



[2020] JMSC Civ 57

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016 HCV 01439

BETWEEN	KAREEN CHRISTIE	CLAIMANT
AND	ERNEST ALPHANSO TURNBULL	DEFENDANT

IN CHAMBERS

Mr. Obika Gordon instructed by Frater Ennis and Gordon for the Claimant

Miss Rochelle McNeil instructed by McNeil and McFarlane for the Defendant

Heard: December 17, 18 and 19, 2019 and March 13, 2020

Effective date of separation – discussion on application for leave to apply for extension – effect of other property owned by relevant party – is application negatively impacted when wrong procedure used within 12 month period – assessment of contribution of parties to acquisition.

T. HUTCHINSON, J(Ag.)

INTRODUCTION

[1] The matter before me is an Amended Fixed Date Claim Form and Affidavit in support in which the Claimant is seeking the following orders;

1. A declaration that the Claimant Kareen Christie of 32 Marine Garden, Ocho Rios Post Office in the parish of Saint Ann is the spouse of the Defendant Ernest Alphanso Turnbull of 32 Marine Garden, Ocho Rios Post Office in the parish of St. Ann.

2. A declaration that the Applicant is entitled under and by virtue of the Property Rights of Spouses Act 2004 to one half interest in property located at 32 Marine Gardens, Ocho Rios Post Office in the Parish of St. Ann comprised in Certificate of Title registered at Volume 1111 Folio 19 of the Register Book of Titles. An order that a valuation of the said lands be done by a Valuator to be agreed between the parties or in the absence of such agreement by a Valuator appointed by the Court.
3. An order that the costs of any valuation undertaken in respect of the said lands be borne by the parties equally.
4. An order that the Defendant be allowed to purchase the Claimant's interests in the said lands.
5. In the alternative an order that the said lands be sold on the open market and that the net proceeds be divided between the parties in accordance with their interests.
6. An order that the Claimant's Attorney-at-law have carriage of sale.
7. An order in the event the Defendant refuses to sign any document relevant to the transfer of said property the Registrar of the Supreme Court ne empowered to execute all such documents on the Defendant's behalf.
8. A declaration that the Claimant is the sole owner of the 1992 Toyota Cressida motor vehicle bearing registration number 3507 DB.
9. A Declaration that the Claimant is entitled to $\frac{1}{2}$ interest in Toyota Hiace registration number PP982J, Toyota Corona registration number 0528FL, Toyota Coaster registration PE 22304 and Toyota Corona registration 1269GR.

10. An order that the Defendant signs all documents necessary to effect transfer of the said motor vehicles and in the event the Defendant refuses to sign any document relevant to the transfer of the said motor vehicles the Registrar of the Supreme Court be empowered to execute all such documents on the Defendant's behalf.
11. An order that the Defendant be allowed to purchase the Claimant's interest in the said motor vehicles, in the alternative an order that the said motor vehicles be sold on the open market and the net proceeds be divided between the parties in accordance with their interests.
12. An injunction restraining the defendant whether by himself or his servant and/or agent from transferring or otherwise dealing with the said properties in any way prejudicial to the interest of the Claimant.
13. Such further and other relief as this Honourable Court deems just.

[2] The orders sought in the Fixed Date Claim Form have previously been requested of the Court in a Claim Form filed on the 11th of April 2016 and pursuant to the directive of the Court the claim was subsequently refiled by way of a Fixed Date Claim Form which was later amended.

[3] In respect of the orders outlined, it is noted that the status of the parties underwent a significant change in August 2016 as the Defendant got married to someone else. Additionally, in the course of the trial it was indicated that Order 8 was no longer in issue as the Defendant was prepared to consent to that Order being made.

SUMMARY OF CLAIMANT'S CASE

[4] The case for the Claimant is that she met the Defendant in 1985 and commenced an intimate relationship with him. In 1986 she moved in with him at his residence in Content Gardens, Ocho Rios, St Ann and they commenced living as husband and wife. In 1993, the house located at 32 Marine Gardens, Ocho Rios, St Ann,

the subject of this claim was purchased for the sum of \$500,000 of which she said she contributed \$25,000 from her savings account at National Commercial Bank. She deponed that when this money was given by her to the Defendant he assured her that her name would be added to the title but this was never done.

- [5] Ms. Christie outlined that in addition to the initial sum provided towards the purchase price, she covered the cost of the utilities, grocery and other household expenses while the Defendant paid the mortgage. She also stated that they both contributed towards the maintenance of the property as it was the family home. In addition to this, Ms Christie said she contributed towards the improvement of the property and the furnishings, details of which she gave in her affidavit.
- [6] It was also outlined by Ms. Christie that during the course of the relationship, she had a son for the defendant and he assisted in raising her daughter who was the child of a previous relationship. She exhibited the birth certificate of their son in support of her claim and it is noted that when the child was born in February 1994 both individuals gave their address as 32 Marine Gardens. In respect of the motor vehicles in question, Ms. Christie deponed that up to 1998 all 4 vehicles had been purchased by herself and the Defendant and were operated as taxis and for tours. She stated that up to the time the relationship ended in 2016 she had been living with the Defendant as his spouse for 31 years and they had been single at the time they became involved.
- [7] She averred that in the course of their relationship she was a joint account holder on accounts that the Defendant maintained at Bank of Nova Scotia and Royal Bank of Trinidad and Tobago. She also noted that she performed wifely duties for the Defendant from the start of their relationship up to when it ended in 2016. She also stated that even after the Defendant's marriage in August 2016 they continued to engage in a sexual relationship.
- [8] In outlining the circumstances that led to her filing this claim she stated that the relationship between the Defendant and herself had deteriorated as he began to

demand that she move out of the house as he was now involved with someone else. She also stated that he began to make threatening remarks to her. It was in these circumstances she said that she made a decision to file a claim to protect her interest in the property.

- [9]** She denied that the house was purchased solely from funds provided by the Defendant combined with a mortgage sourced by him, she also denied that the relation between them had ended in 2005 when the Defendant moved into a separate bedroom. Or that a separate dwelling house been constructed by her with the Defendants assistance. In relation to that property which is located in Lydford, St Ann she has asserted that although her name is on the title it is there as Joint Tenants along with her mother for whom the land was purchased and the house was built solely as her mother's residence.
- [10]** Under cross examination it was accepted by her that she did not personally participate in the purchase of the property all the steps were taken by the Defendant. She also acknowledged that she did not know the cost of the individual vehicles neither did she know if the Defendant had borrowed money to assist with their purchase. She also accepted that the Defendant no longer had any of the buses acquired up to 1998 as these had been changed for newer vehicles. Under further cross examination she insisted that the buses from that period were still in the Defendant's possession. She maintained however that she had made a financial contribution to the purchase of the replacement vehicles.
- [11]** She acknowledged that at one point both her and the defendant were occupying two separate rooms but stated that this was only for a week. In relation to his spouse she acknowledged that the Defendant had been cheating on her for years but she only became aware of that individual in July 2016. She acknowledged that at the time she filed the original claim in April 2016 the Defendant was engaged but she said this was not the first time.

- [12] As part of her case, the Claimant relies on the affidavit of her daughter Charlene Vassell. In her account Ms Vassell outlined that she has known the Defendant ever she was two years old and she said this was in or about 1985 when her parents first got together. She stated that they lived at 108 Marine Street for 8 years before moving to the disputed property in 1993. She said that they lived as a family there up to 2012 when she migrated.
- [13] She also deponed that when the Defendant's mother fell ill she moved into the house and became a part of the family and lived there with them until her passing in March 2014 which she sought to confirm by way of a funeral programme attached.
- [14] Under cross examination she stated that she lived with her grandmother on Main Street in her younger years up to age 12. She told the Court that she was born December 1983. She added that in respect of her mother she was back and forth between the grandmother's house and that of the Defendant.
- [15] In respect of her assertion that the family had a tour and taxi operation she stated that while she knew this she personally never participated in it as she was a child.

SUMMARY OF DEFENDANT'S CASE

- [16] In his account while Mr. Turnbull accepted that he met the Claimant in 1985 he insisted that they did not begin living together until 1992. In respect of the relevant property he outlined that this was purchased in 1992 for the sum of \$500,000 which was financed from his personal savings and a loan of \$100,000 provided by Jamaica National Building Society. In support of this he has attached a commitment letter dated July 14th, 1993. According to Mr. Turnbull he began living at the house in 1992 and during that time he informed the Claimant that he had purchased a house and invited her to reside there with him and she agreed.
- [17] He noted that the house needed minor repairs by way of fresh paint, grills and a door needed to be changed. He said it was at this point that he asked the Claimant

if she had any money that he could borrow and she gave him \$25,000 and assured him that he did not need to repay her since they would both be living at the house. This money he said was used to effect these repairs all of which was done before the Claimant moved in.

- [18]** Mr. Turnbull denied making any promise to the Claimant to place her name on the Title. He agreed that the Claimant paid the water and telephone bills but said that he was the one who paid the mortgage, the light bill and purchased food (grocery). He denied that the Claimant provided the furnishings which she claimed that she did and stated that while she purchased linen for the home he was the person who gave her money to purchase appliances. He acknowledged that renovations were done to the house between 1995 and 1996 but asserted that the cost was borne solely by him as he was making good money as a tour operator working in the Tourism Sector while the Claimant was working at Central Medical Laboratories earning just a fraction above minimum wage.
- [19]** He contended that the relationship with the Claimant ended from 2005 when he was baptized as he moved into a separate bedroom and discontinued sexual relations with the Claimant. He said that they would sometimes share meals as he would occasionally leave food for the Claimant if he cooked and she would do likewise but their relationship had become like brother and sister.
- [20]** Mr. Turnbull stated that the Claimant never gave an indication of being interested in his house as she had acquired a piece of land in Lydford and he spent thousands of dollars assisting her in building a house on it. He said between 2005 and 2016 he offered the Claimant a million dollars to complete her house as he wanted her to move into her own space as he no longer want to continue living with someone he was not in a relationship with. He denied that he continued to be sexually active with the Claimant and she said that the reason he asked her to leave the house was because he wanted to live in keeping with his Christian beliefs.

- [21]** In relation to the motor vehicles named in the claim he denied being assisted by the Claimant to purchase same and asserted that these were purchased using his sole resources and bank loans. In respect of the vehicle registered PP982J he produced a certificate of title showing that it was acquired in 2008, in respect of 0529 FL a title was also produced showing the year of acquisition as 2013 and in respect of vehicle registered as 1269 GR the title produced shows that it was acquired in 2014. No title has been produced for vehicle registered PE 2304. All the titles produced bear only the Defendant's name.
- [22]** It was also denied by Mr Turnbull that he held any joint accounts with the Claimant. He accepted offering her a sum of money to settle the matter when he was served with the initial set of Court documents but said this was done not to pay her for her interest in the house but purely to assist her in completing her own home in order to occupy same.
- [23]** He outlined that during the relationship he sought to assist the Claimant with a number of financial ventures such as a gift store, a clothes store and a restaurant and he also brought tourists as patrons to a restaurant she owned and operated. He said that he spent about \$600,000 on the Claimants house in Lydford in 2010 as they were separated and he wanted them to live separately.
- [24]** Under cross examination he was asked about the exact point when he had ceased relations with the Claimant and he indicated that it was early 2005 before he became baptized. He was shown his affidavit where he had said it was after he had become baptized that relations ceased and after some disagreement on this he accepted that the affidavit was correct. Under further cross examination however he stated that the relations could have ceased earlier than 2005 maybe 2004 or even as early as 2003. He also conceded that there had been at least one account held by him on which the Claimant appeared but he explained that this was because of advice received from the bank as to the need to do so. He was also asked about the sharing of meals with the Claimant after 2005 and denied

that this occurred but when shown his affidavit he eventually accepted that this may have happened.

CLAIMANT'S SUBMISSIONS

[25] In written submissions, Counsel for the Claimant has sought to identify the issues which they believe arise for consideration by the Court, these are stated as follows;

- a. Whether a common law union existed between the parties.
- b. If there was, what was the date of separation and was the claim filed in time.
- c. Whether the Claimant is entitled to an interest in the subject property.
- d. Whether the Claimant is entitled to an interest in the motor vehicles named herein.

[26] Under the first heading, the court first has determine whether or not the parties were spouses within the meaning of section 2 of the Property's Rights of Spouses Act (PROSA). On this point Counsel submitted that there is no dispute between the parties as to whether or not they lived as husband and wife, the point of disagreement is when the parties began living together in this manner and when it ended. It is Counsel's submission that whatever the Court decides in respect of when the relationship ended, there is overwhelming evidence for the Court to find that a common law union had existed and the Claimant was a spouse for the purposes of the Act.

[27] On the question as to the date of separation, Counsel submitted that on a balance or probabilities, the Claimant's account that the parties separated in 2016 is far more credibility that the Defendant's version that they had lived as brother and sister for a period of 11 years. It is also submitted that should the Court find that the parties separated in 2016 the original claim which was filed in April 2016 was filed within time. If the Court believed however that the application was filed outside the 12 month period then reliance was placed on ***Saddler v Saddler [2013] JMCA***

Civ 11 where the Court stated that where an application was brought outside the 12 month period, there was no need to seek leave to apply for an extension.

- [28] In support of the contention that the Claimant is entitled to an interest in the subject property Counsel has referred to and sought to rely on Section 6(1)(c) of PROSA which speaks to a presumption of equal entitlement in respect of the family home. Reliance has also *been placed on the decision **Peaches Stewart v Rupert Stewart 2007HCV0327*** where Sykes J as he then was examined the concept of the family home. Counsel also relies on the affidavit and viva voce evidence of Ms. Charlene Vassell, daughter of the Claimant who was raised by the Defendant in support of this contention.
- [29] On the final issue of whether the Claimant is entitled to an interest in the motor vehicles Counsel relies on Section 14(1)(b) of PROSA. He points to the evidence of the Claimant that the vehicles were purchased by the parties from their joint resourced and they were used for the benefit of the family. He referred to and relied on the case *of **Dixon v Dixon [2017] JMSC Civ 106*** particularly paragraph 131 where it was stated by K. Anderson J that a motor car was to be shared equally by the parties as it was 'acquired jointly and for the benefit of the family'.
- [30] In amplified submissions, Counsel indicated that they are also relying on the decision of ***Tricia Carter v Lloyd Parnell*** on how the Court should view and treat with the subsequent marriage of the Respondent. On the question of then it was that the parties separated Counsel has found that even if the Court believes that the relationship between the parties ended in 2005 it can still find that termination of the co-habitation did not occur until 2016 and on that basis find that the action was filed within time.
- [31] Mr Gordon also sought to draw the Court's attention to the credibility of the respective parties. He submitted that in respect of the date of separation the Defendant was back and forth on this. He has asked the Court to note that when giving evidence on sexual relations between the parties under cross examination

Mr Turnbull stated that the last sexual contact was in 2004. He also gave evidence that he was baptised in 2005. When his affidavit was put to him he agreed that he had stated there that it was after he got baptised in 2005 that sexual relations between the parties discontinued.

[32] Counsel submitted that another issue was when they started living in separate rooms. At one point he submitted Mr Turnbull said this occurred up in 2003 or 2004. It was pointed out that this was also inconsistent with the evidence in his affidavit as it was stated there that it was after he got baptised in 2005 that they started to live in separate rooms.

[33] Another point that was relied on by Mr Gordon to show what he described as the shaky credibility of the Defendant was his evidence about the Claimant cooking in the house. Counsel noted that Mr Turnbull stated in cross examination that she never cooked in the house after 2005. He said she would bring food from outside and by the time she shared it most of the time he had already cooked. Mr Gordon pointed out that after saying this Mr Turnbull then sought to change his response to say that he recalled her cooking after 2005 but could not recall how many times before changing this to say she would cook occasionally. In light of all these changes Mr Gordon has asked the Court to find that this is a clear indication that if he would lie or be untruthful about something as simple as Ms. Christie cooking in the house it suggests that he may also be untrue about larger issues and is not a credible witness. Counsel submitted that this situation is not improved when the Court considers that Mr Turnbull had also stated under cross-examination that he would occasionally eat from the Claimant but stated as well that he would not eat from her.

[34] Mr Gordon also pointed out that the Respondent's lack of credibility also extended to his evidence on whether he had held any joint accounts with the Claimant as under cross examination he had stated that there was no joint account. When asked if there was any account held by him where her name was also on the account he said no. When asked about an RBTT account, he stated that he had

put the Claimant's name on that RBTT account but it was years ago. Counsel submitted that the situation became worse in re-examination when in response to Counsel's question, he stated that he had placed the Claimant's name on the account as she had a son for him and he had been told if he should die someone else's name should be on account. Mr Gordon submits that this was in clear contradiction to his earlier response, he also remarked that there is no claim to money in an account in this matter and as such this goes to show that Mr Turnbull is an untruthful witness.

[35] Mr Gordon has also asked the Court to consider the content of paragraph 31 of the Defendant's affidavit which he contended is very important as it speaks to the state of mind of the Defendant at that time. He noted that under cross examination Mr Turnbull stated he offered the Claimant one million dollars to vacate the house. He also agreed that he offered this sum her to get the house for himself. It was submitted that this is evidence of an intention on the part of Mr Turnbull to give Ms. Christie something in relation to the house.

[36] In respect of the Defence submissions as to how the property was acquired, Mr Gordon has asked the Court to note that there have been authorities which have determined that the non-financial contribution of an individual can be taken into account. He has also highlighted the Claimant's contribution of \$25,000 to the purchase price which he says was worth far more then than now.

[37] Finally, in respect of the timing of this application, Mr Gordon has also asked that the Court consider ***Claim 2009HCV02358 Thelma May Whilby Cunningham v Leroy Augustus Cunningham*** a decision of McDonald Bishop J.

DEFENDANT'S SUBMISSIONS

[38] In written submissions filed on the 11th of December 2019 it was submitted on behalf of the Defendant that the Claimant is not entitled to a 50% interest in the disputed property as the Defendant had acquired same from his sole resources

and with the aid of a loan before he began cohabiting with the Claimant and the mortgage and renovation expenses were solely borne by him.

[39] It was also submitted that it would be unjust, unfair and unreasonable to grant a 50% interest to the Claimant in circumstances where she owned a property consisting of a 2 bedroom, 2-bathroom house. It was also submitted that throughout the relationship the parties had kept their monies separate and owned no asset between them. It was also submitted that the Claimant held no interest in the motor vehicles as these were acquired by the Defendant from his own resources and with the aid of a loan.

[40] It was submitted by Ms. Neil that the application had been brought out of time as the parties had separated in 2005 and as such this application should have been brought no later than December 31st, 2006. Counsel also submitted that no application having been made for an extension of time to bring this claim the claim is irregular and in this regard reliance has been placed on ***Calvern Gavin v Laretta Gavin [2017] JMSC Civ 119***, paragraph 13 where in the combined appeal of ***Angella Bryan Saddler v Samuel Oliver Saddler and Fitzgerald Hoilette v Valda Hoilette etal [2013] JMCA Civ 11*** on the point of an application brought under PROSA outside of the 12 month period it was observed inter alia by Phillips JA as follows;

'the claim was not invalid but irregular and could not proceed if the order to extend time was not granted'

[41] Issue is also taken with the assertion that the Claimant could be considered a spouse as the parties separated in 2005 and the Defendant is now married. Counsel submits that in light of the definition of spouse under PROSA the Claimant must prove that she fell within same otherwise her application must fail.

[42] While accepting that the property would have been the family home for the purposes of the Act, Counsel has submitted that the task for the Court was to examine the evidence to determine if this was an appropriate case for the presumption to be varied pursuant to Section 7 of PROSA. In this regard, Counsel

has sought to rely on Section 7 (ii) which speaks to whether the family home was already owned by one spouse at the time of the marriage as it is the defence's contention that he purchased the house in 1992 and later invited the Claimant to move in with him. It was also submitted by Ms. Neil that the fact that the Defendant did not place the Claimant's name on the title although they were in a relationship was a clear indication that he did not intend to give her a legal interest in the property.

[43] It is submitted that in light of the foregoing the Court should find that the Claimant was not entitled to more than a 30% interest and the Defendant to 70% and reliance is placed on the decision ***Heather Fern McLaren-Josephs v Nigel Archibald Josephs [2019] JMSC Civ 72***. It is also submitted that the value of the parties share should be determined as at the date on which the parties ceased to cohabit which is said to be 2016.

[44] In respect of the motor vehicles it is submitted that the motor vehicles registered PE 2304 and 0528 FL do not belong to the Defendant. In respect of the Toyota Hiace PP982J and the Toyota Corona 1269 GR Counsel has asked the Court to note the Certificates of Title which refer only to Mr. Turnbull as the owner.

[45] In additional submissions addressing the viva voce evidence of the witnesses, Ms Neil has pointed out that on the Claimant's own account she was never a part of the transaction to acquire the disputed property. She was not a signatory to the mortgage, neither was she able to produce documentary proof of any contribution made by her.

[46] In support of this contention, Counsel also pointed to the admissions by the Claimant that she did not know the deposit paid or the monthly mortgage payments.

[47] Ms Neil also referred to and relied on Exhibit ET1 which is a sale agreement in respect of the said property which shows that same was executed in 1992 and had the stated date for completion as August 31st 1992 as evidence which shows

that the Defendant entered into a contract to purchase the relevant property long before 1993.

- [48]** In respect of the sum of \$25,000 which the Claimant pointed to as her contribution towards the purchase of the property, Counsel has asked that the Court accept the evidence of the Defendant on this point that the money was used for painting and new locks as it is evident that it had nothing to do with the purchase which the defence contend had already occurred.
- [49]** In respect of when the parties began to cohabit Ms Neil has asked the Court to take special note of the evidence of Charlene Vassell the daughter of the Claimant who gave evidence that both she and her mother would be back and forth between her maternal grandmother's house and that of the Defendant. This situation she said continued until she was twelve years old and on her account that would have meant that cohabitation did not begin until 1994/5.
- [50]** Counsel has submitted that this evidence is in clear contradiction with that of the Claimant and undermines her veracity as it was her assertion that the parties began to live together in 1986.
- [51]** It was also submitted that the Claimant's account was riddled with inconsistencies as in speaking of renovations done by her to the property she stated in her affidavit that this was done in 1995 to 1996. Under cross examination however she stated that the renovations took place before her son was born and accepted this would have been 1993. When asked if the renovations occurred in the year the property was purchased however she indicated that it did. When asked about the nature of the renovations she replied we both fix up the place before saying I paint and bought paint and locks. I do a lot of fixing up as a woman. It is submitted that in light of these inconsistencies the Court should prefer the account of Mr Turnbull that the sum of \$25,000 given by the Claimant was for the initial 'fixing up' of the property but it was his sole effort in 1995/6 that took care of the renovations done.

- [52]** In respect of the pooling of funds by the parties Ms Neil has submitted that it is evident that this did not occur as the Claimant gave evidence that she did not put the Defendant on her accounts. In respect of the account which the Defendant later admitted having placed the Claimant on, Ms Neil stated that it was so long ago it is clear that he simply forgot but his reason for placing her on the account ought to be accepted by the Court as plausible in the circumstances.
- [53]** On the point of the parties operating independently of each other, Ms Neil also made reference to the other businesses operated by the Claimant in addition to her position as a lab technician. She has also asked the Court to note that the house built by the Claimant was clearly done to exclude the Defendant from occupying same.
- [54]** In respect of the separation date of the parties, Ms Neil submitted that although the Claimant said she and the Defendant separated in August 2016 she also stated that he had become engaged to more than one person over the years. It was Counsels contention that the Defendant's involvement in a number of relationships over the years as acknowledged by the Claimant is a clear indication that he had always operated as a single man. The end result of this it is submitted is that the parties would have separated long before August 2016 and if this was from 2005 the Claimants action was out of time.
- [55]** In concluding her submissions Ms Neil observed that the Claimant had failed to prove on a balance of probabilities that she had been living with the Defendant as man and wife up to 2016.
- [56]** She submitted that in the event the Court found that this was the date of separation the contribution of the parties must be closely examined as on the Claimants account she contributed 5% while the Defendant contributed 95%. She has also asked the Court to find that Ms Christie never assumed any of the expenses of the family and her payment of the utility bills for electricity and water was the least she

could have done as an occupant of the premises. As such any award to be made should not exceed 25% to the Claimant and 75% to the Defendant.

[57] In respect of Mr Gordon's submission that on the Defendants account the parties would still have cohabited until 2016, Ms Neil asked the court to consider the definition at section 2 of the act which states that cohabitation exists where the parties live together in a conjugal relationship.

[58] In respect of the motor vehicles reference was made to what has been termed as independent evidence which shows that the vehicles owned by the Defendant were acquired between 2008 and 2014 and as such could not have been acquired through the parties joint resources in 1998 as stated by the Claimant. As such outside of the Cressida which it is accepted is owned by the Claimant the Court is asked to find that the additional vehicles are not relevant to this claim neither did the Claimant contribute to their acquisition.

Issues for consideration

[59] On a review of the respective cases as well as the submissions of Counsel for both parties, it is clear that there are a number of issues which must be determined by the Court.

1. Was the application brought within the twelve-month period as required under Section 13(1) of PROSA and if not has a basis for an extension of time been made out by the Claimant?
2. Should the equal shares rules be applied or has a sufficient basis been provided on which same should be displaced?
3. Has the Claimant provided evidence to the requisite standard to justify her claim in respect of the motor vehicles?

RELEVANT LAW

[60] Time Limit for the bringing of an application under PROSA

[61] In respect of the factors which trigger the point of the bringing of an action under this Act and the period within which such an action should be brought, Section 13((1) and 2) provide as follows;

13. (1) *A spouse shall be entitled to apply to the Court for a division of property –*
- (a) *on the grant of a decree of dissolution of a marriage or termination of cohabitation; or*
 - (b) *on the grant of a decree of nullity of marriage; or*
 - (c) *where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or*
 - (d) *where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.*
- (2) *An application under subsection (1)(a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant.*

[62] There is no dispute that the situation in respect of applications made outside of the twelve-month period has been judicially considered and one of the earlier decision in respect of same is ***Brown v Brown [2010] JMCA Civ 12***, where Morrison JA (as he then was) said at [77]:

“On an application under section 13(2), it seems to me, that all the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as merits of the case (on a purely prima facie basis), delay and prejudice, also taking into account the overriding objective of the Civil Procedure Rules of ‘enabling the court to deal with matters justly’ (rule 1.1(1))”.

[63] Both Attorneys have also made reference to the consolidated appeal ***of Angella Bryan-Saddler v Samuel Oliver Saddler [2013] JMCA Civ 11***, where the Court found that where a claim had been filed out of time and there had been no extension of time granted the status of that claim was not invalid but irregular and

it could not proceed if an order extending time was not granted by the Court. Phillips JA also went on to state;

“Of course it must be taken as a given that in order for the application for extension to be successful and to obtain the exercise of the discretion of the court in favour of the applicant, the applicant must set out the length of the delay, the reasons for the delay, whether the claim is worthy of the grant of extension and whether there is prejudice to the other party (Allen v Mesquita)”.

[64] In **Gavin v Gavin** which has been referred to and relied on by Counsel for the Respondent, the Court allowed an extension of time in spite of a delay of 9 years in the bringing of the application. The Court came to this conclusion by examining the reasons given for the delay which were found to be reasonable in light of the surrounding circumstances. The Court also considered the question of any possible prejudice to the Respondent and found that while none had been raised it amounted to no more than the loss of a technical defence while the prejudice to the Applicant if his claim was not allowed to proceed was far greater.

Division of Property – Equal Shares Rule and the Displacement of Same

[65] The Application made by Ms. Christie in respect of the order for division of property has been made on the premise that the property in question is the family home. In respect of what qualifies as the ‘family home’ Section 2(1) of PROSA defines this as follows;

“family home” means the dwelling-house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit.

[66] On my examination of the evidence of the respective parties, in spite of the initial apathy of Mr. Turnbull, it does not appear that there is any dispute between them that the house at 32 Marine Gardens, St Ann would fall within the parameters of

this definition, as it was the principal residence of the family from 1993 to 2016 when the Respondent moved out and subsequently got married to someone else.

[67] With that issue being an uncontroversial one, the Court would then have to consider the provisions of the legislation in respect of the rights of each individual on the termination of the union. On this point, the Court takes note of Section 6 which states;

“6 (1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home--

- (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
- (b) on the grant of a decree of nullity of marriage;*
- (c) where a husband and wife have separated and there is no likelihood of reconciliation.*

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one- half share of the family home.”

[68] The application of this section has been examined in a number of decisions from the Supreme Court one of the more useful analysis being that of McDonald-Bishop J (as she then was) in ***Graham v Graham Claim No 2006 HCV 03158 (delivered 8 April 2008)*** where she assessed the statutory basis for the equal share rule at paragraphs 15-16 of that case, thus:

*“15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See ***R v R [1992] 1 AC 599***, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in ***Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633***.*

16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation....”

[69] From this authority, it is clear that the purpose of this provision is to ensure that each party to the marriage walks away with an equal share of the family home unless there is good reason to the contrary. The objective of this being to attain fairness between the parties.

[70] The reference by the Court to the phrase ‘unless there is good reason to the contrary’ is a recognition of the fact that there are occasions when the application of the rule can and ought to be departed from and Section 7 of the Act addresses this as follows;

“(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-

(a) that the family home was inherited by one spouse;

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration.

(2) In subsection (1) "interested party" means-

(a) a spouse;

(b) a relevant child; or

(c) any other person within whom the Court is satisfied has sufficient interest in the matter.”

[71] In considering how to treat with the provisions of Section 7(1) of the Act the dicta of Brooks JA in *Stewart v Stewart* provides useful guidance where he stated at paragraph 17;

At least three things are apparent from section 7(1):

- a. The section requires the party who disputes the application of the statutory rule, to apply for its displacement.
- b. The use of the word “including”, implies that the court is entitled to consider factors other than those listed in section 7(1).
- c. The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.

[72] The effect of this position and its application to this case means that it is the responsibility/burden of the Respondent to satisfy the Court on cogent evidence that this rule should be displaced. In other words, he who asserts must prove. It also means that while certain categories are outlined at (a) to (c) this is not an exhaustive list as the Court accepted that a Judge is entitled to consider factors other than those listed. Additionally, the party seeking to displace this rule has the burden of persuading the Court that it would be unreasonable or unjust to give effect to it.

[73] Further guidance on the approach that should be adopted by a Court to this Section is given at paragraph 34 of the judgment where Brooks JA stated;

What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration. For instance, the family home may have been inherited by one spouse, but the other may have, by agreement with the inheriting spouse, solely made a substantial improvement to it at significant cost. In such a case the court would be unlikely, without more, to award the entire interest to the spouse who had inherited the premises.

[74] In concluding his analysis of this provision and what it entails at paragraph 76 and 77 the Learned Judge stated as follows;

“[76] In order to displace the statutory rule for equal interests in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act, or a similar factor, exists. Contribution to the acquisition or maintenance of the family home, by itself, is not such a factor, it not having been included in section 7. This is in contrast to its inclusion, as a relevant factor, in section 14, which deals with property other than the family home.

[77] If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule. The degree of cogency of that evidence is greater than that required for other property. In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution.”

ANALYSIS AND DISCUSSION

Was the Application brought within the twelve-month period

[75] As outlined above, Section 13(2) of PROSA clearly provides that the time period for bringing an action is within twelve months of the end of cohabitation by the parties or the termination of the marriage, whichever is applicable. It is the Claimant’s contention that although the initial claim filed was brought by way of the incorrect process her action should be viewed as having been filed in time as the filing was regularized in short order. It has been noted by Counsel on her behalf that the information in the Claim and the orders sought of the Court are substantially the same and as such the Court should find that the date on which the action had been brought was the 11th of April 2016.

[76] Counsel for the Defendant on the other hand has submitted that even if the Court was prepared to accept April 2016 as the applicable filing date the Claimant is still outside of the twelve month period as the parties had ceased cohabiting from as far back as 2005. If the Defence submission is accepted the Court would have to

consider not only the length of delay and any possible prejudice which may be occasioned to the Defendant but consideration would also have to be given to the reason provided for the delay and at this stage, I note that none has been given.

[77] In coming to a decision on this issue the Court has to give careful consideration to the respective accounts of the parties to determine when it was that their relation actually came to an end.

[78] On the Claimant's account her relationship with the Defendant continued to survive the high and low points even though she was fully aware that Mr Turnbull hadn't been a faithful partner, as he had even fathered a child by someone else during the relationship. In addition to this she also knew about other females with whom he had been involved including a lady in the USA. It was clear from her evidence that knowing all of this she had accepted Mr Turnbull for who he was and decided to stay in the relationship and until 2016 when he told her it was over it was her understanding that he was committed to remaining in the relationship with her as well.

[79] In addition to Ms Christie's account there was also the account of her daughter Charlene Vassell that the parties were still living as man and wife up to 2012 when she migrated to the United States. It was also not disputed that during this time the Defendant's mother had moved in with them into that family dynamic or that this was the situation until her death in 2014.

[80] On the other hand, the Court noted that while the Defendant accepted that he had resided at the premises up to 2016 and had only moved out after he was served with the papers filed in April 2016 he denied that the relationship had been in existence up to that year. He insisted that he had been driven to ask the Claimant to leave the house because he wanted to live a Christian life but on his own evidence he had already done that by moving into another bedroom and severing all relational ties with her.

- [81]** Mr Turnbull's position as to the date when the relationship actually ended also seemed to be somewhat fluid. This was shown in the fact that although he had stated in his affidavit that he brought the relationship to an end in 2005 as he had gotten baptized and the Claimant refused to join him in Church under cross examination he insisted that things had ended much earlier about 2004 or even 2003. Additionally, his demeanor in response to suggestions that the relationship had still been in existence as the parties were still engaging in sexual relations up to 2016 was less than convincing and I was not impressed with his denials which seemed more embarrassed than robust.
- [82]** Section 2 of PROSA makes it clear that included in the definition of cohabitation is the existence of sexual relations. Having reviewed the foregoing evidence, I accept that this situation was still in existence between the parties up to 2016 and I also believe that the claimant was still performing other widely duties including the provision of meals for her family in which the Defendant partook.
- [83]** I did not believe the Defendant that the Claimant had stopped cooking from 2005 or only occasionally as he later stated, as she had a son who would have been 11 years old in 2005. In my assessment of the Claimant she did not strike me as the sort of individual who would have resiled from performing this function especially taking into account that there was a child to provide for. I did not believe that she was taking home food for herself as the defendant insisted and I believe that he only made this assertion as part of his attempt to convince the Court that the relationship had ended.
- [84]** I accept that the actual time of separation was 2016 and I view the defendant's assertions to the contrary as nothing more than an attempt to deny the Claimant of the opportunity to have her matter heard by insisting it was brought out of time. In light of this finding, there is no need to consider whether an extension needs to be granted.

- [85]** Should the equal shares rules be applied or has a sufficient basis been provided on which same should be displaced?
- [86]** An application having been made by the Claimant under this heading in circumstances where it has been accepted that the parties had been in a relationship, the application was brought within time and the residence in question had been the family home, the issue which must now be considered is whether on the evidence presented by Mr Turnbull the equal share rule outlined at Section 6 of the Act should be displaced.
- [87]** It is settled law as seen in *Graham v Graham* that the purpose of section 6 is to ensure that each party to the 'marriage' walks away with an equal share of the family home unless there is good reason to the contrary, the objective being to attain fairness between the parties.
- [88]** In *Stewart v Stewart* it was stated that in order to successfully displace this rule the party making this assertion must show that the application of same is unreasonable or unjust. It was also noted by the Court that contribution to the acquisition or maintenance of the family home, by itself, is not a factor that could displace the application of this rule it not having been included in section 7.
- [89]** Taking these principles into consideration the Court must first be satisfied that a section 7 factor existed in this situation and only then would the issue of contribution come into play. In support of his contention that the rule should be displaced, Mr Turnbull relies on the assertion that the property had been owned by him prior to the Claimant moving in. He also seeks to rely on the fact that although the Claimant gave him the sum of \$25,000 which he said was to be used for minor renovations, the greater financial contribution towards the acquisition of the home was his. Additionally, while it has not been put forward as a section 7 factor Mr. Turnbull had also made reference to the fact that the Claimant is the registered proprietor of land on which has been constructed a dwelling house which can provide her with a home.

- [90]** In relation to the first factor on which the defendant relies, I note that although he has attached a sales agreement which states the date for completion as sometime in 1992, this agreement is unsigned and undated. The commitment letter presented however bears a date in July 1993 and states therein that the mortgage payment toward the purchase of the property had now been disbursed and monthly repayments were scheduled to commence September 1993. What it appears actually occurred is even though the Defendant seems to have entered into an agreement for the purchase of this property in 1992, this transaction was not completed until 1993, a conclusion which I note finds support in the Defendant's own exhibit.
- [91]** On the Claimant's account she had been living with the Defendant since 1986 and they moved into the disputed property in 1993. On his account, Mr. Turnbull's account insisted that the relationship between he and the Claimant had been a visiting one but he confirmed that in 1993 she began living with him at the disputed property on his invitation. He accepted that in the same period she gave him the sum of \$25,000 which was used to do renovations to the house such as painting and grilling all of which he accepted was done not long after taking up occupancy in same.
- [92]** I believe that contrary to the assertion of the Defendant the sale of the property was not completed until late 1993 after which he and the Claimant moved into the property and carried out these minor reservations and their son was born there a few months later in February 1994.
- [93]** On the issue of the financial contribution of the respective parties, while the monetary contributions of the Defendant at the time of the purchase of the property was clearly greater than that of the Claimant, it is undisputed that during the course of the relationship she would have borne responsibility for some of the expenses associated with the running of the home. I accept her account that these non-financial contributions were made and I note that some of these were reluctantly accepted by the Defendant under cross examination.

[94] The decided cases on this area have made it clear that not only is contribution not a factor that can displace this rule but the non-financial contributions of a spouse can and ought to be taken into account when coming to a decision on this issue. This is especially important where it is contended that it was with the financial and non-financial contributions that made it possible for the Defendant to make the monthly mortgage payments as has been stated by Ms. Christie and accepted by the Court.

[95] In light of the foregoing evidence and conclusions, drawn I am not persuaded that the Defendant has provided a basis on which the equal shares rule can or should be displaced and his request for a 75:25 division of the property must fail. I have considered whether this position should be adjusted taking into account his contention that she has another 'home' to go to and I am unable to conclude that it should.

[96] I believe that for 31 years the Claimant shared a relationship with the defendant that had clearly been marked with a number of high as well as low points. In spite of this she made a home with the Defendant making contributions towards the acquisition and maintenance of same from what I accept were her more meagre resources. In spite of the fact that her name had not been placed on the title, I accept that this was no less her home than it was the Defendant's and I believe that it was in recognition of this fact that he offered not only to finish her mother's house in Lydford for her to move from the disputed property but also to pay her \$1 million dollars for her to 'get something for herself.'

Has the Claimant provided evidence to the requisite standard to justify her claim in respect of the motor vehicles?

[97] In relation to the claim for half the value of the motor vehicles owned by the Defendant, it is the Claimant's case that these were acquired up to 1998 from both herself and the Defendant pooling their resources to make these purchases as she always contributed towards this whenever she was asked. In cross examination

she accepted that the Defendant had in fact purchased new vehicles, maybe even as recently as 2013/14. The Defendant on the other hand provided documents for 3 of the 4 vehicles in issue which showed that acquisition years as 2008, 2013 and 2014.

[98] While the Claimant insisted that she would have contributed to the purchase of any vehicles owned by Mr Turnbull, I found that her account at the end of cross examination was left in a most unsatisfactory state. In light of this I was unable to conclude that the vehicles which she said were jointly acquired are in fact the same vehicles currently owned by the Defendant and accordingly her claim for an equal share of these assets fails.

DISPOSITION

[99] In relation to the first order sought that the Claimant be declared to be the spouse of the Defendant, the Defendant having gotten married in 2016 the Court is constrained to declare that the Claimant had been his spouse until sometime in 2016.

[100] The Claimant's request for a declaration that she is entitled under and by virtue of the Property Rights of Spouses Act 2004 to one half interest in property located at 32 Marine Gardens, Ocho Rios Post Office in the Parish of St. Ann comprised in Certificate of Title registered at Volume 1111 Folio 19 of the Register Book of Titles is granted.

[101] An order is made that a valuation of the said lands be done by a Valuator to be agreed between the parties or in the absence of such agreement by a Valuator appointed by the Court.

[102] An order is made that the costs of any valuation undertaken in respect of the said lands be borne by the parties equally.

[103] An order is made that the Defendant be allowed to purchase the Claimant's interests in the said lands.

- [104]** In the alternative it is ordered that the said lands be sold on the open market and that the net proceeds be divided between the parties in accordance with their interests.
- [105]** The Claimant's Attorney-at-law shall have carriage of sale.
- [106]** In the event the Defendant refuses to sign any document relevant to the transfer of said property the Registrar of the Supreme Court ne empowered to execute all such documents on the Defendant's behalf.
- [107]** The Claimant is the sole owner of the 1992 Toyota Cressida motor vehicle bearing registration number 3507 DB.
- [108]** The Claimant's request for a declaration that she is entitled to ½ interest in Toyota Hiace registration number PP982J, Toyota Corona registration number 0528FL, Toyota Coaster registration PE 22304 and Toyota Corona registration 1269GR is refused.
- [109]** An injunction is granted restraining the defendant whether by himself or his servant and/or agent from transferring or otherwise dealing with the said properties in any way prejudicial to the interest of the Claimant.