

**Lynn Anne Abbott**

*Appellant*

v.

**Dane Norman Lawrence Abbott**

*Respondent*

FROM

**THE COURT OF APPEAL OF  
ANTIGUA AND BARBUDA**

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JUDGMENT OF THE LORDS OF THE JUDICIAL  
COMMITTEE OF THE PRIVY COUNCIL

Delivered the 26<sup>th</sup> July 2007

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*Present at the hearing:-*

Lord Bingham of Cornhill  
Lord Walker of Gestingthorpe  
Baroness Hale of Richmond  
Lord Carswell  
Lord Neuberger of Abbotsbury

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*[Delivered by Baroness Hale of Richmond]*

1. These are proceedings between a divorced husband and wife about the beneficial ownership of their former matrimonial home, its furniture and some shares (an earlier dispute about a bank account has now been resolved). In the High Court, Mitchell J declared that both the house and the shares were beneficially owned by the parties in equal shares. He ordered that the house be sold and the proceeds divided equally, with an adjustment to reflect the wife's joint ownership of the furniture. The Eastern Caribbean Court of Appeal allowed the husband's appeal. The wife now appeals to the Board.

*The matrimonial home: the law*

2. Unlike some other Caribbean countries, Antigua and Barbuda have no equivalent of the wide powers of property adjustment enjoyed by divorce courts in the United Kingdom. Property disputes have therefore to be resolved according to the ordinary law. Nevertheless, the inferences to be drawn from the conduct of husband and wife may be different from those to be drawn from the conduct of parties to more commercial transactions. The modern law has been developed in four decisions of the House of Lords, *Pettitt v Pettitt* [1970] AC 777, *Gissing v Gissing* [1971] AC 886, *Lloyd's Bank plc v Rosset* [1991] 1 AC 107, and most recently *Stack v Dowden* [2007] UKHL 17, [2007] 2 WLR 831, largely approving an important decision of the Court of Appeal in *Oxley v Hiscock* [2005] Fam 211.

3. Not surprisingly, both courts in this case based their reasoning on a famous passage from the speech of Lord Bridge of Harwich in *Rosset's case* [1991] 1 AC 107, at 132-3:

“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. . . .

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.”

Gordon JA in the Court of Appeal emphasised the last sentence. But in this respect the law has undoubtedly moved on, as we shall see.

4. There are, of course, two separate questions: first, was it intended that the parties should share the beneficial interest in a property conveyed

to one of them only; and second, if it was so intended, in what proportions was it intended that they share the beneficial interest? There are two separate concepts which may help in answering those questions, explained by Peter Gibson LJ in *Drake v Whipp* [1996] 1 FLR 826, 827:

“A potent source of confusion, to my mind, has been suggestions that it matters not whether the terminology used is that of the constructive trust, to which the intention, actual or imputed, of the parties is crucial, or that of the resulting trust which operates as a presumed intention of the contributing party in the absence of rebutting evidence of actual intention.”

It is now clear that the constructive trust is generally the more appropriate tool of analysis in most matrimonial cases. As Lord Walker of Gestingthorpe explained in *Stack v Dowden* [2007] UKHL 17, at para 31:

“In a case about beneficial ownership of a matrimonial or quasi-matrimonial home (whether registered in the name of one or two legal owners) the resulting trust should not in my opinion operate as a legal presumption, although it may (in an updated form which takes account of all significant contributions, direct or indirect, in cash or in kind) happen to be reflected in the parties’ common intention.”

5. Lord Walker also commented upon the passages from the speech of Lord Bridge of Harwich in *Lloyd’s Bank plc v Rosset* [1991] 1 AC 107 quoted in para 3 above. Lord Walker pointed out, at para 25, that although Lord Bridge had drawn a sharp contrast between cases in which there had been some prior agreement to share and those where there had not, he and all the other members of the House were “unanimously, if unostentatiously, agreeing that a ‘common intention’ trust could be inferred even when there was no evidence of an actual agreement”. Lord Walker went on to comment, in para 26:

“Lord Bridge’s extreme doubt ‘whether anything less will do’ was certainly consistent with many first-instance and Court of Appeal decisions, but I respectfully doubt whether it took full account of the views (conflicting though they were) expressed in *Gissing v Gissing* (see especially Lord Reid [1971] AC 886 at pp 896G-897B and Lord Diplock at p 909D-H). It has attracted some trenchant criticism from scholars as potentially productive of injustice (see *Gray & Gray, Elements of Land Law*, 4<sup>th</sup> ed [(2005)], paras 10.132 to 10.137, the last paragraph being headed ‘A More Optimistic Future’). Whether or not Lord Bridge’s observation was justified in

1990, in my opinion the law has moved on, and your Lordships should move it a little more in the same direction . . .”

6. Lord Walker, Lord Hoffmann and Lord Hope of Craighead all agreed with my own opinion, in which I summed the matter up thus at para 60:

“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 House also approved a passage from the Law Commission’s discussion paper on *Sharing Homes* (2002, Law Com No 278, para 4.27):

“If the question really is one of the parties’ ‘common intention’, we believe that there is much to be said for adopting what has been called a ‘holistic approach’ to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.”

*The matrimonial home: the facts*

7. The wife is Canadian and the husband Antiguan. They were married on 21 May 1983 in Nova Scotia while the husband was studying medicine there. In June 1984, the husband’s mother transferred a plot of land at Paradise View in Antigua into the husband’s name. On the wife’s case this was so that they could in due course build their matrimonial home there. Husband and wife returned to Antigua in July 1984 and the husband set up in medical practice. The wife worked in the surgery for him for a while and also worked in a travel agency. In March 1986, their first child, Danielle, was born and the wife did not work outside the home again until 1995. In June 1986, the couple returned to Canada for the husband to pursue post graduate studies. Their second child, Shannon, was born in December 1987. The family returned to Antigua in July 1990.

8. During 1990 and 1991 their matrimonial home was built on the land which had been given by the husband’s mother in 1984. The construction was financed partly by a bridging loan, which was later replaced by a mortgage, and partly by gifts from the husband’s mother. The mother contributed cash totalling some EC\$400,000 but it is unclear how this was paid. The wife’s case was that some was paid into the couple’s joint bank account and some was paid direct to the tradesmen. The bridging loan of EC\$250,000 was made by the Bank of Nova Scotia

in November 1990. This too was paid into their joint account. In August 1991, it was replaced by a loan of the same amount, secured by a mortgage, from the Barbados Mutual Life Assurance Society. The husband, as legal owner, executed the charge over the property. But the wife also made herself jointly and severally liable for the repayment of the principal and interest on the loan. The loan was also secured by insurance policies on each of their lives, for EC\$150,000 on the husband's life and for EC\$100,000 on the wife's. The husband also took out a mortgage protection policy. The husband first stated in evidence that "apart from the insurance I do not recall the claimant being involved in the loan in any other way" but had then to accept that "she is a party to the charge. I do not know why". He later claimed that "today is the first that I heard that she was asking for 50%" although he had signed the defence to the statement of claim in which she had claimed an equal share. He then stated "she has a share in the house, but I do not know what her share is. It should be linked to the \$100,000 policy".

9. All the couple's income went into a joint bank account from which the mortgage instalments and insurance premiums were paid. The wife began working outside the home again in 1995, when she went to work at the local branch of Kentucky Fried Chicken (KFC) where she still works. At first she paid her salary into the joint account but she stopped doing so when the husband moved out of the matrimonial home in January 1996. In November 1996 they signed a formal agreement for maintenance and visitation rights. Under this the husband was to pay a monthly sum to the wife and also the children's school fees, medical and dental bills. The wife was to be responsible for paying the mortgage, insurance and property tax on the matrimonial home. Repair costs were to be split between them.

10. The couple resumed cohabitation in September 1997 but the reconciliation did not last. Divorce proceedings were begun in 1999 and in July 2000, the wife and children left the matrimonial home. The divorce was granted in May 2001 and in April 2002 these proceedings were begun.

11. The husband's mother died in 1995, when the marriage was already in some difficulty. She was not therefore available to give evidence as to her intentions. The wife's case was that she had always had a good relationship with her mother in law, whom she had first met in 1981, and this grew even stronger when the couple were having marital difficulties. It was her understanding, gained from what her husband had told her, that the plot had been given and the construction costs paid as a gift to them both. The plot had not been conveyed to them both because she was not then an Antiguan citizen and would have had to get a licence.

This was not, however, discussed at the time. The husband's case was that they were a gift to him alone. But he also accepted that in happier times he had considered that whatever financial arrangements were for the benefit of the entire family, including the wife, and that "it all belonged to my wife, myself and my two children".

*The matrimonial home: applying the law to the facts*

12. The trial judge gave two main reasons for concluding that the parties had an equal beneficial interest in the matrimonial home. First he found "no reason to believe that [the husband's mother] wanted to make a gift of the land to her son alone. On the contrary, there is every reason to believe that she intended the land to be a gift to both parties for the purpose of building their matrimonial home in the early days of their marriage when they could hardly afford to build the home themselves."

13. Second were the circumstances surrounding the loan from Barbados Mutual. Both their life insurance policies were put up to secure the loan. Both became liable for its repayment. "This is the clearest evidence of detrimental action or alteration of position on her part. If in truth she had no interest, Dr Abbott could have refused to have her join in both the loan and the security. Barbados Mutual could as easily have required her to execute the usual certificate or release that a lender requires of a spouse when a matrimonial home is being given as security only by the spouse with title."

14. The judge also gave some weight to the fact that all the couple's income went into a joint bank account from which their furniture was bought and the loan payments made. "All this combines to convince me that the parties from the time of the acquisition of the property and at all times prior to the break-up of the marriage had the understanding that Mrs Abbott had an equal joint beneficial interest in the home."

15. In the Court of Appeal, Gordon JA took the view that there was "absolutely no factual basis" for the inference that the land was a gift to them both. Relying on the second part of the passage cited in para 3 above from *Lloyd's Bank plc v Rosset*, therefore, he took the view that the wife could only acquire an interest by way of direct contributions to the mortgage payments. Counsel for the husband had generously agreed that it should be assumed that the whole of the wife's salary after she went back to work in 1995 should be attributed to the mortgage. This, he calculated, would give her 8.31% share in the equity. Gordon JA therefore seems to have disregarded altogether the wife's joint and several liability to repay the loan and the additional security given by her life assurance policy.

16. It is fair to say that there are passages in the judge's notes of evidence which can be taken either way. They might indicate the sort of unspoken assumptions upon which happily married couples organise their lives or they might indicate something more concrete about their shared intentions as to ownership. Little would be gained by reciting them. The trial judge had the great benefit of seeing and hearing both parties give evidence. It is clear that he found the husband's evidence unsatisfactory in some respects, although he was not specific. It is easy to understand why, as the husband claimed to have no knowledge of matters which clearly ought to have been within his knowledge if his case was correct.

17. It has been said more than once in the English courts that if a parent gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them rather than to one alone: see *McHardy and Sons (A Firm) v Warren* [1994] 2 FLR 338, at 340; *Midland Bank plc v Cooke* [1995] 4 All ER 562, at 570. It might be doubted whether such an inference could so readily be drawn in other countries where the culture may be different. But this was a Caribbean judge, albeit from a different small Caribbean island, and it is certainly not for us to say that it was an inference which he was not entitled to draw.

18. Furthermore, it was supported by the behaviour of both parties throughout the marriage until it broke down. Not only did they organise their finances entirely jointly, having only a joint bank account into which everything was paid and from which everything was paid. They also undertook joint liability for the repayment of the mortgage loan and interest. This has always been regarded as a significant factor: see *Hyett v Stanley* [2003] EWCA Civ 942, [2004] 1 FLR 394. Yet the Court of Appeal appear to have attached no weight to it at all.

19. Finally, it must be borne in mind that the husband accepted in the course of his evidence that the wife did have a beneficial interest in the home, although he disputed the amount. The Court of Appeal appears to have attached undue significance to the dictum of Lord Bridge in *Lloyd's Bank plc v Rosset*, in particular as to what conduct is to be taken into account in quantifying an acknowledged beneficial interest. The law has indeed moved on since then. The parties' whole course of conduct in relation to the property must be taken into account in determining their shared intentions as to its ownership.

20. For all those reasons, the Board is of the view that the Court of Appeal should not have interfered with the findings of the learned trial judge on the beneficial ownership of the matrimonial home.

*The shares*

21. In 1985 the husband's aunt also gave him a parcel of land. The wife has never suggested that this was a gift to them both. But in 1991 the land was sold to the local Kentucky Fried Chicken (KFC) franchise for them to build a branch. On sale the husband received 10,000 shares in the company. The shareholders arranged for their dividends to be paid offshore. To that end a joint bank account was opened in the Cayman Islands in the names of both husband and wife into which the dividends were paid until the parties separated. Unusually, drawings from that account required the signature of both husband and wife.

22. The judge declared that the wife was entitled to one half of the funds in the Cayman Islands bank account. The husband has not appealed against that finding. However, the judge also found that the husband held the shares themselves in trust for husband and wife in equal shares. The wife claimed that the husband intended that the shares should belong to them both. The husband denied any such intention.

23. The Court of Appeal recorded that the wife's counsel had conceded that the shares belonged to the husband exclusively. However, Gordon JA went on to observe that at no point did the judge find any evidence that the wife had acted to her detriment on the basis that the shares were hers. There was nothing to indicate that the husband had made himself constructive trustee of one half of the shares.

24. The wife should not now be allowed to resile from the concession made on her behalf in the Court of Appeal. In any event it was almost certainly properly made. The sale of the land was a perfectly ordinary commercial transaction. There was no participation by the wife as there was in the construction of the house. There was no express declaration of trust by the husband. Putting the dividends into an account in joint names cannot be construed as such. Agreeing to the husband's withdrawals from the Cayman Islands bank account cannot be construed as acting to her detriment in reliance on the belief that the shares, as opposed to the bank account, were hers. If the husband did indeed intend that the shares should belong to them both, this was an imperfect gift.

*The furniture*

25. The judge also decided that the furniture bought for the matrimonial home was owned in equal shares. The wife had not had the benefit of it since she left. Hence he ordered that she be given credit for half its value when the house was sold in accordance with his order. The Court of Appeal set aside his order for sale, ordering instead that the husband pay the wife the sum of EC\$65,192 to represent her beneficial

interest in the home. It must therefore have concluded that she had no interest in the furniture or that such interest as she had was worthless.

26. The judge's reasoning was that the furniture was bought out of the joint bank account for the benefit of the family as a whole, although the husband had contributed almost all the money to that account. But the husband appears to have accepted that the furniture belonged to them both. Furniture in the matrimonial home is very different from shares, which can readily be transferred into joint names. There is no simple means of delivering domestic furniture from one occupant to another. Buying it out of a joint account and causing it to be delivered to the family home for their joint use and benefit is the most that can usually be expected.

27. However, the judge proceeded to order an adjustment based upon the wife's estimate of the costs of purchase in 1991. This is unrealistic. It is not suggested that any of the furniture was valuable antiques or art work which might be expected to increase rather than decrease in value. Twelve years later much of it will have been of little value. Some had been disposed of and the wife had declined to take any of it with her. The wife is entitled to something to compensate her for what she has lost, but in the absence of better evidence it should not be more than 20% of the costs of acquisition.

### *Conclusion*

28. The Board will therefore humbly advise Her Majesty that the appeal should be allowed in respect of the house and the furniture. There should be a declaration that the husband holds the house in trust for them both in equal shares. There should also be an order that the house be sold and the proceeds divided equally, subject to an adjustment in favour of the wife for 20% of the costs of acquiring the furniture. The wife's appeal in relation to the KFC shares should be dismissed. The parties are invited to make written submissions on costs within 21 days. Each has enjoyed a measure of success before the Board but in rather different proportions from the success enjoyed in the Court of Appeal.