none of the parties before the Court had title.
>
> (b) The Learned Judge failed to consider that the only documentation regarding the Anchovy property was the contract of [sic] sale for [sic] land dated 3rd December, 2004 and same listed [Miss Gibbs] and Petrine Stewart as the purchasers of [the] same as joint tenants.
>
> (c) The Leaned Judge erred in the face of the said contract for sale of land in concluding that the court can make orders concerning questions of equity between [Mr Stewart] and only one of the prospective joint tenants, despite the fact that the other prospective joint tenant was never a party to the proceedings and has not been served with notice of same.
>
> (d) The Learned Judge mislead [sic] himself when he ignored the doctrine of privity of contract and introduced [Mr Stewart] as a purchaser. In doing so, he ignored the founding principle of privity of contract that is, *no one may be entitled to [sic] or bound by the terms of a contract to which he is not an original party*.

(e) The Learned Judge failed to consider that the contract of sale of land was a *chose in action* and did not create a legal estate in land. [Miss Gibbs] and Petrine Stewart had an intangible right to sue for the subject Anchovy property as opposed to a fee simple interest. It was therefore, it was [sic] not plausible to award [Mr Stewart] a beneficial fee simple interest against [Miss Gibbs].

(f) The Learned Judge erred in holding that despite there being no Title to and no sub-division approval from the Parish Council for the subject Anchovy Property [Miss Gibbs] had a determinable interest in the subject Anchovy property which could be divided. The lack of any evidence of a plan, lot number or on ground description regarding the subject Anchovy Property was ignored by the Learned Judge in making his decision.

(g) The Learned Judge mislead [sic] himself in deciding that the subject Anchovy property described in the contract for sale of land, dated 3rd December, 2004, between [Miss Gibbs], Petrine Stewart and Lascelles Gordon, was the very same land the Defendant [sic] refers to as being purchased by himself from Myrtle Miller in 1986. The Learned Judge failed to acknowledge that without adequate evidence (such as, a description of the land or survey report), he could not conclude that [Mr Stewart] had bought the very same property in 1986.

(h) The Learned Judge failed to consider that if in fact [Mr Stewart's] rights were founded on a contract of sale in 1986 concluded with Myrtle Miller, the matter before the court could not have proceeded without the addition of Lascelles Gordon, as a party, as he purported to sell the land to [Miss Gibbs] under the contract of sale dated 3rd December, 2004. The said Lascelles Gordon is described as having purchased the property on 20th November, 1987 in the contract of [sic] sale. The Learned Judge ought to have considered that since there was no objection to the authenticity of the contract of sale dated 3rd

December, 2004, he could not disregard Lascelles Gordon's ownership as stated in the said contract.

(i) The Learned Judge failed to consider that if it was to be believed that [Mr Stewart] bought the said land in 1986, any claim would have been statute barred as at 2007 when [Mr Stewart's] case was filed. The Learned Judge therefore, failed to consider the defence under the statute of limitations.

(j) The Learned Judge failed to consider that [Miss Gibbs] operated a food stand on the side of the road without formal documentation or official sanction. An order to divide this 'business' was unreasonable as there is no evidence of any asset apart from [Miss Gibbs'] skill in preparing meals being used in the 'business'. Since there was no evidence of any tangible assets in this 'business' this made accounting and division of that enterprise pointless and impracticable."

The issues

Tucker and Anchovy

[34] Upon a close scrutiny of the grounds of appeal, it is observed that they do overlap in fundamental respects and so, for ease of analysis, they have been grouped and examined collectively in so far as commonalities among them permit. In respect of the Tucker and Anchovy properties, the issues arising from the grounds of appeal concerning them may, conveniently, be subsumed and addressed under five broad issues which have been formulated as follows:

(i) Whether the learned trial judge erred in finding that Mr Stewart is entitled to a 50% share in the entire

beneficial interest in the Tucker and Anchovy properties in the light of the evidence that legal title or the fee simple estate is not vested in either Mr Stewart or Miss Gibbs (grounds (a), (b), (e) and (f)).

(ii) Whether the learned trial judge erred in concluding that the land described in the 2004 agreement for sale between Miss Gibbs, Petrine Stewart and Lascelles Gordon was the same land Mr Stewart claimed to have purchased from Myrtle Miller in 1986 due to insufficient evidence as to proper identification and description of the land (ground (g)).

(iii) Whether the learned trial judge misdirected himself by ignoring the doctrine of privity of contract and introduced Mr Stewart as a purchaser of the land at Anchovy (ground (d)).

(iv) Whether the learned trial judge erred in dividing the entire beneficial interest in the Anchovy property in the absence of and without the knowledge of interested third parties who were not joined as parties to the proceedings or served with notice of the proceedings (grounds (c) and (h)).

(v) Whether the learned trial judge erred when he failed to consider the defence that the claim to an interest in the Anchovy property would have been statute barred by virtue of the statute of limitations in the light of his acceptance of Mr Stewart's evidence that the land was purchased in 1986 (ground (i)).

The business in Negril

[35] In so far as the business in Negril is concerned, the core issue for consideration is extracted and formulated as follows: whether the learned trial judge's finding that Mr Stewart is entitled to one-half of the business and his order that Miss Gibbs give an account to him in respect of the business are unreasonable and impractical having regard to all the evidence, including the fact that the business is operated without formal documentation or official sanction (ground j).

Analysis and findings

[36] It is recognised that the learned trial judge is being challenged not only in relation to his findings of law but more so with regard to his findings of fact, which revolved, primarily, around the credibility of the parties. Mr Steer, in submitting on behalf of Mr Stewart, sought to remind the court of the well settled principles governing the approach of an appellate court in treating with the findings of fact of a lower court. Learned counsel made reference to the oft-cited cases of **Watt or Thomas v Thomas** [1947] AC 484 and **Roy Green v Vivia Green** [2003] UKPC 39. The principles from

these authorities are by now so deeply entrenched within our jurisprudence so much so that it is considered to be of no real utility to restate them in detail for present purposes.

[37] In the interest of time, it is considered sufficient to simply state that the principles enunciated in them have been adopted and adhered to in treating with the findings of fact of the learned trial judge in this case. Ultimately, the issue to be determined is "whether it has been shown that [the] judgment on the facts was affected by material inconsistencies or inaccuracies or that [the learned trial judge] failed to appreciate the weight of the evidence or otherwise went plainly wrong" (per Lord Hope of Craighead, in **Green v Green** at paragraph 18).

Issue (i)

Whether the learned trial judge erred in finding that Mr Stewart is entitled to a 50% share in the entire beneficial interest in the Tucker and Anchovy properties in circumstances where the parties do not have legal title to those properties (grounds of appeal (a), (b), (e) and (f))

[38] In ground of appeal (a), Miss Gibbs complains that the learned trial judge erred in finding that it was possible to award a beneficial fee simple interest in land to which none of the parties before the court had the legal title. This ground applies to both the Tucker and Anchovy properties. In treating with the issue arising from this ground of appeal, it is recognised that it necessitates an examination of some of the other grounds of appeal, which, essentially, have a bearing on the issue to be resolved under this heading. Those are grounds of appeal (b), (e) and (f). Those grounds have been

collectively examined in an effort to determine whether there is merit in ground of appeal (a), which is, indeed, the core and all-embracing ground.

Tucker

[39] The learned trial judge found that the parties had "'a shared intention' to purchase the land in Tucker and Anchovy, St James together" (at paragraph [11] of the judgment) and he then proceeded to order that Mr Stewart is to share in the "entire beneficial interest" in both properties. He clearly treated with the properties as if the parties do have an interest in the freehold estate in both of them. However, the undisputed evidence reveals that the Tucker land is a leasehold with a house constructed on it by the parties, while the Anchovy land is, from all indication, a freehold with a house constructed on it. Miss Mullings in her submissions had referred to the house on the Tucker land as being a chattel house but there is no such evidence from the parties to substantiate this contention. So, as far as the evidence is concerned, there is nothing to say the house on the leased land is a chattel house.

[40] Furthermore, there was no evidence that the parties had a shared intention to purchase the land at Tucker as the learned trial judge had found. This was, as Miss Mullings correctly noted, an error on the part of the learned trial judge when he stated that they intended "to purchase" this property. It is clear and undisputed, however, that they both jointly acquired the leasehold interest in that land.

[41] It follows from this that the parties would be entitled to equal share in the leasehold estate as joint lessees or joint tenants of the land at Tucker. As such, they

are not the fee simple owners of the legal estate or, in other words, the owners of the freehold estate. It means, then, that the learned trial judge would have erroneously divided the "entire beneficial interest" in the property between the parties to the exclusion of and without due regard to the interest of the fee simple owner who, incidentally, was not a party to the proceedings.

[42] It is against this background that Miss Mullings submitted that the order made by the learned trial judge, in relation to the property at Tucker, should have been more specific as it could be construed from the language he used that he had given the parties a freehold estate when they, in fact, only had the leasehold estate. That argument is not without merit. The learned trial judge, in making the order he did, should have made it clear, by being specific, that it was a share in the leasehold interest that Mr Stewart has in the land at Tucker and not in the freehold. By not doing so, the learned trial judge would have fallen into error because such an order would have had the effect of granting Mr Stewart an interest in the property that he does not have in law.

[43] The learned trial judge would also have had to go a bit further with his analysis and be more specific and careful in the terms of his order because of the absence of evidence to assist him in determining, within the context of the dispute between the parties, whether the house constructed on the land is a chattel house or a fixture. The law as it relates to chattels and fixtures would have evoked the need for caution in resolving a dispute such as this that concerns leased land. This is so in the light of the well established principle, "*quic quid plantatur solo, solo cedit*", that is to say, "whatever

is attached to the soil becomes part of it".

[44] In practical application to this case, the principle would mean that if the house is permanently affixed to the freehold, then, it would have become a part of it and as such belongs to the owner of the freehold. The fact is that legal title in the fixture is in the landlord until the tenant chooses to exercise his power and sever it: Megarry and Wade, The Law of Real Property, Fifth edition, page 735. The law is also clear that, prima facie, the beneficial title in land follows the legal title. So, as the person with the legal title, the freehold owner, would also, prima facie, own the beneficial interest in the house. So, for the tenant to successfully claim a beneficial interest in the fee simple estate, he would have to invoke in his favour some legal doctrine, such as proprietary estoppel or adverse possession, depending on the circumstances. The reverse would also be true, that is to say, if the house is not permanently attached to the land, then it would not, in the ordinary course of things, become the property of the freehold owner but would remain the property of the parties who put it there. See, in this regard, **Greaves v Barnett** (1978) 31 WIR 88; **Patsy Powell v Courtney Powell** [2014] JMCA Civ 11; **Simmons v Midford** [1969] 2 Ch 415; and **Royco Homes Ltd v Eatonwill Construction Ltd** [1979] Ch 276.

[45] In the light of the foregoing principles of law and given that the owner of the freehold estate was not a party to the proceedings, the court would have had to ensure that any order made would not have been prejudicial to the interest of the freehold owner. It is only if it were established beyond question that the house is a chattel house, properly so called as a matter of law, could the parties' interest in the house (as

distinct from the land) be properly declared and divided between them without prejudice to the freehold owner. Without sufficient evidence before the learned trial judge in this regard, there was no legal basis on which the entire beneficial interest in the property at Tucker could have been divided between the parties who holds interest in the property merely as lessees.

[46] There was no analysis along this line by the learned trial judge and so the order he made did not reflect accurately the real interest of Mr Stewart in the property as established by the evidence presented. The order should have been confined to the leasehold interest and not extended to what seems to be the entire beneficial interest in the freehold estate. An order in such terms as now being proposed would not cause any prejudice to the interest of the fee simple owner in the property.

[47] It may be concluded, then, that the learned trial judge, in so far as the property at Tucker is concerned, did err when he, without qualification, awarded Mr Stewart a 50% share in the "entire beneficial interest" in that property. There is, therefore, merit in ground of appeal (a) as it relates to the property at Tucker.

[48] Accordingly, the order of the learned trial judge, as framed in relation to the Tucker property, cannot be allowed to stand and, as agreed by counsel for both parties, a more appropriate order ought to be made to give effect to the true state of affairs concerning the parties' interest in that property. The appropriate order should be that Mr Stewart is entitled to a 50% interest in the leasehold estate.

Anchovy

[49] Ground of appeal (a) will now be examined as it relates to the Anchovy property. It is appreciated that an examination of ground (a) in relation to this property also brings into focus grounds of appeal (b), (e), and (f). The central theme that runs through the complaints that are embodied in those additional grounds relate to the issue of the legal title to the property and the insufficiency of evidence that was adduced before the learned trial judge surrounding that issue. These complaints have been distilled and may be stated to be as follows:

(a) The learned trial judge had failed to consider that the only documentation regarding the Anchovy property was the contract for sale of the land between Miss Gibbs and her daughter as the purchasers and Lascelles Gordon as the vendor (ground (b)).

(b) The learned trial judge failed to consider that the contract for sale was a chose in action and did not create a legal estate in the land. Miss Gibbs and her daughter had an intangible right to sue for the property as opposed to a fee simple interest. It was therefore impossible to award Mr Stewart a beneficial fee simple interest against Miss Gibbs (ground (e)).

(c) The learned trial judge erred in holding that Miss Gibbs

> had a determinable interest in the Anchovy property which could be divided although there was no title, no subdivision approval to which the contract was subjected as a condition precedent and no adequate description or identification of the land (ground (f)).

[50] The learned trial judge had found that the Anchovy property was bought in 1986 from Myrtle Miller as contended by Mr Stewart and that Mr Stewart had contributed towards the construction of the house on the land through the provision of money, material and labour. The finding as to the acquisition of the land was based on the acceptance of the oral evidence of Mr Stewart that he had purchased the land in 1986 and the "Francis Tulloch & Co receipt" that was in the possession of Miss Gibbs and which was exhibited at the trial.

[51] The receipt to which the learned trial judge attached significant weight in proof of this purported purchase was in actuality unhelpful to establish that the land was, in fact, conveyed to Mr Stewart by Myrtle Miller. It does not reflect any term of the oral agreement that Mr Stewart gave evidence of. In the first place, the receipt is signed by one "S. Johnson" and not stated to be on behalf of or for Myrtle Miller. Furthermore, it states that $7,500.00 was received on 5 May 1986 from Pearline Gibbs "in respect of the undernoted services

> Re: Deposit ¼ Acre
> Paul Delisser to sell
> Wiltshire Lands".

As can be seen, there is no reference in that receipt to either Mr Stewart or Myrtle Miller, the alleged parties to the contract.

[52] Mr Stewart had said that he had paid Myrtle Miller the sum of $15,000.00 in full payment for the land and she never asked for a down payment, yet, the receipt shows a deposit of $7,500.00 being paid in respect of the transaction that was recorded. There is nothing showing that full payment of $15,000.00 or any other sum was ever made. Mr Stewart did not say that the money was given to Miss Gibbs to pay to an attorney-at-law. He stated that he paid Myrtle Miller. Despite these evidentiary issues arising on the face of the document which remained unexplained, the learned trial judge found, at paragraph [10] of the judgment, that:

> "…I accept that receipt No. 808 from Francis Tulloch & Co, for **the deposit** by [Mr Stewart] on the Wiltshire lands, is the same land described as Anchovy." (Emphasis added)

This finding is clearly not in keeping with the evidence of Mr Stewart that he had paid no deposit and that he had paid $15,000.00 in full to Myrtle Miller. This conclusion would have been against the weight of the evidence that was adduced before the learned trial judge.

[53] Even more importantly is the fact that the receipt bears the name "Paul Delisser", apparently, as the person named as selling the land. Mr Stewart did not know him and was not able to connect him to the land and to any transaction he had with Myrtle Miller. So, at the end of Mr Stewart's case, there was no evidence showing the connection, if any, between Myrtle Miller and Paul Delisser. The weight that the learned

trial judge placed on that receipt was misplaced.

[54] It is evident that the oral evidence of Mr Stewart had done nothing to establish any evidentiary material on which it could have been properly concluded that legal title was vested in him for the purpose of declaring that he was also, prima facie, vested with the beneficial interest. The critical question that arose on the evidence of Mr Stewart, and which remained unresolved at the end of his case, was on what basis was he entitled to the beneficial interest in the Anchovy property given that legal title did not vest in him.

[55] It is clear from the learned trial judge's reasoning that he had proceeded on the basis that Mr Stewart was relying on the existence of a trust in his favour although Mr Stewart's reliance on a trust was not expressly and specifically averred in his pleadings. He had, however, stated in his amended claim that the claim was brought in equity and so it was open to the learned trial judge to see whether a trust could have been inferred or implied in his favour. The relevant starting point in treating with Mr Stewart's entitlement to the property in question on the basis of a trust in all the circumstances should have, however, commenced with the guidance afforded by Lord Diplock in his oft-quoted dictum in the celebrated **Gissing v Gissing** [1971] AC 886. His Lordship, in directing attention to the principles applicable to the claim of a trust in favour of a person claiming beneficial interest in property, usefully noted, at pages 904-905:

> "**Any claim to a beneficial interest in land by a person, whether spouse or stranger, in whom the legal estate in the land is not vested must be based upon the**

> **proposition that the person in whom the legal estate is vested holds it as trustee upon trust to give effect to the beneficial interest of the claimant as cestui que trust**. The legal principles applicable to the claim are those of the English law of trusts and in particular, in the kind of dispute between spouses that comes before the courts, the law relating to the creation and operation of 'resulting, implied or constructive trusts.'…
>
> A resulting, implied or constructive trusts – and it is unnecessary for present purposes to distinguish between these three classes of trust – is created by a transaction between the trustee and cestui que trust in connection **with the acquisition by the trustee of a legal estate in land**, whenever the trustee has so conducted himself that it would be inequitable to allow him to deny to the cestui que trust a beneficial interest in the land acquired. And he will be held so to have conducted himself if by his words or conduct he has induced the cestui que trust to act to his own detriment in the reasonable belief that by so acting he was acquiring a beneficial interest in the land." (Emphasis added)

[56] In the light of this authoritative pronouncement on the subject, it may be said that for Mr Stewart's claim to a beneficial interest on the basis of a trust to succeed it must, as a fundamental pre-requisite, be based on the proposition that the person in whom the legal estate is vested holds it on trust to give effect to his beneficial interest as *cestui que* trust. It follows, then, that on the claim that he had bought it would have had to be first established, before any determination as to his share in the beneficial interest could have been made, that the legal estate is vested in either Miss Gibbs, the person against whom he has brought his claim, or in some other person. In so far as it relates to that third party, he would have had to establish that he has "an equity" in the property jointly with Miss Gibbs against that person, which is enforceable by the court

in the proceedings he has brought. Mr Stewart's case, however, was not brought against any other person other than Miss Gibbs and so he had pursued no case against any other person.

[57] The pivotal question in the resolution of this appeal in relation to the Anchovy property, therefore, is whether Mr Stewart had managed to establish the crucial facts that Miss Gibbs is vested with the legal estate and holds 50% of the beneficial interest on trust for him. A minute examination of the notes of evidence at the trial has revealed that there was no evidence adduced on Mr Stewart's case, itself, that could have established the pertinent fact that legal title is vested in Miss Gibbs or that it is vested in a third party against whom he and Miss Gibbs could jointly and legitimately set up an equitable interest. The critical question that arises from this observation is: what was the factual basis on which the learned trial judge could have properly found, as a matter of law, that Miss Gibbs holds the interest in the property on trust for the benefit of Mr Stewart? An examination of Miss Gibbs' case is now warranted.

[58] Miss Gibbs' case at trial was that the land on which the house in issue was built was purchased by her and her daughter from Lascelles Gordon after the termination of the relationship with Mr Stewart. For her part, she produced no deed of conveyance or a registered transfer of the property to her so as to evidence the vesting of legal title or the fee simple estate in her. What she had produced in evidence was the duly stamped agreement for sale executed in 2004. In so far as it relates to the question of the ownership of the land, the relevant portion of that agreement for sale, interestingly, reads:

> "WHEREAS by Contract of Sale dated the 2nd day of [sic], 199 [sic.], MYRTLE MILLER, Dressmaker of Anchovy P.O. in the parish of Saint James agreed to buy certain lands situate at **WILTSHIRE**, Saint James Registered at Volume 652 Folio 24 of which the subject land forms a part from Paul DeLisser AND WHEREAS the said MRTYLE MILLER sold the subject lands to the Vendor under Contract of Sale dated the 20th of November, 1987 and placed him in possession thereof.
>
> AND WHEREAS, the Vendor has in the meantime, agreed to sell, and the Purchasers to purchase the said land described in the Schedule hereto subject however to the completion of the Sale between MYRTLE MILLER and the Estate of PAUL DeLISSER for the Consideration and upon the terms set forth in the Schedule.
>
> **SCHEDULE**
>
> DESCRIPTION OF ALL THAT PARCEL of land part of **WILTSHIRE** in the parish of SAINT JAMES to constitute Two and one half (2 1/2) Square Chains by survey and being a part of the land registered at Volume 652 Folio 24 in the Register Book of Titles..."

[59] What appears worthy of note from the foregoing extract is that this agreement for sale purports that the land being claimed by the parties is part of a parcel of registered land owned by the estate of Paul DeLisser. No certificate of title was adduced in evidence. In fact, counsel for the parties had indicated to this court, upon enquiries made, that no one had conducted a title search, even when confronted with this agreement for sale stating that the property is a parcel of registered land that is not yet subdivided.

[60] This need for investigation and resolution of the legal title and ownership of the fee simple estate was even more pressing when one looks at the content of this

agreement for sale in conjunction with the contents of the receipt purportedly issued by Francis Tulloch & Co. Myrtle Miller's name does not appear on the receipt as vendor of the land (albeit that the learned trial judge found that the land was purchased from her by Mr Stewart in 1986) and where it appears in the agreement for sale, being relied on by Miss Gibbs, she is said to have been in a contract to purchase the land from the estate of Paul Delisser. That contract had not been completed by the time Miss Gibbs purportedly entered into the agreement with Lascelles Gordon. That led the agreement for sale between Miss Gibbs and Lascelles Gordon to be expressed as being made subject to completion of that sale between the estate of Paul Delisser and Myrtle Miller. Miss Gibbs did not know Paul Delisser and was not able to assist with any connection between him and the land and between him and Myrtle Miller, beyond what is stated in the agreement.

[61] What the agreement for sale would have managed to reveal is that legal title was never vested in Myrtle Miller at the time she purportedly sold the land to Lascelles Gordon and so legal title could not have been vested in Lascelles Gordon at the time he purported to sell to Miss Gibbs and her daughter. Clearly, on the case presented by both parties, there was nothing to show that the persons through whom they are claiming the right to the property were the legal owners who could have passed the fee simple estate to them.

[62] With Paul DeLisser's name appearing in both documents (which incidentally, were presented as emanating from offices of attorneys-at-law) the learned trial judge should have been put on enquiry as to the legal title to the land in question, given the

absence of documentary (or indeed any) proof of title from the parties. In all the circumstances, the legal right to sell to the purported purchasers would have had to be resolved before any determination could have been made as to the beneficial interest of the parties or of any of them in the land.

[63] Furthermore, and equally important, is that the agreement for sale produced by Miss Gibbs was expressed as being subject to subdivision approval being obtained from the Parish Council as a special condition. The evidence before the learned trial judge, and which he evidently accepted, was that the subdivision approval had not been obtained. That fact, by itself, would have meant that the agreement on which Miss Gibbs would have been relying to say she had purchased the land would not have been completed so as to lead to the vesting of legal title or the fee simple estate in her.

[64] Miss Gibbs' counsel at the trial, in the light of that, had contended before the learned trial judge that no rights in the land had accrued under the agreement for sale, which was predicated on a grant of subdivision approval by the Parish Council. The learned trial judge, however, rejected that argument and stated, at paragraph [6] of his judgment:

> "…From [Miss Gibbs'] evidence the sub-division approval was not obtained from the Parish Council. Counsel for [Miss Gibbs] argues [sic] that the Sale Agreement is at least voidable. This is true, but voidable at the option of the vendor, not between the purchaser and someone claiming under a trust as in this case."

The reasoning of the learned trial judge on this aspect is not readily comprehensible. If there was no agreement for sale between the proposed vendor of the land and the

proposed purchaser, then there could be no estate in the land passing to the proposed purchaser for him to hold an interest on trust for a third party. So in the circumstances of this case, the legal estate in the land would not have vested in Miss Gibbs, as the intended purchaser, to be held on trust for the benefit of Mr Stewart on the basis of this sale agreement. The agreement was ineffectual in vesting the legal title or estate in her.

[65] At the end of Miss Gibbs' case, there was no evidence that could have satisfied the learned trial judge that Miss Gibbs is the person in whom the legal estate is vested for the purpose of finding the existence of a trust in favour of Mr Stewart.

[66] The learned trial judge had relied on **Stack v Dowden** in coming to his conclusion that the entire beneficial interest in the land must be shared. The reliance on that case was, however, misplaced in the context of the Anchovy property in which it had not been first proved that the property was conveyed or transferred in the name of either party in order for the legal title to vest in any of them.

[67] The relevant principle emanating from that authority, invariably, relates to situations where property is conveyed in the name of one or both cohabiting parties and there is dispute as to how the beneficial interest should be shared. In other words, there must either be single legal ownership or joint legal ownership by the parties before the question as to entitlement to beneficial interest between them properly arises. Those features were notably absent from this case. In the result, the learned

trial judge would have erred in dividing the property on the basis of **Stack v Dowden**, without first resolving the question of legal title.

[68] For yet another reason, the question of the legal ownership of the land at Anchovy was a critical one that should have been resolved before the entitlement of Mr Stewart to a beneficial interest was declared and the property ordered sold (as the learned trial judge had done). This reason happens to be, again, the law as it relates to chattels and fixtures that was discussed above in treating with the house at Tucker (see paragraphs [43]-[45]). At the hearing of his appeal, the attention of counsel for both sides was drawn to this issue of law, particularly, in relation to the Anchovy property, which the learned trial judge had ordered to be sold.

[69] The house that is erected on the land at Anchovy is, from all indications, a structure permanently affixed to the land. It would, as such, form part of the freehold and thereby becomes, prima facie, the property of the fee simple owner. As the owner of the legal estate, the fee simple owner would also, prima facie, be the owner of the beneficial interest unless and until the contrary is shown. There is thus no interest in the property that could be shared between the parties, independent of and without any regard to the interest of the fee simple owner in the circumstances of this case. In **Hyacinth Gordon v Sidney Gordon** [2015] JMCA Civ 39, Brooks JA, at paragraph [26] of the judgment, drew attention to the dictum of Bowen LJ in **Falcke v Scottish Imperial Ins Co** (1886) 34 Ch D 234, at page 248, where the Lord Justice stated:

> "The general principle is, beyond all question, that work and labour done or money expended by one man to preserve or

> benefit the property of another do not according to English law create any lien upon the property saved or benefitted, nor, even if standing alone, create any obligation to repay the expenditure. Liabilities are not to be forced upon people behind their backs any more than you can confer a benefit upon a man against his will."

[70] Of course, there are exceptions to this principle but no such matter that would have given rise to an application of those exceptions had arisen for consideration before the learned trial judge because the claim was not pursued along those lines against the fee simple owner. In the light of all this, the principles applicable to fixtures cannot at all be ignored in treating with the question whether the entire beneficial interest in the property should be shared between Miss Gibbs and Mr Stewart and the property be sold. The learned trial judge, it seems, had failed to direct attention to this relevant aspect of the law that would have a bearing on the question whether Mr Stewart is entitled to 50% of the entire beneficial interest in the Anchovy property. For that reason, it cannot comfortably be said that he had fully directed himself in law in coming to his decision.

[71] What has emerged up to this point in the analysis is that the transactions relating to the land at Anchovy have managed to raise more questions than answers in relation to the legal title to the land. The evidence from the parties was replete with what may aptly be termed oddities. The most striking of these oddities is that the purported vendors from whom each party claimed to have purchased the land had not been shown to be the persons in whom legal title was vested. On the totality of the case presented before the learned trial judge, there was no evidence that the legal title

for the property was ever vested in the parties jointly or in any of them, solely, in order for the beneficial interest to be shared between them, without more. Furthermore, Mr Stewart was not relying on any other doctrine or principle of law or equity to set up title against the person in whom the legal estate is vested. The learned trial judge, regrettably, failed to demonstrate that he had paid regard to those oddities that would have materially affected the claim of Mr Stewart.

[72] The appellant's fundamental complaint embodied in grounds (b), (e) and (f) is that the learned trial judge had failed to appreciate that the agreement for sale of land produced by Miss Gibbs did not create a legal estate in the land in her favour. This ground cannot be dismissed as having no proper basis in law to commend it. It does seem that the learned trial judge did not properly direct himself on the law and the facts in coming to his decision concerning Mr Stewart's beneficial interest in the property at Anchovy.

[73] There is, therefore, merit in the core contention of Miss Gibbs as contained in ground of appeal (a) that the learned trial judge erred in finding that it was possible to make an order regarding the division of the beneficial interest in the Anchovy land for which none of the parties before the court holds the legal title.

[74] Just for completeness and to avoid any questions remaining unanswered, it should be pointed out that Miss Mullings had raised the argument that the learned trial judge erred in awarding the 50% interest to Mr Stewart because the property was not the family home. She sought to invoke the provisions of the Property (Rights of

Spouses) Act in advancing her argument. It should be noted, however, that her submissions incorporating the provisions of the Property (Rights of Spouses) Act have not been accepted, as the claim was not brought pursuant to that statute. Therefore, the provisions of that statute would have had no bearing on the issues to be determined at trial and, as such, are wholly irrelevant to a consideration of the issues to be resolved on appeal.

Issue (ii)

Whether the learned trial judge erred in finding that the land described in the agreement for sale executed in 2004 is the same land claimed by Mr Stewart to have been purchased in 1986 (ground of appeal (g))

[75] In ground of appeal (g), Miss Gibbs complains that the learned trial judge misdirected himself in deciding that the property described in the agreement for sale was the same land that Mr Stewart had referred to as having been purchased from Myrtle Miller in 1986. According to her, the learned trial judge failed to acknowledge that without adequate evidence (such as a description of the land or a surveyor's report), he could not have concluded that Mr Stewart had bought the very same property in 1986.

[76] In considering this complaint, it cannot be ignored that the case generally suffered from a paucity of material evidence. Both parties have accepted that a house is built on the land and they are claiming the same house. They have identified the same plot of land on which the house is built as having been purchased by them albeit from different persons and at different times. Mr Stewart went as far as to say that he had

viewed the land before he had purchased it and that the house is on that land. The learned trial judge evidently chose to resolve it merely on the credibility of the parties.

[77] I find, however, that the critical issue to have been determined by the learned trial judge was far more fundamental than the description and identification of the land in dispute (by a land surveyor or otherwise) because the legal title to the land being claimed by both sides was an issue that had to be determined as a necessary pre-condition. The need to resolve that question would have been so whether the land was bought in 1986 by Mr Stewart or in 1994 by Miss Gibbs and whether or not it is the same piece of land. As already indicated, the learned trial judge would have erred in failing to resolve that material question. It follows that all his findings in relation to the parties' entitlement to the property at Anchovy would have been flawed.

[78] Accordingly, the conclusion arrived at in relation to ground of appeal (a) and the related grounds (b), (e) and (f) is considered sufficient to dispose of the appeal in relation to this property. There is therefore no useful purpose that could be served by a further consideration of this ground. There is no need for any definitive statement to be made as to whether the learned trial judge was wrong or right in coming to this finding as to the identity of the land.

Issue (iii)

Whether the learned trial judge erred in ignoring the doctrine of privity of contract when he found that Mr Stewart was a purchaser of the land at Anchovy (Ground of appeal (d))

[79] In ground of appeal (d), Miss Gibbs complains that the learned trial judge misled himself when he ignored the doctrine of privity of contract and introduced Mr Stewart as a purchaser of the land at Anchovy. According to the argument in support of this ground, Mr Stewart was not a party to the agreement for sale of the land that was signed in 2004. Therefore, the learned trial judge should have adhered to the doctrine of privity of contract and found that only the parties named in the contract are entitled to the benefit of it or to be bound by it.

[80] This ground of appeal is predicated on Miss Gibbs' case that the land was bought by her from Lascelles Gordon after the relationship between Mr Stewart and her had ended. The learned trial judge had rejected that contention because he accepted (whether rightly or wrongly) that Mr Stewart's claim to the land arose from the evidence of his purchase from Myrtle Miller in 1986. The question as to who was to be believed concerning when the land was purchased was one of fact for him and he believed Mr Stewart. He, therefore, did not resolve the rights of Mr Stewart to the property based on that 2004 contract. For that reason, privity of contract would not have been relevant to his analysis and so it cannot be said then that he had misled himself when he ignored the doctrine of privity of contract and introduced Mr Stewart as a purchaser. This ground therefore fails to advance Miss Gibbs' cause on appeal.

Issue (iv)

Whether the learned trial judge erred in dividing the beneficial interest in the Anchovy property in the absence of interested parties who should have been joined as parties to the proceedings (Grounds of appeal (c) and (h))

[81] Miss Gibbs also challenged the learned trial judge's decision on the ground that he was wrong to have made an order granting 50% of the beneficial interest in the Anchovy property to Mr Stewart in circumstances where other persons who may have had an interest in the property and who would have been directly affected by the order were not made parties to the proceedings (grounds (c) and (h)).

Petrine Stewart

[82] Miss Gibbs maintained in ground of appeal (c) that the learned trial judge erred in the light of the agreement for sale of the land in concluding that the court can make orders concerning the questions of equity between Mr Stewart and only one of the prospective joint tenants (Miss Gibbs), despite the fact that the other prospective joint tenant (Petrine Stewart) was never a party to the proceedings and was never served notice of same.

[83] The learned trial judge, in dealing with this submission that was made before him, stated at paragraph [7] of the judgment:

> "…Although it would have been preferable for [Mr Stewart] to have filed an action against both joint tenants, in my judgment, this does not preclude the court from making orders concerning questions of equity between [Mr Stewart]

> and one of the joint tenants. [Miss Gibbs'] arguments on both of these questions, must therefore fail."

[84] For the purposes of the proceedings, Miss Gibbs and her daughter would have been, at least, parties to a contract, the validity and effect of which fell to be determined by the court in the face of Mr Stewart's claim that in 1986, he had purchased the same land which forms the subject matter of the contract. Based on the evidence presented, Petrine Stewart, as co–purchaser, would have been an interested party in the proceedings as the decision by the learned trial judge did, in fact, affect her purported rights under the contract, and by extension, her purported interest in the property.

[85] In my view, natural justice and fairness demand that she should have been given notice of the proceedings and be joined as a party so that she could have made representations before any decision adverse to her purported interests was taken. In all the circumstances, it seems more than just merely "preferable" that Petrine Stewart should have been joined as a party as the learned trial judge had reasoned. It was necessary and fair that she be joined. The learned trial judge, therefore, erred in stating that he was not precluded from making the orders in her absence.

Lascelles Gordon

[86] Miss Gibbs had contended in similar fashion in ground of appeal (h) that the learned trial judge had failed to consider that if, in fact, Mr Stewart's rights were founded on a contract in 1986 that was concluded with Myrtle Miller, then the matter

before the court could not have proceeded without Lascelles Gordon being joined as a party. This is so because, according to her, he had purported to sell the same land to Miss Gibbs under the agreement for sale on the basis that he bought the property from Myrtle Miller in 1987 and was put in possession of it. She maintained that the learned trial judge ought to have considered that since there was no objection to the authenticity of the agreement for sale, he could not have disregarded Lascelles Gordon's ownership as stated in it.

[87] The learned trial judge did not demonstrate that he had paid any regard to the purported involvement of Lascelles Gordon in the transactions relating to the property in question. In that agreement, the land was stated to be part of a larger holding owned by the estate of Paul DeLisser and is registered land. It has not escaped attention that an attorney-at-law had carriage of sale on the face of that agreement. The agreement, for what it is worth, at least, points to the estate of Paul DeLisser, Myrtle Miller and Lascelles Gordon as other interested parties in the property in question. Yet, the trial was allowed to proceed and orders made ultimately for the property to be valued and sold and no effort whatsoever was made to involve these persons in the proceedings or at least to give them notice of it. This is unsatisfactory in light of the fact that none of the parties to the proceedings had properly established legal ownership to the property in dispute.

[88] I do share the views expressed by Brooks JA in **Hyacinth Gordon v Sydney Gordon**, at paragraph [20] that:

> "It is a basic tenet of our common law that a person could not be deprived of his interest in property without having been given an opportunity to be heard in respect of any such deprivation. A court that is made aware of a person's interest in property should, therefore, make no order concerning that property, unless that person is given an opportunity to appear and make representation in that regard."

It cannot be said that there is no merit in ground (h). In my view, it succeeds.

Issue (v)

Whether the learned trial judge erred in law for failing to consider the statute of limitations and to find that the claim was statute barred (ground of appeal (i))

[89] It was contended in ground of appeal (i) that the learned trial judge failed to consider that if it was to be believed that Mr Stewart had bought the land in 1986, then the claim would have been statute barred as at 2007 when the claim was filed. Accordingly, he had failed to consider the statute of limitations defence that was raised by Miss Gibbs.

[90] It is seen that the learned trial judge did not accept that the claim was statute barred based on the case of Mr Stewart that he accepted as true. He accepted the evidence of Mr Stewart that he would visit the property and that he aided in the construction of the house up to 2003, through the provision of material and labour.

[91] Without commenting on whether the learned trial judge was correct or not, I will simply say that based on what he accepted on the evidence as true, it was inevitable

that he would have ignored the statute of limitations and its applicability to the issue before him. In the circumstances as he found them to be, it cannot be said that upon accepting that the land was bought in 1986, he would have fallen in error in failing to have regard to the statute of limitations.

[92] I should indicate, however, that given the view that I ultimately hold concerning the learned trial judge's decision as it relates to the Anchovy property, I would refrain from further comment in relation to whether there is merit in the limitation defence raised by Miss Gibbs in the circumstances of the case.

Summary of findings in relation to Anchovy

[93] It was submitted by Mr Steer on behalf of Mr Stewart, that the learned trial judge had made findings of fact, which, on the evidence before him, he had the right to do. For the appeal to succeed, counsel contended, it had to be proved that the findings were plainly wrong. Mr Steer maintained that the learned trial judge was entitled to make the orders he did and was not plainly wrong in doing so on the evidence before him. With all due respect to Mr Steer, I find it difficult to accept this submission in relation to the Anchovy property for the reasons outlined below.

[94] Even though the learned trial judge had accepted the evidence of Mr Stewart and had relied on it, the evidence before the court was not sufficiently cogent in law to prove ownership of the land and resolve the issues relating to title between the parties. There were several red flags and oddities arising from the evidence that should have

put the learned trial judge on enquiry in treating with the application concerning the Anchovy property.

[95] There was evidence from the exhibited agreement for sale pointing to the possibility of the land in dispute being part of a parcel of registered land that had not been subdivided. The volume and folio numbers were even stated. Despite all this, none of the parties assisted the court on the issue whether the land was, indeed, registered land as no search was conducted at the titles' office. The Registration of Titles Act establishes the inviolability or indefeasibility of a registered title and so Mr Stewart would have had to surmount this hurdle in law before he could properly be declared as being entitled to the beneficial interest in the property. This was not a matter simply to be resolved on who was to be believed. It was a question of law, which the learned trial judge evidently failed to address.

[96] Furthermore, the house built on the land in Anchovy, in law, would be considered to be part and parcel of the land itself and therefore as, prima facie, belonging to the registered owner of the property or the person entitled to the fee simple interest. This is so even though the learned trial judge had accepted Mr Stewart's case that the house was built with his contribution. This principle that the house that is affixed to the land becomes part of the land and is owned by the freehold owner is of general application. However, as already indicated in relation to the house at Tucker, the principle can be circumvented in certain circumstances but Mr Stewart had not pursued his claim in reliance on any such circumstance.

[97] As a result, the house that is on the Anchovy land could not have been divided between the parties without title in favour of one or both of them having first been established against the fee simple owner. No such person, or anyone claiming through him, has been made a party to the proceedings or served with notice of it. That should have been done and such omission would have had the effect of rendering the proceedings unfair in the light of the orders that were made affecting the fee simple estate.

[98] So, even though the learned trial judge was entitled to decide who to believe or whose version of events to accept on the case before him, the evidence from the parties was clearly insufficient for him to have properly determined that Mr Stewart was entitled to a 50% share in the beneficial interest of the Anchovy property.

[99] I am, therefore, of the view that the learned trial judge had failed to appreciate the weight of the evidence, had misdirected himself in fact and law and had gone plainly wrong in making the order dividing the Anchovy property between the parties and ordering the valuation and sale of it in the peculiar circumstances of the case. Accordingly, the learned trial judge erred in law and so there is merit in the appeal against his decision concerning the Anchovy property on several bases as contended in grounds of appeal (a),(b), (c), (e), (f) and (h).

The business in Negril

Whether the learned trial judge's finding that Mr Stewart is entitled to one-half of the business and his order that Miss Gibbs gives an account to him are

unreasonable and impractical, having regard to all the evidence (Ground of appeal (j))

[100] The learned trial judge had found that Mr Stewart is entitled to one-half of the business operated in Negril on the basis of his contribution to its operation and what he found to have been the parties' shared intention during the course of the union to build a life together.

[101] Miss Gibbs complained in ground of appeal (j) that the learned trial judge erred when he made such a finding along with the relevant consequential order for an account because he failed to consider the nature of the business, including the fact that the business is operated without formal documentation or official sanction. She also complained that he failed to consider the level at which she was operating, in that, the business had no assets except for her skill that is used to prepare the meals. She maintained that since there is no evidence of any tangible assets, the learned trial judge's order is unreasonable and impractical.

[102] Miss Mullings, in advancing this ground, was at pains to point out that there is no business or company name for this venture and that it is without any formal structure. It was further submitted on Miss Gibbs' behalf that it was clear from Mr Stewart's evidence under cross–examination that he had limited or no knowledge of the affairs of the business and so he ought not to have been accepted as speaking the truth and awarded a share of it.

[103] I cannot agree with this contention of Miss Gibbs that the findings of the learned trial judge, in relation to the business at Negril, should be disturbed by this court. The

learned trial judge, after having seen and heard the parties, found it proper to make the orders he did for the reasons he gave. It was a matter for him as to what he believed or who he found to be more credible on the issue. He believed Mr Stewart's evidence as to the nature of the business, his role in it and of his contribution to it up to 2003-2004. The lack of a business name or a formal structure should not be a basis to preclude Mr Stewart sharing in the business, particularly, as Miss Gibbs had not alleged that the operations were illegal so that it would be against public policy to give effect to their arrangement.

[104] The informal business structure as obtained in this case is yet another feature of our society and so our courts must be attuned to the varied types of business relations between persons and aim to do justice between them when called upon to do so. The mere fact that Miss Gibbs has regarded the order to be unreasonable and impractical, partly due to the informal or rudimentary business operations, is not a sufficient basis for this court to interfere with the decision of the learned trial judge.

[105] As already indicated, by reference to the relevant authorities specifically cited during the course of arguments, this court must be very slow to disturb the findings of fact of the learned trial judge and, particularly so, when such facts do hinge wholly on the credibility of the witnesses. There is nothing from the learned trial judge's findings pertaining to the business in Negril, in respect of which this court could justifiably hold that he had misdirected himself or had gone plainly or palpably wrong in coming to a finding that Mr Stewart is entitled to a one-half share of it. In all the circumstances, it is considered the duty of this court to defer to his judgment in this regard.

[106] Miss Gibbs will simply have to account to Mr Stewart for the operation of the business. There is no basis in law for this court to disturb the order of the learned trial judge on the ground alleged. Ground of appeal (j), therefore, fails.

Disposal of the appeal

[107] Having given what I hope may be viewed as full consideration to all the circumstances of this case, within the framework of the applicable legal principles, I have arrived at the conclusions set out below in my determination as to how this appeal should be disposed of.

Tucker

[108] In relation to the property at Tucker, the appeal should be allowed. The order of the learned trial judge granting Mr Stewart a 50% share in the "entire beneficial interest" in the property should be set aside and an order substituted therefor in the following terms: Mr Stewart is entitled to a 50% share in the leasehold interest in the property *situate* at Tucker in the parish of Saint James.

Anchovy

[109] With respect to the property at Anchovy, the appeal should be allowed and all the consequential orders of the learned trial judge in relation to this property set aside. The question that has generated much anxiety, in treating with this property, is how the claim in relation to it should be disposed of given that the orders have been set aside. At the end of it all, the property is not sufficiently proved, on the evidence

adduced before the learned trial judge, to be owned legally or beneficially by either party for an order granting Mr Stewart a 50% share in the beneficial interest to be sustained. This, however, is not a comfortable state of affairs given the issue raised for determination by the court and the stakes that are apparently involved.

[110] Although certain evidential gaps in the case exist, and they have, indeed, given some legitimate cause for concern, after careful consideration, however, fairness dictates that the aspect of Mr Stewart's claim pertaining to Anchovy should be left open for relitigation. This is so because the proceedings below did not involve all the necessary parties that could have assisted in the determination of the question as to Mr Stewart's beneficial or equitable interest in the property, if any, and the learned trial judge had failed to take the question of legal ownership of the property and the absence of relevant third parties into account in dealing with the case. Justice would demand that no one is unjustly enriched at the expense of Mr Stewart, if it was to be proved and accepted that he had expended on the property and substantially improved its value.

[111] Mr Stewart will have to establish his claim against the legal owner as well as other interested parties whose names have been disclosed during the course of the proceedings, while pursuing his claim against Miss Gibbs. There is thus a need for those interested parties to be involved in the proceedings dealing with his interest in the property. Only then can the real issue in controversy between him and Miss Gibbs with respect to this property be finally and conclusively determined.

[112] The need for interested third parties to be joined as parties to the proceedings should have been recognised in the court below and the necessary orders made in the exercise of the court's wide case management powers for the purpose of managing the case and furthering the overriding objective. In this regard, the Civil Procedure Rules provides in rule 19.2(3) that the court may add a new party to the proceedings without an application if, (a) it is desirable to add the new party so that the court can resolve all the matters in dispute in the proceedings, or (b) there is an issue involving the new party which is connected to the matters in dispute in the proceedings and it is desirable to add the new party so that the court can resolve that issue.

[113] Rule 26.1(2)(u) and (v) also provides, respectively, that the court, in the exercise of its case management powers, may direct that notice of any proceedings or application be given to any person or it may take any step, give any direction or make any other order for the purpose of managing the case and furthering the overriding objective. The failure of the court below to exercise these powers cannot be overlooked and is a material consideration at this stage in considering the best way to treat with this issue concerning the Anchovy property.

[114] Given all the circumstances, it appears that Mr Stewart ought not to be denied access to the machinery of justice to have his grievance finally and fully settled. It is my considered view that this aspect of the claim be remitted for a new trial of the issue with the involvement of the relevant third parties with an interest in the property, in particular the paper owner (whoever that person is found to be) and those persons

whose names appeared on the evidence during the course of the proceedings: Myrtle Miller, Petrine Stewart, Lascelles Gordon and Paul DeLisser or his estate.

[115] This will necessitate an amendment to the existing statements of case to the extent necessary to establish each party's case in the light of the new party or parties to be joined. The parties should be at liberty to make such applications in the court below as are considered necessary to give effect to the order that this aspect of the claim, regarding the beneficial ownership of the Anchovy property, be retried. A case management conference for the issuance of further directions to facilitate the new trial of the claim relating to the issue would be necessary.

[116] Ultimately, the way forward rests with Mr Stewart, as the claimant, as it is a matter for him whether the claim should be further pursued and the basis on which to do so.

The business in Negril

[117] In relation to the business in Negril, the appeal should be dismissed and the order of the learned trial judge in relation to it should be affirmed.

Costs

[118] On the question of costs, it is observed that Mr Stewart was awarded the costs of the proceedings below. It is my view that Miss Gibbs having succeeded, in part, on this appeal, she should be awarded ½ the costs of the proceedings in the court below and on the appeal; such costs to be taxed if not agreed.

[119] I would propose that these conclusions are incorporated as part of the final orders to be made by this court. It should also be said in disposing of the appeal, that the failure of this court to more expeditiously deal with this appeal is profoundly regretted.

DUKHARAN JA

ORDER

(1) The appeal is allowed, in part.

(2) Paragraph 1 of the order made in the Supreme Court on 21 January 2011 that Mr Stewart is entitled to a fifty percent (50%) share of the entire beneficial interest in the properties *situate* at Tucker and Anchovy in the parish of Saint James is set aside.

(3) The consequential orders (for valuation, sale, and empowerment of the Registrar of the Supreme Court to give effect to the orders) in relation to the property at Anchovy, as set out in paragraphs 3, 4, and 5 of the said order, are set aside.

(4) In relation to the property at Tucker, Saint James, the following order shall be substituted:

> Mr Stewart is entitled to a fifty percent (50%) share in the beneficial interest in the leasehold estate of the property *situate* at Tucker in the parish of Saint James.

(5) Paragraphs 2 and 6 of the order that Mr Stewart is entitled to one-half of the business in Negril operated by the parties and that Miss Gibbs give an account to Mr Stewart of the business are affirmed.

(6) The aspect of the claim relating to Mr Stewart's beneficial interest in the property at Anchovy is remitted to the Supreme Court for a new trial upon the joinder of all relevant third parties with an interest in the property in dispute or an interest in a contract pertaining to the sale of the property in dispute, including but not limited to, Myrtle Miller, Petrine Stewart, Lascelles Gordon, Paul DeLisser or his estate.

(7) The relevant third parties are to be served with all documents filed by Mr Stewart and Miss Gibbs relative to the claim, including this judgment.

(8) Miss Gibbs and Mr Stewart are at liberty to make such applications as they see fit or consider necessary, including amendment of their statements of case, for a proper and fair disposal of the issue on retrial.

(9) A date for a case management conference to facilitate preparation for the new trial is to be fixed by the Registrar of the Supreme Court after consultation with all relevant parties, as soon as is reasonably practicable.

(10) ½ the costs of the proceedings in the court below and on appeal to Miss Gibbs to be taxed if not agreed.