



[2015] JMSC Civ. 59

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009 HCV 4855

BETWEEN	MERNA BENIAN	CLAIMANT
A N D	KARL EVANS BROWN	DEFENDANT

**CONSOLIDATED WITH**

CLAIM NO 2011 HCV 0988

BETWEEN	IOLA BROWN	CLAIMANT
A N D	KARL EVANS BROWN	1 <sup>ST</sup> DEFENDANT
A N D	MERNA BENAIN	2 <sup>ND</sup> DEFENDANT

Mr. Philmore Scott and Mrs. Camille Scott instructed by Messrs Philmore H. Scott and Associates for the claimant/2<sup>nd</sup> defendant.

Ms. Sherry-Ann McGregor and Ms. Deborah Dowding instructed by Messrs Nunes, Scholefield, DeLeon and Co. for the claimant.

Ms. Carleen McFarlane instructed by Ms. Geraldine Bradford of the Administrator General's Department for and on behalf of Estate Karl Brown.

**Heard: February 24, 25, 27, May 6, 7, 8; July 11, October 17, 2014 and March 27, 2015**

*Division of property-Property acquired while man married to one party and in relationship with other-Husband and wife had separated – Whether wife entitled to interest and share – The Property (Rights of Spouses) Act Sections. 11 and 13 – Whether other woman entitled to interest and share – Constructive trust*

**P.A. Williams, J.**

[1] This matter is the consolidation of two matters where two women as claimants are seeking the court's determination as to whether they have any interest in various properties owned by one man. This man is Karl Evans Brown who died after the matter had commenced. The two women are his wife, Iola Brown and the other woman is Merna Benain with whom he had four children.

[2] The proceedings commenced in 2009 when Merna Benain filed a Fixed Date Claim Form which was amended in September of the following year seeking against Mr. Brown the following orders inter alia:-

1. A declaration that the claimant and the defendant are each entitled to fifty percent (50%) interest in property described as All that parcel of land part of Cardiff Hall Plantation and Unity Pen in the Parish of Saint Ann being the Lot numbered Forty on the Plan of Part of Cardiff Hall Plantation and Unity Pen aforesaid deposited in the Office of Titles on the 17<sup>th</sup> day of August 1961 of the shape and dimension and butting as appears by the said plan and being part of the land formerly comprised in Certificate of Title registered at Volume 1305 Folio 518 of the Registrar Book of Titles (herein after referred to as the subject property).
2. A declaration that the claimant and the defendant are each entitled to fifty percent (50%) interest in property described as All that parcel of Land part of Rose Bank formerly part of Rosetta in the parish of Saint Ann of the shape and dimensions and butting as appears by the land comprised in Certificate of Titles at Volume 1186 Folio 27 of the Registrar Book of Titles on which the B & B Plaza is built ("hereinafter also referred to as the second subject property").
3. A Declaration that the claimant is entitled to fifty percent (50%) interest in premises described as Brown's Plaza, Browns Town in the parish of Saint Ann.

4. A Declaration that the defendant pay the value of all the goods damaged in the B & B Supermarket located on the second subject property.
5. The properties be valued by a reputable valuator and the defendant pay the cost of the said valuation.
6. The defendant should notify the claimant's attorney-at-law if he intends to exercise the option to purchase the claimant's interest in the subject properties within fourteen (14) days of this Order.
7. If the defendant chooses to exercise the option to purchase, that he should sign the Sale Agreement and deliver the required deposits to the claimant's attorneys-at-law within fourteen (14) days of advising them of his intention to exercise the option.
8. The defendant deliver to the claimant's attorney-at-law within forty-two (42) days of signing the Sale Agreement a letter of commitment from a reputable financial institution for the balance purchase price of each Agreement.
9. If the defendant should choose not to exercise the option to purchase or if he fails to comply with paragraphs four (4) and five (5) hereof or any of them then:
  - (a) The subject properties will be sold by private treaty or public auction with the valuation being the reserve price. The claimant's attorney-at-law shall have carriage of sale of the said properties in any event.
  - (b) That upon the failure of any of the parties to execute any of the documents relevant to execute a registrable transfer of the said properties than the Registrar of the Supreme Court is empowered to sign on their behalf.

(c) That all costs of valuation and transfer be borne by the Respondent.

10. That the claimant is entitled to half the amount collected for rental of the second subject property located in Cardiff Hall in the parish of Saint Ann which said sum should be made payable to the claimant upon the execution of the Agreements for sale for the mentioned properties.
11. That the claimant is entitled to one hundred (100%) interest in the 1998 White Toyota Surf purchased in 1991

[3] Mrs. Iola Brown filed her Fixed Date Claim Form on the 3<sup>rd</sup> of March 2011 seeking the following declarations and orders against Mr. Brown and Miss Benain inter alia:-

1. A declaration that the property located at Huntley, Browns Town in the parish of St. Ann is the family home of the claimant and the first defendant.
2. A declaration that the claimant and the first defendant are each entitled to a fifty percent (50%) interest in the family home.
3. A declaration that the claimant and the 1<sup>st</sup> defendant are each entitled to a fifty percent (50%) interest in the property formerly registered at Volume 1149 Folio 170 of the Registrar Book of Titles, but now registered at Volume 1237 Folio 438 of the Registrar Book of Titles.
4. An order that the Registrar of Titles rectify the certificate of titles for properties registered at Volume 1273 Folio 438 in keeping with the declarations in paragraph 3 of the Court's Order.
5. A declaration that the claimant is entitled to a fifty percent (50%) interest in the property located at 77 Ricketts Drive, Cardiff Hall, Runaway Bay in the parish of Saint Ann and registered at Volume 1305 Folio 518 of the Registrar Book of Titles.

6. A declaration that the claimant is entitled to a fifty percent (50%) interest in the property located at Alexandria, in the parish of saint Ann and registered at Volume 1186 Folio 27 of the Registrar Book of Titles.
7. An order that valuation reports be prepared in respect of the properties registered at Volume 1305 Folio 518 and Volume 1186 Folio 27 of Registrar Book of Titles.
8. An order that the properties registered at Volume 1305 Folio 518 and Volume 1186 Folio 27 of the Registrar Book of Titles be advertised for sale by private treaty.
9. An order that the cost of preparing the valuation report be shared in proportion to the beneficial interest held by the owners of the properties.

### **The parties and their relationships**

[4] The defendant in both these claims, Karl Evans Brown, described himself as a businessman in his affidavit. He explained that at one time he was also a farmer and transported people to market to sell goods. He constructed a club on lands he had purchased at Nine Miles, St. Ann as well as a Shop/Supermarket. He operated and owned various businesses to include a Cambio – buying and selling foreign exchange. Although he said he was a successful businessman, he said he could only sign his name as he was not literate. Mr. Brown had sworn to two affidavits in this matter but by the time the matter came to trial he had died in January 2013. Thus the court had no opportunity to see and assess Mr. Brown but had to rely on the two affidavits filed in 2011.

[5] Iola Brown and Karl Brown met as she remembered it, in or about 1969. They lived in a common-law relationship for more than five (5) years before getting married in Ontario, Canada on August 15, 1976. Prior to getting married they had three (3) children and after marriage they had two (2) more. Mrs. Brown described herself as a businesswoman and said that both she and her husband became successful business people. She described how in the 1970's they earned from selling crop such as

cabbage, yam and potatoes which they planted on the land at Nine Miles. She said she helped to manage the club which was built in Nine Miles while her husband continued to farm. Up to 1991 she claimed she worked alongside her husband in some of the various businesses and in that year she went abroad and found employment as a civil servant in the U.S.A. She worked abroad until she retired in 2005.

[6] The marriage however was not without problems and although at first seeking to challenge the documents exhibited, she at the commencement of the trial admitted to them. They showed that in July of 1990 she filed a petition for dissolution of the marriage. In her evidence while being cross-examined when asked if it was not she who had abandoned her husband in the businesses after 1991 she responded that it was he who had abandoned her but if she had stayed she would “have ended up in Bellevue”.

[7] She described her husband as extremely hardworking – he was the head of the business and although he was not literate he could “handle his money very well”. She however, said he did not trust anyone and could be a contentious man. She also spoke of him as being abusive and was not reluctant in describing the abuse. She said whenever she tried to engage him in certain discussions concerning Miss Benain she “would get two fists in her jawbone.” She frankly told of how he would beat her up for Miss Benain all the time.

[8] Karl Brown and Merna Benain met in 1970 while she was still living at her mother’s home in Friendship District, Brown’s Town in the parish of St. Ann. Their relationship became an intimate one by 1972 as she remembers it. She was already mother to two (2) children and her first child with Mr. Brown was born in 1975 when she was 19. Together they had four children with one dying tragically in 2004. It is noteworthy that one child was born within one month of the time Lola and Karl got married in 1976. Mr. Brown referred to Miss Benain as his mistress and described their relationship as an “on and off relationship” from “about early mid 1970’s.”

[9] Miss Benain described herself as a businesswoman. This career she said commenced in about 1984 and before that she was a stay at home mother being looked

after by Mr. Brown. She said her working as a businesswoman came about by her working with Mr. Brown in the various businesses. She worked firstly with him in Alexandria and then in Browns Town. She was aware that Mr. Brown had another woman but said that initially she was unaware that other woman was his wife.

[10] As to when Miss Benain learnt Mr. Brown was not a bachelor is not very clear. In an early affidavit filed in 2010 she stated that Mr. Brown had separated from his wife in 1972 and had been living with her in a permanent arrangement since then which could be described as man and wife but not legally so. In a subsequent affidavit she explained that she had learnt of his marriage from her sister. At one stage under cross-examination she said it was in the early 1980's that Mr. Brown had told her he was separated. She later however said that it was in 1989 that her sister had told her. She also contended that it was when she commenced court proceedings in the Resident Magistrate's Court seeking maintenance from Mr. Brown that she found out he was married when the court told her that his attorneys advised that he was indeed a married man. This happened in 2004.

[11] Mrs. Brown seemed to have always been aware of the level of involvement between her husband and Miss Benain. She spoke of them working together in Alexandria at the time of filing for her divorce in 1999. At that time she, in her petition, spoke of his abusive nature. She spoke of his moving out of the matrimonial bedroom from May 1989 bringing the cohabitation to an end. At the time she said he was cohabiting with another woman who had borne him four children.

[12] Miss Benain seemed on the other hand largely unaware of the nature of the relationship between Mr. and Mrs. Brown. She denied knowledge of him being a farmer whereas Mrs. Brown had spoken of how she it was who had worked with him on the farm initially. Miss Benain knew little about the business in Nine Miles although she had been to the Club. She knew nothing about Mrs. Brown's involvement in the businesses in Brown's Town. Interestingly, their son gave evidence of his knowledge of Mr. Brown being married to lola from he was a boy going to school. Indeed the son professed of spending time at the home of his father's wife but he said he never shared this information with his mother.

[13] Mr. Brown in his affidavit spoke of the hostilities between his wife and Miss Benain as well as the two (2) sets of children. He said the relationship was far from smooth and amicable. He however spoke of how the relationship he had with Miss Benain became extremely hostile over several years with there being several Court cases between them in the Resident Magistrate's Court between 2000 and 2009. Indeed Miss Benain did not seek to admit or deny this assertion but chose to rely on documents she had filed in 2004 in the Resident Magistrate's Court seeking a protection order against Mr. Brown.

[14] These then are the parties who now seek to turn to the Courts for a determination of the interest in properties now in the name of Mr. Karl Brown.

### **The course of the proceedings**

[15] As already noted it was Miss Benain who commenced proceedings when she filed her Fixed Date Claim Form. She duly served her documents on Mr. Brown but he failed to acknowledge service or did he seek to participate in the matter then before the Court. He later explained this failure as being due to his then attorney being unable to appear for him and his inability to move around much because of his ill health.

[16] At the first hearing on the 18<sup>th</sup> of February 2010, the matter was adjourned to the 26<sup>th</sup> of April 2010 for another opportunity for service on Mr. Brown. He again failed to acknowledge service or enter an appearance. The matter was again adjourned and Miss Benain was ordered to file submissions. The next date was the 27<sup>th</sup> of October 2010 and on that date Miss Benain was able to secure a judgment in default and the Court granted orders in terms of the Fixed Date Claim Form as amended.

[17] With this judgment, Miss Benain is said to have, though her attorneys-at-law, had letters issued to tenants on the Browns Town Plaza. The letter advised them of the Court Order of the 27<sup>th</sup> of October 2010 and directed that all rentals were to be paid into an account in the names of Miss Benain and Mr. Brown and her attorney-at-law. This was to facilitate the sums being divided into equal shares in compliance with the Court Order. This letter was dated February 18, 2011. One of the tenants was Miss Kim

Brown, the daughter of lola and Karl. Miss Brown operated Kims' Go Go Club on the plaza.

[18] Miss Benain was moving to enforce her judgment. By the time the matter came to trial it was revealed that she had managed to sell the motor vehicle the court had declared her to have 100% interest in even while it was registered in the name of Mr. Brown.

[19] Mrs. Brown heard of the judgment and spurred her husband to take action while she moved to protect her interest and that of their children. By March of 2011 she filed her Fixed Dated Claim Form. She stated in her affidavit in support of this claim that she had found it 'curious' that she had not been named as a party given that she was still married to Mr. Brown. She felt that this had deprived her of the opportunity to assert her interest in the properties in which Miss Benain claimed a half share.

[20] She, at the same time, also filed a Notice of Application for Court Orders. She was seeking injunctions to restrain Miss Benain from taking any further steps to enforce the default judgment and from doing any business associated with the management of the properties. She joined both Mr. Brown and Miss Benain in her actions and it was later explained that this was felt necessary since in seeking to have her interest determined in all the properties, it was recognized that Miss Benain was registered as joint tenant in one of them.

[21] On April 11, 2011 Mr. Brown filed a Notice of Application for Court Orders seeking to have the default judgment set aside. He further sought to have the two matters in which he was named a defendant consolidated. He too sought an interlocutory injunction to restrain Miss Benain from taking steps to enforce the judgment or otherwise taking steps to dispose of any of the properties.

[22] As the matter proceeded through the courts, it had various adjournments and in January 2013, Mr. Brown died. By the 3<sup>rd</sup> of October 2013, the Administrator General was appointed administrator ad litem for the limited purpose of carrying on these proceedings on behalf of his estate.

[23] At the Pre-trial Review held on the 27<sup>th</sup> January 2014, orders were made which were to guide the procedure at trial. Significantly the affidavits of Mr. Brown were to be tendered into evidence. He had made two – the first in support of his notice of application for the default judgment to be set aside. The second was in opposition to one made by Miss Benain in her claim. Notably there was none in response to the claim or affidavit filed by Mrs. Brown.

[24] Another significant order was made which narrowed the issue before the court to that of the division of the commercial properties. It was ordered that the claims against the properties at Cardiff Hall and at Huntley were withdrawn, the parties consented to have the claims proceed without the matter of the property at Cardiff Hall and the property at Huntley being part of the dispute.

[25] It is in light of this order that it was somewhat perplexing that with no evidence led and no submissions made by the attorneys-at-law regarding those domestic/residential properties, Miss McFarlane during her closing submissions addressed the issue of Cardiff Hall. It is undisputed that the property had been registered in the names of Karl Brown and Merna Benain as joint tenants. Mr. Brown had in his affidavit indicated that this was done with a house subsequently constructed there on as he wanted “Merna to have a place in which she was legally entitled to an interest, as she was the mother of some of (his) children”.

[26] In her closing submissions Miss McFarlane sought to engage the Court in a consideration of whether the filing of the claim by Miss Benain and the application by her for the sale of the property with equal division of the proceeds there from constituted a severance/partition of the joint tenancy during Mr. Brown’s lifetime. Given the order made at the pre-trial review, clearly indicating what had been consented to by the parties, it is inappropriate and unnecessary for any such consideration to be embarked upon.

### **The properties in dispute**

[27] With the two homes removed from the dispute, there remain two properties – commercial in nature. The first parcel of land is located at Browns Town in St. Ann.

This property was originally registered at Volume 1149 Folio 173 in the Registrar Book of Titles. The certificate of title shows that the transfer of the property was done on the 6<sup>th</sup> of September 1984 with consideration money of one hundred and five thousand dollars (\$105,000.00). A bakery was in existence on this property at the time this purchase and transfer was made. Mr. Brown explained that there had been two titles for two (2) lots at the location. A decision was made that the lot with the bakery would be sold with a plaza being constructed on the remaining lot. This property is now registered at Volume 1273 Folio 438 as of the 1<sup>st</sup> September 1994. The plaza constructed thereon became known as Brown's Plaza. A supermarket, furniture store and hardware store seem to be among the shops operated from this location.

[28] The second property is located in Alexandria in St. Ann. This property is registered at Folio 1186 Folio 27 in the Registrar Book of Titles and is described as being part of Rose Bank formerly part of Rosetta. The Certificate of Title indicates that the transfer of the property to Mr. Brown was done on the 26<sup>th</sup> of November 1984 with consideration money being one hundred and thirty thousand dollars (\$130,000.00). A plaza was also constructed and it seems a supermarket and wholesale and a hardware store were also among the stores operated there. This plaza was named the B & B plaza and it is generally accepted that this stood for Brown and Benain.

### **The approach**

[29] It is proposed to approach this matter by considering first the case of Miss Benain looking at the basis of her claim, the law applicable to her claim and the evidence and submissions made in regards to it. The same method will be used in next considering the case of Mrs. Brown. A discussion/analysis with the application of relevant law will then be done to arrive at a conclusion. It will be appreciated that given the amount of evidence led in the matter, all will be fairly considered and only that deemed relevant will be outlined. The same also applies to the submissions of counsel and it must be indicated that the Court is grateful for the assistance given from the level of research done in the preparation and the clarity in the presentation of these submissions .

## **The case re Miss Merna Benain**

[30] In her first affidavit of October 2009 Miss Benain stated that she contributed directly and indirectly to all the properties and was entitled to 50% interest in each. Further she asserted she acted to her detriment in the acquisition of all the properties, both real and personal. She also stated that at all material times she acted to her detriment in relation to the acquisition and improvement of the subject properties and the respondent encouraged and approved of her actions knowing full well that it was both their intention for them to own and share the properties equally.

[31] In April 2010, Miss Benain filed a supplemental affidavit where she stated that her claim in respect of the properties was not based on her intimate relationship with the defendant but her contributions to the acquisition and improvement of the properties.

[32] In the closing submissions made on behalf of Miss Benain the issues identified for determination are:-

- A. Does the court have jurisdiction to hear Lola Brown's claim
- B. What, if any were the contributions of Lola Brown to the acquisition and improvement of the properties in dispute within the meaning of section 14 of the Property (Rights of Spouses) Act "PROSA".
- C. What, if any were the contributions of Merna Benain to the improvement of the properties in dispute?
- D. What was the common intention of Karl Brown and Merna Benain in respect of the ownership of the properties and was there detrimental reliance on that common intention by Merna Benain?

## **The law applicable**

[33] The criteria for the existence of a constructive trust on which Miss Benain relies was stated in the following terms by Sir Nicholas Browne-Wilkinson V.C. (as he then was) in **Grant v. Edwards [1986] Ch 638** at page 654:-

*“If the legal estate in the joint home is vested in only one of the parties (the legal owner) the other party (the claimant) in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated (a) that there was a common intention that both should have a beneficial interest; (b) that the claimant has acted to his or her detriment on the basis of that common intention”.*

[34] The passage of time has seen the developments of the law in this area to have progressed in a manner some may regard as being consistent with the changes in the economic and social realities. One of the most recent pronouncements in this area came in **Jones v. Kernott 2012 1 AC 776**. A summary of the current position was presented in the joint judgment of Lord Walker and Baroness Hale at paragraphs 51 and 52. The principles there outlined were described as being applicable in a case where a family home is bought in the joint names of a cohabiting couple who are both responsible for any mortgage, but without any express declaration of their beneficial interests.

[35] It is however another comment made in the decision that is useful to a matter such as the instant case. At paragraph 31 they had this to say inter alia:-

*“In deference to the comments of Lord Neuberger and Rimer L.J., we accept that the search is primarily to ascertain the parties’ actual shared intentions, whether expressed or to be inferred from their conduct. However, there are at least two exceptions. The first, which is not this case, is where the classic resulting trust presumption applies. Indeed this would be rare in a domestic context but might perhaps arise where domestic partners were also business partners: see Stack v. Dowden, paragraph 32.....”*

[36] In **Stack v. Dowden [2007] 2 All ER 929** at paragraph 32 Lord Walker made this instructive statement:-

*“I would (at the risk of confusion) add one qualification. The doctrine of a resulting trust (as understood by some scholars) may still have a useful function in cases where two people have lived and worked together in what has amounted to both an emotional and commercial partnership. The well-known Australian case **Muschinski v.Dodds** (1985) 62 ALR 429.....is an example. The High Court of Australia differed in their reasoning but*

*I find the approach of Deane J persuasive (1985) 62 ALR 429 at 458.....*

*“That property was acquired, in pursuance of the consensual arrangement between the parties, to be held and developed in accordance with that arrangement. The contributions which each party is entitled to have repaid to her or him were made for, or in connection with its purchase or development. The collapse of the commercial venture and the failure of the personnel relationship jointly combined to lead to a situation in which each party is entitled to insist upon realization of the asset, replacement of her or his contribution and distribution of any surplus”.*

[37] These observations are supportive of the view that where spouses are also involved as business partners and properties in dispute are commercial properties, the considerations when determination of interest in the business/properties becomes necessary must be different from those when a home/domestic property is in dispute. The issues which may arise and can be presumed to have been considered when the parties are seeking to secure a home may not be so relevant when it was a business enterprise that was being embarked upon. In the latter the factors that will be necessary to start a business are not usually influenced by the sort of emotions that come in to play when the parties are committing to live together. The general position remains however that it is the party whose name does not appear on the title for such a business/property who must prove the existence of a common intention that they should have a beneficial interest.

[38] It is recognized that the majority of authorities in this area of the law is concerned with the division of interest in matrimonial/family homes. One of the older authorities which considered the quality of evidence necessary in establishing an interest in a business enterprise is the Privy Council decision of **Stoeckert v. Margie Geddes (Jamaica) [1999] UKPC 52**. In that case the plaintiff had cohabited with Paul Geddes for eighteen years until he wrote her a letter abruptly bringing the relationship to an end. Shortly after, he married the respondent and the plaintiff was forced to launch her claim to secure an interest in his extensive business. Her claim was found at paragraph 6 to be:-

*“based on the proposition that there was an agreement., arrangement understanding or common intention between her and Mr. Geddes, arising from express discussions between them, that she should have a beneficial interest in his assets. Her case was that she acted in reliance on this state of affairs with the result that she became the beneficiary under a constructive trust of a share in those assets. She did not suggest that she had made any direct or indirect financial contribution to the acquisition of any of the assets.”*

[39] The Court noted that the judge at first instance had found that Mr. Geddes had given certain assurances which amounted to express oral agreement that she should have an interest in his assets. Further it was noted that he had given her shares in one of his business and had established in their joint names and for their benefit and not for convenience, three not insubstantial bank accounts of interest bearing status. He appointed her one of his executrices and bequeathed to her a life interest in one third of the income from his residuary estate in his will which was revoked by his subsequent marriage to someone else.

[40] It was also noted that the judge had decided that she had acted to her detriment on the basis of this common intention by providing “services which took the form of encouragement, discussion and advice given by her at Mr. Geddes request and without remuneration”. At paragraph 11 it was observed:-

*“After detailing the services provided, the judge found that Helga Stoeckert .....as pleaded by her served as “a confidante and business supporter to the defendant at every level, and was a sounding board in and about his business interests and decisions”. He concluded that, since Helga Stoeckert had rendered these services in reliance on the common intention that she would have a beneficial interest in Mr. Geddes assets existing during the period of their cohabitation, she satisfied the conditions for the creation of a trust in her favour in the assets of Mr. Geddes as they existed to 10<sup>th</sup> April, 1991”.*

[41] The Privy Council agreed with the Court of Appeal that no such agreement, arrangement, understanding or common intention that she should have a beneficial share in Mr. Geddes assets could be spelt out of the facts and matters relied upon by the judge whether viewed separately or cumulatively. Questions of detriment, reliance and the like did not arise for consideration.

### **The case for Merna Benain**

[42] It was in 1984, that Miss Benain said she launched her career as a business woman. This was some fourteen years after meeting Mr. Brown and three (3) children being born to them. For those fourteen (14) years she had stayed at home to raise the children – their three plus two she had before the relationship commenced. As she recalled it Mr. Brown already owned a shop and in effect maintained her; not allowing her to work. It was in 1982 to 1983 she convinced him that she wanted to have a business of her own.

[43] In her affidavit she explained that they had been approached by the owner of a bakery in Browns Town to purchase it and after discussions with her, Mr. Brown did so and proceeded to run the business. She was not involved in it as Mr. Brown continued to demand she stay at home. After a year into that business the decision was made by them to extend the building housing this bakery into a plaza. During the renovation she would visit the site to see how work was progressing. Mr. Brown yet again refused to let

her be an integral part of the process for the reason that she should stay home with the children.

[44] Thus it was in 1982 to 1983 after a heart to heart talk with him, when she indicated that she wanted to work and wanted her own place of business, that he relented. Instead of purchasing land for herself however, she was encouraged to build on land he had already owned in Alexandria. They planned what would be an ideal building and she said she was instructed to withdraw ninety-five thousand dollars (\$95,000) from her personal bank account. This amount she said was from monies she had received from her father who was in England at the time. The total amount she had received was \$100,000.00 which her father had given her to assist her in opening her business and in her affidavit she said she had received it for quite a while.

[45] The \$95,000.00 is the only amount she asserted she had given, which would qualify as her financial contribution to the businesses on the land in which she is now asserting an interest. In her affidavit she explained that having withdrawn the amount she had given it to Mr. Brown who used it to buy materials and hired workman to construct a one (1) storey building which housed a hardware store, a supermarket and wholesale, a storeroom and a restaurant.

[46] Under cross-examination it was her evidence that construction of this plaza commenced in 1983. By her recollection it cost around three to four million to build. The construction was completed in 1983 and the business commenced in 1984. The bakery was purchased afterwards, she later explained. The dates of the transfer of these properties to Mr. Brown suggested otherwise.

[47] Also under cross-examination she said it was in 1971-1972 that she had got the monies from her father. She expanded that he had left her an inheritance of some ten million dollars. At first she had said she received this inheritance in 1972 but when she recalled that her father had died in 1979, she clarified that it was in 1982 she had received it. The sums she had received in 1971-72 remained at \$100,000.00 but she expanded that it was in fact two withdrawals she had made and it was the entire amount she had contributed.

[48] Given the doubts that were cast on the existence of this money, in closing submissions Mrs. Scott highlighted what for them was a eureka moment to prove this assertion. Miss Benain had exhibited pages of a bank book opened in the name of Mr. Brown and her to prove that they had lived together at Silver Bullet in Runaway Bay, St. Ann. This was against the background that under cross-examination she had admitted to failing to reveal from which bank she had withdrawn the sums to give Mr. Brown. The submission made by Mrs. Scott was to draw attention to the fact that indeed the sum of \$100,000.00 had been deposited into an account opened with the Jamaica National Building Society in October of 1983.

[49] Mr. Brown in his response to the assertions of Miss Benain, denied any discussions with her about business and asserted that she was not even aware of when the construction was going on. He said at the time theirs was a visiting relationship as he was still in a relationship with his wife with whom he was doing business. He denied getting any money from Miss Benain but rather it was the National Commercial Bank from whence he secured a loan of two million dollars to start constructions. He said he was solely responsible for purchase of the land and construction of the plaza. There are mortgages registered on the title between 1986 to 1995 but none on the early years in the amount of two million (\$2M) dollars.

[50] It is perhaps useful to note that at the time of the preparation of Mr. Brown's affidavit it is apparent he and Miss Benain had gone through various court proceedings. It is already noted that there were claims of abuse and neglect leveled against him. Mr. Brown in his affidavit spoke of the fact that he believed Miss Benain had stolen money from the business to build houses and acquire a car for one boyfriend. Thus he admitted that this caused problems between them. Miss Benain was cross-examined about this matter and denied it. She maintained the monies she used to build one house were from her inheritance. She spent three and a half million in that venture. She however admitted the truth to Mr. Brown's assertion that she had been involved in court proceedings in the Supreme Court in respect of the house she had built and had been unsuccessful in that matter. In any event, Mr. Brown felt that Miss Benain had siphoned off millions of dollars from his several businesses even though he had been extremely

benevolent to her over the years. It is necessary to bear in mind that it is against this background of the problems that existed between Mr. Brown and Miss Benain that the contents of his affidavit must be considered. The fact that he died before the trial has meant that these assertions have not been tested under cross-examination and it can be viewed that the court has been deprived of the opportunity of fully appreciating and assessing any evidence he may have given.

[51] In any event, there is agreement between Mr. Brown and Miss Benain that the plaza in Alexandria did house certain stores. Miss Benain said it was she who rented the restaurant and operated the hardware and supermarket and wholesale. However, she said Mr. Brown demanded all the proceeds from the business so she would give him most of it but retained a small portion to assist in her personal expenses and the children's' expenses.

[52] Miss Benain had documentary evidence to prove her association with the business at Alexandria. She exhibited licences under the Licences on Trade and Business Act for her to carry on business as a retailer at premises at Alexandria dated May 1987 and July 1999. Also, there was exhibited a licence for B & B Hardware to carry on business as a wholesale dated July 1986. There was a Government of Jamaica general receipt for a retail licence for the period 1999-2000.

[53] In regards to B & B Hardware, she exhibited the Certificate of Incorporation showing that the business was incorporated on the 1<sup>st</sup> of July, 1987. Also exhibited were the Memorandum of Association and Articles of Association dated May 1987. She and Mr. Brown are listed as subscribers to the business along with their three (3) sons. The birth certificate of these sons were among the several other items exhibited by her. These certificates show that these boys would have been aged twelve (12) years and two (2) months; ten (10) years and nine (9) months and five (5) years and two (2) months at the time they signed as subscribers. Mr. Brown took 530 shares, Miss Benain took 200 shares and the boys took 90 shares each in the company.

[54] Miss Benain continued in her affidavit to describe how the business was expanded to a two (2) storey building following discussions between them. She said a

loan was obtained to do this along with proceeds from the supermarket, wholesale and hardware. She continued to operate the first business and was in charge of renting shops whenever necessary. Mr. Brown denied these assertions and stated that he never discussed the matter of expansion with her and used funds from his trading in foreign exchange along with funds from the business he operated in Brown's Town with his wife to do the expansion. He also said it was he who rented the shops and collected his own rent.

[55] Miss Benain asserted that in October 1993 Mr. Brown signed over half his interest to her. This she said was done after discussion whereby her contribution and success in the business operation were to be acknowledged. She exhibited a transfer and declaration of value which she said was executed by them. However, she explained that he had delayed the lodging of the documents as at the time the estimated taxes were high. Again Mr. Brown denied her assertions and countered that it was only half ( $\frac{1}{2}$ ) interest in the Cardiff Hall property that he ever intended to transfer to her. The intention was put into effect he noted when he put Miss Benain's name on the title for that property as a joint tenant.

[56] Miss Benain explained how she came to stop working at the Alexandria Plaza. She said that Mr. Brown was having difficulties with delinquent customers at his furniture store in Browns Town and she was asked to assist him for one weekend by writing letters and making calls to the delinquents. This weekend she said became two and a half years during which time she had to hire someone to run her business. Once the arrears were cleared she wanted to return to her plaza but Mr. Brown objected and placed chains on the doors of both the hardware and supermarket and wholesale. As a result foods in the supermarket and wholesale rotted and this formed the basis of her claim for the value of the goods. In her affidavit she said it amounted to over one million dollars. She exhibited a list of the foods destroyed, damaged and/or lost as a result amounting to a total of \$10, 780,490.00. This had happened in the year 2000.

[57] Mr. Brown acknowledged that he chained up the doors of the stores. He conceded that he had allowed Miss Benain to operate it since his wife was with him in Brown's Town at the time. He said he had found out in 2000 that Miss Benain had been

taking money from the shop to support her boyfriend and had been building a house for him. He also explained how he had become upset when he discovered that she had taken the boyfriend to the house in Cardiff Hall and that was why he went to Alexandria and locked down the business and rented the premises. Further he asserted that since the stock in the shop belonged to him as he had purchased them he had moved them to the stocks at the Brown Town supermarket rather than leaving them to rot.

[58] Since Miss Benain has sought to recover the value of the goods she said were lost, it is to be noted that under cross-examination she first seemed unable to recall exactly when the goods were lost, She said it was in the early 90's than said it was the mid 90's and then she settled on 2000 but she couldn't exactly recall when in that year. She said the list she compiled was from a list she had in a hard cover book of things that were damaged/spoiled at the time and not merely from memory. It is noted that her list is undated and refers to the total current price. Given that she had asserted that she had spent two years away from that business it is hardly surprising that she may not be able to say when and what things were lost.

[59] Miss Benain's evidence concerning the property at Brown's Town was not as extensive as that concerning Alexandria. She admitted not making any direct financial contribution to the acquisition of the original bakery located there. Her contribution in this regard was already noted to have been limited in the initial operation of the bakery because Mr. Brown had insisted she stay at home with the children. Similarly she was not involved in the expansion of the bakery into the plaza which became known as Browns Plaza. She said Mr. Brown used one of the shops as a supermarket and wholesale which he operated. It was stated at one point in her affidavit that it was the original bakery that was extended and improved into a plaza and at another that they had taken a decision to purchase land adjacent to the one that housed the bakery so that another plaza could be built. Miss Benain claimed that goods from the hardware store in Alexandria were used in the construction of the plaza. Funds from the businesses in Alexandria also were used.

[60] Mr. Brown explained otherwise saying the discussion was between he and his wife to sell the bakery and use funds there from to build the Plaza on an adjoining lot

since the land had two titles and was already divided into two lots. It was his wife and the children of the marriage who he said were involved in the operation of both the supermarket and the wholesale. There was also a furniture store in Browns Town which was also operated by his wife and children. When his wife left Jamaica it was one of his daughters who assisted him in operating that store. This assertion countered Miss Benain's evidence that she had gone to assist him recovering monies from delinquent customers of the furniture store.

[61] Having been locked out of the stores in Alexandria in 2000, Miss Benain said she told Mr. Brown she was willing to return to Browns Town and forget about Alexandria if she would be allowed to operate her own business from one of the shops. She decided to operate a boutique and used her own money to purchase stocks and operated the boutique successfully. Among her exhibits was a retail trade licence receipt for the period 2003 and 2004 for Hair and Things Boutique, Browns Town. This receipt is dated July 12, 2011. It was from her boutique that she said Mr. Brown operated an informal cambio service.

[62] Yet again, Mr. Brown denied these assertions. He maintained that she never operated a boutique in the plaza. He accepted however that he had a little section there from which he did operate a cambio business and this was done from the time the plaza was constructed.

[63] Miss Benain explained how she went to her business one day and found the locks had been changed, thus denying her access. She subsequently could conduct business only when Mr. Brown was there and she had to leave whenever he did. The doors of this store was later chained and Mr. Brown sold out all her items. She sought to explain this behavior by speaking of how Mr. Brown would get boisterous if and when she interacted with her customers in a friendly manner.

[64] Miss Benain said she opened yet another business on the plaza, this time it was a restaurant which was in honour of their daughter who had died in 2004. This restaurant she opened in December 2004 she said with the permission of Mr. Brown. The restaurant was named Crystal Caterer Restaurant. There is exhibited a receipt for

a licence in respect to a Crystal's Catering and Restaurant Brown's Plaza for 2005 and 2006. This receipt is also dated July 12, 2011. The doors to this business was again chained up by Mr. Brown.

[65] Mr. Brown admitted opening the restaurant in about 2004 but said it was opened using his own funds. He said it was he who told the claimant to operate it and he agreed that he did eventually lock it down but this he said was due to the fact that Miss Benain had been disrespectful and had her boyfriend coming to the premises on a daily basis. He also claimed that a one point she had taken money from the business and gone away for three (3) weeks.

[66] The evidence of Mrs. Brown will be considered more fully when her case is being reviewed. Suffice it to say that Mrs. Brown said it was she and Mr. Brown who had been approached about the property being sold in Browns Town. They had discussions and agreed to buy it using their joint resources. The property in Alexandria she knew was bought by her husband and she said she was certain it was from monies earned in their business. Under cross-examination she admitted that she was not involved in the business at Alexandria and confessed being aware that he operated it with Miss Benain.

[67] Miss Benain did not rest her contributions on financial matters only. She stated that they included business advice to Mr. Brown, visits to professionals and workmen to deal with legalities and various issues required for the various properties, design and furnishing advice, daily site visits during construction and also entrusting him with the proceeds of her business to be re-invested into the businesses over the years. She also said she was the 'brain' or driving force behind his success and many of the contracts he entered into, she assisted with the negotiation and settlement of same.

[68] Miss Benain called three (3) witnesses on her behalf and the affidavit of a fourth was admitted into evidence. The evidence of these witnesses could speak of what was observed by them concerning the joint hard work and apparent commitment to each other by Mr. Brown and Miss Benain. One witness was the second son of Miss Benain, another was a son of them both. Their son was unable to assist the court as to contributions made by her in the business other than seeing them work side by side.

He just figured they had built the plaza at Alexandria together. Her son could speak about how Mr. Brown spoiled his mother and took care of her financially and otherwise. He also spoke of her being in charge of operation at Alexandria while Mr. Brown would run the business at Brown's Town. It is not clear from his evidence on what factual basis he was able to say he could attest to the fact that there was always the understanding between his mother and Mr. Brown that the properties belonged to them both.

### **The Submissions**

[69] In their submissions in considering the issue of whether there was a common intention that Miss Benain and Mr. Brown would share ownership of the properties and what, if any was the contributions of Miss Benain, Mrs. Scott commenced by reviewing the applicable law. This meant reviewing cases such as **Jones v. Kernott [supra]**; **Alison Binger v. Michael Ranger [2014] JMSC Civil 9**; **Stack v Dowden [supra]**. It was also recognized from the outset that in establishing the existence of a common intention to share the property the analysis usually starts with **Lloyds Bank plc v. Rosset [1991] AC 107**.

[70] It was noted however that in **Abbott v. Abbott [2007] UKPC 53** Baroness Hale of Richmond stated at paragraph 19:-

*“The Eastern Caribbean Court of Appeal appears to have attached undue significance to the dictum of Lord Bridge in Lloyds Bank, 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”.*

[71] The argument then continued that the court have also notwithstanding how the initial acquisition of the property was done considered whether post acquisition contributions may in certain circumstances alter the beneficial ownership in a property. Support for this proposition was found in **Arthur Aspden v. Joy Elvy [2012] EWHC 1387** and in our courts from **Dean Hinds v. Janet Wilmot Claim No. 2009 HCV 00519**.

[72] From this perspective, it was then noted that if the court decides that there was a common intention between the parties it must turn its attention to the conduct of the parties to see if there was detrimental reliance on that intention. The case of **Clinton Campbell v. Joyce McCallum and Renea Whitemore Claim No. 2003 HCV 01825** was noted where Campbell J cited with approval the reasoning of Lord Walker in the decision of **Gillette v. Holt and Anor 2001 Chan 2010**. At paragraph 32 Campbell J stated:-

*“The overwhelming weight of authority shows that detriment is required. But the authorities also show that it is not a narrow or technical concept. The detriment need not consist of expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances”.*

[73] The other legal principle that it was opined the court should have regard is that of proprietary estoppels. The text **The Law of Real Property** was referred to for the definition given to the term as the equitable jurisdiction by which a court may interfere in cases where the assertion of strict legal rights is found to be unconscionable. The equity arises once three things are established – 1) encouragement (active or passive) or acquiescence; 2) detrimental reliance and 3) unconscionability. The case of **Aspden v. Elvy [supra]** was also relied on in support of this approach.

[74] The submission then turned to consider the evidence and noted firstly that at different points during the course of the relationship Mr. Brown and Miss Benain discussed the properties and made certain decisions. Matters noted included the heart to heart discussion concerning her desire to open her own business followed by the decision to build on the Alexandria lands; the decision to use her \$100,000.00 to build; the decision to expand obtaining a loan from NCB to construct the 2<sup>nd</sup> floor; the naming of the property B & B plaza for Brown and Benain. The evidence of Nigel Gaynor son of Miss Benain of his hearing more than one discussion between Karl and Merna that the properties were theirs was also noted.

[75] In their submissions, there was great reliance on affidavits that had been filed by Mr. Brown in divorce and maintenance proceedings that had been commenced by Mrs. Brown. The admission of these documents had been challenged by opposing counsel who had argued that they had purportedly been signed by Mr. Mr. Brown without the relevant acknowledgement of the fact that he was unable to read. Thus there was no certificate in the jurat that the affidavits had been read to him, that he had understood and had signed in the presence of whosoever had read it to him. Without this certificate, the affidavit should not be used in evidence, however, it was ruled admissible not for truth of its contents. The reliance on these affidavits however seemed to have been precisely because truth of the assertions therein would be beneficial to the case being presented on behalf of Miss Benain and in opposition to the case of Mrs. Brown. To avoid any possible suggestion that the affidavits were being accepted for its truth, I will not consider or review any of the references made to them.

[76] The court was asked to accept the evidence of Miss Benain as to the discussions and circumstances surrounding the construction and operation of the Alexandria plaza. Further it was urged that as regards the Brown's Town Plaza, Miss Benain's contribution was set out to include business advice, visits to professionals to complete legalities, visits to workmen to deal with issues, input into the designs of the building, daily site visits during construction, proceeds from her businesses; negotiation of contract and playing an active role in Karl Brown's businesses.

[77] Mrs. Scott returned to considering some law as she sought to urge the court that the issue of when Miss Benain found out that Mr. Brown was married was irrelevant to the issue to be determined. She noted the decision of **Bernard v. Joseph [1982] 3 All ER 162** as supportive of her assertion that the fact the Mr. Brown and Miss Benain shared an intimate relationship outside of marriage does not preclude the court from finding that they were business partners and that their conduct showed an intention of permanence in their affairs.

[78] In **Geary v. Rankine [2012] EWCA Civ. 555** the approach of the English Court of Appeal in dealing with a property purchased for business purposes by the man which was eventually run by the woman was noted. In that case the court was said to have

found there was no business partnership inter alia because there was no business account in joint names and the facts showed instead a strong intention for the woman to work in the business. The court however held at paragraph 11 that –

*“a family or quasi family relationship was not necessarily incompatible with the relationship of business partner ..... a partnership can be found in an agreement inferred from conduct’*

and further opined at paragraph 18 that *‘the burden (to establish a common intention trust) is all the more difficult to discharge where, as here the property was bought as an investment rather than as a home’*.

[79] It was submitted that notwithstanding that difficulty, the instant case was distinguishable. It was opined that the burden had been discharged given the discussions held about the construction of the plaza, the fact that they held a joint business account at NCB from which the mortgage was paid, the fact that they incorporated a company together to run the hardware and that there were numerous business licences to show that Miss Benain was operating the businesses at Alexandria and others at Brown Town. It was also pointed out that Mrs. Brown admitted knowing that Miss Benain and Mr. Brown were operating the business together.

[80] The court was engaged in a discussion on the true status of the love triangle. This was to submit that there was a clear preference for Miss Benain and it was she who was working at Mr. Brown’s side to establish the businesses now in dispute. Mrs. Brown had decided to leave Jamaica whereas Miss Benain had turned in her permanent resident card for the USA and “stayed by Karl’s side because of her love and commitment to their family and their businesses”

[81] In acknowledging that the issue of credibility was one with which the court had to grapple, it was pointed out that Mrs. Brown had admitted that she had lied in documents filed in previous proceedings. Further it was submitted that the evidence of Mr. Brown should be viewed from the perspective that the default judgment had already been obtained and he and his wife had “strong motivation to have that judgment set aside.”

[82] It was the assertion that Miss Benain should be accepted as a witness of truth especially given her admission that she had nothing to do with the acquisition of the properties and that she never worked in the bakery when it was operational. Further it was urged she supported her claim with documentary evidence which operates to buttress her position.

[83] The concluding comments made on behalf of Miss Benain bears repeating:-

*“Merna Benain relationship with Karl Brown up to his death in January 2013 resulted in the significant improvement of the properties in question. Merna Benain had been guilty up until recently of a certain amount of naivety in respect of her belief that Karl Evans Brown had her best interest at heart. This naivety has caused her to act to her detriment in respect of the properties and her various business endeavours over the year. The court is being asked not to penalize her naivety but consider all the circumstances and find that she did act upon the common intention between herself and Karl Evans Brown that she should share in the properties they acquired to her detriment. We submit that she should therefore be given 50% in both Alexandria and Brown’s Town Plaza.*”

[84] It was acknowledged in the submissions made on behalf of Mrs. Brown that with the order setting aside the default judgment and Mrs. Brown withdrawing her claim to an interest in the Cardiff Hall house, no further issues were joined between her and Miss Benain. The remaining claims are those by Mrs. Brown and Miss Benain and are against the Estate of Karl Brown. This did not prevent Miss McGregor from advancing submissions commenting on the case brought by Miss Benain since it is recognized that the decision made about that case would impact the claim of Mrs. Benain.

[85] The assertion was made that the “story of Karl Brown’s life would be incomplete without reference to Merna Benain. She was the ever-present mistress who enjoyed Karl Brown’s benevolence and eventually claimed an equal interest in the properties acquired during the course of his marriage to Lola Brown”. It was also recognized that

Mr. Brown did not defend Mrs. Brown's claim as both his affidavits were filed in response to Miss Benain .

[86] The statement of Baroness Hale in **Stack v. Dowden** [supra] was referred to as the classic statement of the law in relation to such a claim. It was submitted that the direction from the case is clear:

*".....the starting point where there is sole legal ownership is sole beneficial ownership.....The onus is upon the person seeking to show the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all."*

[87] It was recognized and opined that since the properties are registered in the sole name of Karl Brown the evidence presented on behalf of Miss Benain must be assessed in light of the **Lloyd's Bank PLC v. Rossett** test. The admission by Miss Benain that she did not make a direct contribution to the acquisition of either property is thus significant. Further Miss McGregor noted that Miss Benain also admitted she never worked on the farm, in the businesses at Nine Miles or in the Bakery and those were the businesses that preceded the establishment of the plazas in Brown's Town and Alexandria.

[88] It was submitted that it is the plaza at Alexandria on which Miss Benain had hinged her claim by saying that she invested her inheritance from her father into the construction of the first floor of the building. It was argued that the evidence of that inheritance was dubious at best and patently fictitious since the court must be left with questions as to when Miss Benain's father actually died; how much money did she really inherit; where was that money held and how much was in fact given to Mr. Brown. The conclusion was that Miss Benain's allegation as to direct financial contribution should be rejected for the several uncertainties surrounding it and for the absence of any documents to prove that the funds did exist.

[89] On the question of whether Miss Benain made any indirect contributions towards the maintenance or improvement of the properties, it was noted that she alleged working in the various businesses; some were her own and the income from those businesses was used to finance additional construction and to pay the various mortgages. However, the evidence of Mr. Brown was that the businesses were his and that he controlled the money from the businesses and deposited them in an account held by Mrs. Brown and himself. It was noted that both women said that Karl Brown controlled all the money and from all the accounts he spent it as he chose to.

[90] It was urged that careful note should be made that Miss Benain had no claim to an interest in any of the businesses. There was no proof that any of those businesses had a bank account or any assets at all or for what period they may have traded. It was opined therefore that since her claim was for an interest in real property, the assets base of the businesses became irrelevant.

[91] It was boldly asserted that Miss Benain was unable to prove any agreement or arrangement between her and Mr. Brown as to ownership of the properties, there was no evidence from which it can be inferred or imputed that a common intention existed for her to share in the properties.

[92] The final submission in this area concerned the question of proof of reliance detriment. It was submitted that Miss Benain did not prove that she relied on any representations from Mr. Brown relative to a promised interest in property to her detriment. On the contrary, it was argued that based on all the evidence she was a lavishly maintained mistress who had been given opportunities to run businesses owned by Mr. Brown. These opportunities were taken away at his whim with him locking her out of the businesses. The question was posed as to if those were indeed her business ventures why did Miss Benain not make her claim to them when those acts were committed.

[93] The submissions made was buttressed by the case of **Thompson v Humphrey [2010] 2 FLR 107** where it was opined that the court made clear that an intention to share the use of property is very different to an intention to share the ownership of a

property. This case was highlighted as being an example of the application of the test in the **Lloyds Bank Plc** case.

[94] It was further submitted that the situation in which Miss Benain finds herself is no different than that in which Helga Stoeckert found herself as set out in the Privy Council's decision in **Stoeckert v Geddes [supra]**. After reviewing the facts of that case and noting similarities with the instant case, it was submitted "that this court being bound by the ruling of the **Stoeckerk** case ought to find that Merna Benain being "spoilt" by Karl Brown, and being the recipient of gifts and a joint holder on an account, has not overcome the threshold of proving that she has a beneficial interest in either property.

[95] Another case which was relied on for facts which was argued closely resembled the facts of this case in that it involved a husband, wife and an intervener who had been the husband's mistress for many years. The decision comes from Hong Kong Court of Appeal **Z v X (C - intervener) [2010] HKCA 480** which although admittedly not binding on this court, was noted as taking an approach which was commendable. The court there dismissed the claim of the mistress due to the absence of evidence of contribution.

[96] The submissions made on behalf of the estate of Karl Brown included the noteworthy comment that the fact that there are two cases in which he is named as a defendant is truly reflective of the double life that he lived, and the manner in which he conducted himself. He was held out to be a maker of his own rules who took care of his women and children most lavishly, and was for the most part an indulgent benefactor.

[97] It was argued that there was no evidence of Ms. Benain acting to her financial detriment, or proof of her suffering any financial loss instead it was obvious that she benefitted financially from her relationship with Mr. Brown. The approach taken in the submissions made by Miss McFarlane was therefore to extensively assess Ms. Benain's testimony to support the contention that it was so riddled with inconsistencies, misstatements and outright lies that it should be rejected and described as unreliable.

Of note was the evidence she gave in respect to her knowledge of Mr. Brown's marital status and their living arrangement. Further, her evidence in relation to her financial contribution was argued to be even more contradictory.

[98] It was stressed that in any event the monetary contribution admitted to the \$95,000.00 or \$100,000.00 ought to be considered *de minimis* given the cost of constructing the Alexandria Plaza. Her assertions as to other non-monetary contributions were noted but the sum total of it was held to be failing to make out a case of constructive or resulting trust against the defendants' estate.

[99] The cases of **Grant v Edwards** [supra] and **Stoekert v Geddes** [supra] were also relied on. The comment of Millet J in the case of **Windelov v Whitehall [1990] 2 FLR 505** was noted. He was quoted as saying:

*"To succeed therefore it is not sufficient for the plaintiff to persuade me that she deserves to have an interest, she must satisfy me that she already has it."*

[100] In supplemental submissions made on behalf of the estate it was raised that the court had no jurisdiction to entertain either claims. As regards the one brought by Ms. Benain it was argued that this was as a result of the extinguishment of her right pursuant to the Limitation of Actions Act. This submission was to my mind inappropriately raised at the point at which it was being urged. This is a defence which is deemed waived once the matter proceeds through trial and after all evidentiary matters has been completed. The response on behalf of Ms. Benain to this argument relied on the comments by Batts J in **Alvin Ranglin v Berben Ltd [2013] JMSC Civ 111** where at paragraph 9 he said *inter alia*:

*"It is important to recall that the statute of limitations bars the remedy not the right. That is the cause if action remains valid but relief is barred. ....the claimant is entitled to succeed until and unless the defendant pleads a statute of limitation. A time bar does not mean there is no reasonable cause of action."* See generally **Stuart Simes A Practical**

### The case for lola Brown

[101] The significant starting point in the evidence for Mrs. Brown is that it was she who Mr. Brown married in 1976 and this was even after he was in a relationship with Merna Benain who was then pregnant with their second child. She remained married to him until his death. Mrs. Brown thus grounded her claim initially in the provisions of the Property (Rights of Spouses) Act "PROSA" sections 6, 11, 13, 14, 21 and 23.

With the withdrawal of a claim for her interest in what was to be regarded as the family home, the reliance is on sections 11 and 13.

### The Law

[102] PROSA section 11 states *inter alia*:

- (1) *"Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, funds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme court or at the option of the applicant irrespective of the value of the property in dispute to the Resident Magistrate of the parish which either party resides.*
- (2) *The Judge of the Supreme Court or the Resident Magistrate as the case may be may make such orders with respect to the property in dispute under subsections (1) including an order for the sale of the property.*
- (3) *A spouse may make an application to the court in respect of any title, interest or rights to property which had been in the possession or under the control of the other spouse but has ceased to be in the possession or under the control of that other spouse."*

[103] In the Supreme Court's decision of **Paulette Gordon v Vincent Gordon** and **Rohan Alphanso Gordon Claim No. 2007 HCV 04845**, Sykes J conducted a useful analysis of this section. At paragraph 10 he said *inter alia*:

*"The key word in section 11 is "subsistence." An application can be made under section 11 by a spouse or any other person only during the subsistence of the marriage or cohabitation. Subsistence means continuing to exist or to live."*

[104] The other provision of PROSA on which Mrs. Brown relies is section 13 which provides the time when application may be made to court for division of property. Section 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 or separation or such longer period as the court may allow after hearing the applicant.*

[105] These "trigger events" or "trigger mechanism" in section 13(1) can be related to section 11. Indeed in **Gordon v Gordon** [supra] Sykes J did just that and stated *inter alia* at paragraph 12:

*"It would appear that for purpose of maintaining separate circumstances of operation for sections 11 and 13 then a decree nisi must be regarded as making the marriage no longer subsisting for the purposes of section 11, even though the marriage has*

- not been fully dissolved and will not have been completely dissolved until the decree absolute.*
13. *Going on to the second trigger event, its obvious that a decree of nullity clearly means that the marriage no longer subsists. This needs no further comment or analysis.*
  
  14. *Moving now to the third trigger event. It has to be noticed that there are two conditions that must be met. There must be (a) the separation and (b) no reasonable likelihood of reconciliation. It is entirely possible that the parties may separate but they have not separated long enough for the court to conclude that there is no reasonable likelihood of reconciliation. Does this mean that if the spouses separate but there is uncertainty over the second part of the criterion that that court would not have jurisdiction? The answer is that the court would have jurisdiction because the marriage would still be subsisting and so the application can be made under section 11 because section 11 does not have any precondition that has to be met.”*
  
  15. *The fourth trigger event speaks for itself and does not require much analysis.”*

[106] The other relevant provision of PROSA is section 14:

- 14(1) *Where under section 13 a spouse applies to the court for a division of the property, the court may –*
  - (a) *.....*
  - (b) *Subject to section 17 (2) divide such property other than the family home as it thinks fit, taking into account the factors specified in subsection (2).....*
  
- (2) *The factors referred to in subsection (1) are –*
  - (a) *The contribution, financial or otherwise directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution ceased to be property of the spouses or either of them;*

- (b) *That there is no family home;*
- (c) *The duration of the marriage or the period of cohabitation;*
- (d) *That there is an argument with respect to the ownership and division of property;*
- (e) *Such fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.*

3. *In subsection (2)(a) contributions means –*

- (a) *the acquisition or creation of property including the payment of money for the purpose.*
- (b) *The care of any relevant child or any aged or infirm relative or dependent of a spouse.*
- (c) *.....*
- (d) *The giving of assistance or support by one spouse to the other whether or not of a material kind including the giving of assistance or support.....*
  - (i) *.....*
  - (ii) *aids the other spouse in carrying on of that spouse's occupation or business.*
- (e) *.....*
- (f) *The payment of money to maintain or increase the value of the property or any part thereof.*
- (g) *.....*
- (h) *The provision of money, including the earning of income for the purposes of the marriage or cohabitation.*

(4) *For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.*

## **The Evidence**

[107] Mrs. Brown explained how she worked with her husband as they lived together from even before they were married. She said they planted cash crops such as cabbage, yam and potatoes and from those earnings was able to build their home, a shop and a bar in Nine Miles, St. Ann. She managed the shop and club while Mr. Brown focussed on farming.

[108] The income derived from these endeavours were placed in their joint bank accounts at Jamaica National Building Society and at the Bank of Nova Scotia Jamaica Limited. At some point farming became the main income earner while she raised their family but eventually she returned to the operations of the shop and club. She said they were able to save significant amounts of money.

[109] She said it was she who discussed and decided with Mr. Brown that buying and operating the bakery would be an ideal business opportunity. She said that the purchase was facilitated from their joint funds. They later extended the bakery and used parts of the building to house a hardware, furniture and wholesale store. The success of that business put them in a position to acquire more lands and on them they built a plaza. Loans were acquired from National Commercial Bank and Bank of Nova Scotia to finance the construction. Endorsements on the title exhibited for this property seem to support this taking of mortgages on the property. She maintained that it was she and Mr. Brown that spent almost every day on the construction site. Upon completion, the shops there on were rented with the rental income deposited in their joint bank accounts.

[110] In her affidavit, Mrs. Brown had asserted that because of the slow down in the business it was decided that she should go to the United States of America to work and send money to assist with household expenses. However, under cross-examination, she said that Mr. Brown had abandoned her in 1991. When she was pressed on the matter of sending money home for the business it was apparent that she was earning a small amount and it was not clear as to how much she would have sent home.

[111] As the evidence unravelled under cross-examination by Mr. Scott it became apparent that after 1991 the marriage was not as strong as it was portrayed to be in her affidavit. Indeed, she filed for divorce and sought ancillary relief by way of maintenance for herself and her children in 1998 and 1999 respectively. It is to be acknowledged that Mrs. Brown's credibility took a downward spiral when she first sought to deny the papers exhibited as hers which were filed in those proceedings. When confronted as the trial was to commence by the attorneys-at-law to whom she would have given instructions in those matters they were conceded as being of her making. She, however, under cross-examination when pressed on the contents of those documents, claimed to having lied in them.

[112] It is noted that in relation to the bakery initially operated by them, it was admitted by Mrs. Brown that when the property was sold sometime in the 90's, her husband gave her seven hundred and fifty thousand dollars. It was suggested to her that this figure represented half of the proceeds but she refuted this and insisted that it was sold for 12 million dollars. She did, however, accept the suggestion made by Miss McFarlane that this sale would have been from in 1999.

[113] Mrs. Brown spoke of the property in Alexandria and indicated that she was certain it was bought with the money they earned together in their business. She said she believed that the plaza constructed there was done with money they had earned from the said business. Under cross-examination she admitted that she had never been involved in the business at Alexandria and had little knowledge about it. She was aware of Miss Benain working there but she said it was as a cashier. She agreed that she did not contribute to the business there from 1991 to 1998. She expressed the opinion that it was "the same money from Nine Miles coming all the way down" - it was the same money that was used from the bar and supermarket and farm that was used to set up the business in Alexandria.

[114] In her affidavit, Mrs. Brown had asserted that upon leaving Jamaica she would return home for annual vacations at which time she would work in the business. This she clarified meant she worked in the bar until 1989. Further clarification came when she said that in 1999 there was an incident that caused her to lose an eye which resulted in her not visiting Jamaica very often thereafter. Indeed she was not sure how frequently she came and estimated it may have been two or three times between 1999 and 2008.

[115] She also admitted that when she did come, she stayed at Huntley and that Mr. Brown visited but did not live there. She was aware that he may have then been living at the house built at Cardiff Hall which she knew was intended to benefit Miss Benain.

[116] One other significant admission from Mrs. Brown was in relation to her agreeing to the suggestion that between 1991 and 2012, when Mr. Brown died, she was not involved in operations of any of the business. Further, when asked about her involvement when she eventually returned home in 2008, she said she was not involved and she could not even recall what a business was then in operation.

[117] She also acknowledged that there was no evidence of any business that was incorporated by her and Mr. Brown. There were no documents that could support any assertion that she was involved in any business operated by Mr. Brown. This was against the assertion of Mr. Brown in his affidavit that they had acquired some properties together and some from his own resources. It has already been noted that Mr. Brown did not respond to the affidavit of his wife. He, however, maintained that he acquired most of his property jointly with his wife who he said worked extremely hard throughout the years. Mrs. Brown herself was unable to identify which properties would have been acquired solely by her husband.

Witnesses were called in support of Mrs. Brown case. Their evidence was limited to seeing Mrs. Brown working in the bakery in the 1980's before she migrated. Indeed any suggestion on their part to the contrary would run against the evidence of Mrs. Brown

herself. Further it was noted that the witnesses seemed to have recognised that it was Mr. Brown who could properly be considered their employer.

### **The submissions**

[118]] The submissions made on behalf of Mrs. Brown identified that she was relying on section 11 and 13 of “PROSA” and noted that the fact that the claim was being brought under those sections meant that reference must be made to section 14.

[119] In relation to the factors to be considered at section 14(2) of “PROSA”, the following was noted:

- (i) That there is a family home at Huntley.
- (ii) The marriage is not one of short duration. The marriage started in 1976 and subsisted until Karl Brown died in 2013.
- (iii) There is evidence of an agreement between Lola and Karl Brown in relation to the properties.

[120] It was submitted that as defined in section 13(3) the contributions Mrs. Brown made were:

- (a) The acquisition or creation of property including the payment of money for that purpose. The bakery was registered in the joint names of Karl and Lola Brown and the proceeds from its sale financed the construction of Brown’s Town.
- (b) The care or Karl Brown’s children including those born to Ms. Benain.
- (c) The giving of assistance or support to Karl Brown including the giving of assistance or support which helped him to carry on the various businesses, managing the household they shared and by performing household duties.
- (d) The provision of money, which was her share of the income from the various business ventures.

[121] It was opined that it would be unjust to assign Mrs. Brown less than a fifty percent (50%) interest in both properties. It was argued that this court should not be persuaded to make any other order simply because Mr. Brown “held the purse strings and directed the women and children in his life by shuttling them to and from various homes as he chose and continuing to live in the two homes.” The court was urged to adopt an approach that involved not departing from the formula of equality of division of the two properties and especially because the marriage was of long duration.

[122] It is noted that there was little submission made in attempting to bring this matter within the trigger events listed in section 13 of PROSA. It was mentioned that Mr. Brown had taken no steps to defend the claim and protect his or Lola Brown’s interest in the properties and this inaction endangered the properties. This was seemingly alluding to section 13(1)(d). Indeed there was absolutely no evidence given on this issue by Mrs. Brown.

[123] In any event, in the submission made on behalf of Miss Benain extensive discussion was embarked on into what amounts to dissipation of matrimonial assets. The discussion was indicative of much research done in the area. However while the efforts made to address this area is acknowledged by the court, in the final analysis it is not to my mind necessary to take this into consideration.

[124] The submissions made which were more pertinent was in this area of the trigger events and questioned the matter of whether Mr. and Mrs. Brown can be viewed as having separated and then the issue would be when did the twelve (12) month period start to run. This was done in a view to addressing the question of whether the court had jurisdiction to hear Mrs. Brown’s claim.

[125] The fact that the Court of Appeal in **Annette Brown v. Orphiel Brown SCCA 12/2009** delivered on the 26<sup>th</sup> of March 2010 had taken the view that a judge was entitled to entertain the jurisdictional point at trial was duly noted. The reasoning of Edwards J in **Deidre Ann Hart Chang v. Leslie Chang Claim No. 2010 HCV 03675** was also highlighted as being supportive of this position.

[126] **Brown v. Brown** [supra] was also referred to for settling the issue as to whether PROSA has retroactive effect. The words of Morrison JA at paragraph 93 were cited as approving the conclusion that the Act does have retroactive effect. He is quoted as saying:-

*“...construing the Act as a whole there are a number of indicia, some larger than others that compel the conclusion that it was intended to have retrospective effect”.*

[127] Further it was submitted that the Court of Appeal in the joint decision of **Angela Bryant-Saddler v. Samuel Olive Saddler and Fitzgerald Hoilette v. Valda Hoilette et al 2013 JMCA Civ. 11** gave useful guidance on the approach to be adopted when the trigger events preceded PROSA.

[128] The position advanced in attacking the validity of the claim brought by Mrs. Brown was that she had been separated from Mr. Brown for some almost thirty (30) years before she showed an interest in preserving her share of the properties. It was highlighted how in acknowledging that Mr. Brown had abandoned her it was pointed out that in her petition for divorce she had said they had separated in or around May 1989 and he was then cohabiting with another woman. Other bits of evidence were reviewed and the conclusion was posited that although married, the marriage between Lola Brown and Karl Evans Brown was on paper only and the parties were separated not only by distance but in the fullest sense of the word. As such it was concluded that the requisite twelve (12) month limitation period envisioned in sections 13 (1) (a) (b) and (c) would have run its course some time ago.

[129] In considering the applicability of section 11 of “PROS”, the argument was made that the questions that may have arisen about title or possession of the properties would have arisen from in the 1970’s and certainly by 1989 before Mrs. Brown had migrated to the U.S.A. Thus the relevant limitation period of twelve (12) years would have run its course and she would be out of time to raise the issues. This was in reference to

section 3 of the Limitations of Actions Act making twelve (12) years the time within which actions in respect to rights to land will accrue.

[130] The Privy Council decision of **Wills v. Wills [2003] UKPC 84** was held out as being instructive. Whilst acknowledging that that decision turned on a question of perceived abandonment of one's interest in property held as joint tenant, this court was urged to find that any such interest Mrs. Brown had, would have been extinguished by Karl Brown's management of the businesses and properties to her exclusion from at least May of 1989.

[131] There was also a challenge mounted as to whether Mrs. Brown would be perceived as having made any contributions consistent with that outlined in section 14 of PROSA. A review of relevant bits of evidence was done to support the contention that Mrs. Brown was not involved in the acquisition, maintenance or improvement of Brown's Town Plaza and that she knew nothing about the acquisition, maintenance or improvement of Alexandria Plaza. It was also highlighted that Mr. Brown in his affidavit did not support her assertions about financial contributions by way of remittances. He did not support her evidence as to the existence of joint accounts with her. Significantly, he did not specify which properties were acquired by their joint efforts and which by his sole efforts .

[132] It was conceded that Mrs. Brown may have in fact worked in Mr. Brown's early business endeavors with the club, shop and bar at Nine Miles and perhaps in the Bakery. However, there was no evidence that she was an equal business partner. There was no proof of her assertions of making financial contributions upon migration neither was there support of her assertions of her involvement after that time. The court was asked to find that Mrs. Brown was not an equal partner in the business of Karl Brown. Any contributions to the acquisition of property it was opined should be limited to the period prior to separation provided she is able to surmount any of the limitation challenges which were raised.

[133] On behalf of the estate of Mr. Brown it was firstly opined that Mrs. Brown had made a valiant attempt to deceive the court as to the extent of her efforts in respect of

the acquisition, contribution and maintenance of the assets and also in relation to the quality and duration of her relationship with Mr. Brown. It was interestingly seemingly conceded that the statements made by Mr. Brown in his affidavits were primarily geared towards defending himself against Miss Benain and to reverse the position where she had secured an interest in his assets. It was said to be clear he had exaggerated the input of Mrs. Brown in order to defend his interest.

[134] It was opined that whereas Mrs. Brown was relying on the provisions of PROSA the case she presented “reeked” of principles of trust and equity. She was found to have emphasized issues such as common intention, prior discussion and agreement, the pooling of resources, contribution, reliance on trust, existence of joint accounts and acquisition from joint income. It was also observed that in creating a connection with subsequent properties, Mrs. Brown “often betrayed her conditioning as to tracing”.

[135] At one point of the submission there was a concession to the finding of an interest to the amount of 25% being given to Mrs. Brown. However ultimately the position was urged that neither lady was entitled to a share and the properties evolved entirely to the estate of late Karl Brown for distribution in accordance with the Intestacy Act and rule of the Supreme Court.

### **Discussion – application of the law to the facts.**

[136] Although I was deprived an opportunity of assessing Mr. Brown in person and of observing his demeanour while his version was tested under what I suspect would have been intense cross-examination, I have formed an impression of him. He seemed to have been an astute, strong-minded businessman although illiterate in the sense of not being able to read and write. He was abusive, controlling and did what he wanted, when he wanted, hardly concerned with the effect of his actions on anyone. I cannot help but express regret that he did not chose to put his affairs in order when his health was failing and made clear what should be done with his business empire.

[137] It is against this background that I must review the relevant evidence and come to a decision on the case presented by these two (2) women in Mr. Karl Evans Brown's life.

**Re: Case for Merna Benain**

[138] Miss Benain has expressly stated that her claim in respect of the properties is based on her contributions to the acquisition and improvement of the subject properties. The first undeniable fact is that she made no direct financial contributions to either of the properties claimed. In respect to the lands at Alexandria, she accepted that her only direct contribution was in the form of monies she said she gave to Mr. Brown to construct the plaza on those lands. The actual amount seemed uncertain because it went from a portion of the money she got from her father to all of it. When she got the monies also is not clear as at one point it seemed to have been part of inheritance she received and at another she expressed that it was given to her for the purpose of starting her own business.

[139] Since it is clear on her account that the money did not go towards the acquisition of the land in which she is claiming an interest, it is significant that the money was to assist in the construction of the plaza to facilitate her being able to start her own business. After being a stay home mother for approximately ten (10) years she was desirous of asserting her independence by having her business. The evidence is clear that it was not then her desire to enter into any business with Mr. Brown. The purpose and intention at the time the money was given could not then have been said to be for their joint benefit.

[140] It is noted that the issue of whether there was in fact this \$100,000 was sought to be settled by pointing to the exhibit clearly showing this amount in an account with Jamaica National Building Society. The evidence given by Miss Benain is that the monies had been in her personal account and Mr. Brown had instructed her to give it to him. The account exhibited was a joint account in both their names and it remains unexplained why he could not have withdrawn the money himself.

[141] It is safe to accept that given the state of Mr. Brown's illiteracy he would have needed assistance when signing any contracts and thus entering into any agreements. Hence, although Miss Benain herself did not purport to have attained any specialized training or indeed any higher level of education, it is not difficult to envision that she may have been able to assist him in that regard. It would have been useful however for there to have been evidence as to what negotiations she helped him settle and which contracts she guided him through to see what was their relevance and significance to the success of the businesses and even more so to the properties in which she now seeks to assert a 50% interest. I frankly find it difficult to envision that the man I have accepted Mr. Brown to have been would have needed or allowed anyone to be a "driving force" behind him

[142] I am satisfied that the burden of establishing a constructive trust in a commercial context requires convincing evidence of the interplay between the expressed or clearly discernible common intention that there was to be a shared interest , the contributions made in reliance on that intention and the detrimental reliance on it . The quality of the evidence must be clear that on the balance of probabilities, the partners were going into business together with a specific intention that they both would benefit. As already pointed out the creation of the plaza in Alexandria was to facilitate Miss Benain assuming her role in society as a businesswoman. The fact that there was an incorporation of the hardware store in the names of Mr. Brown and Miss Benain and their then very young children is significant. The fact is that the shares allotment clearly indicated that Miss Benain was not to be an equal partner. However, it is also significant that Miss Benain was able to provide documentary evidence of business registered in her name alone.

[143] The issue however turns on the actions of Mr. Brown regarding the businesses Miss Benain said were operated. From the outset with her business in Alexandria he collected most of the profits. She retained a small amount to tend to her personal needs. She spoke of entrusting him with the profits so they could have been re-invested in the business but she suggested that she really had no other choice but to turn over the monies to him and had no knowledge of how they were actually spent.

[144] There is evidence that Mr. Brown spent lavishly on Miss Benain. Indeed, the evidence of her and her witnesses did speak to the quality of the lifestyles that was enjoyed – the type of cars that were bought, the type of furnishing in the house she lived and even the trips that were taken. Miss Benain agreed that Mr. Brown would be most generous when he wanted to be.

[145] Even more telling was Mr. Brown's dealing with the business. He closed it and chained her out when he felt betrayed by her. Although the reason for the closure is not as significant as the fact of what the action meant, to my mind, it was a clear indication that Mr. Brown did not want to be in business with Miss Benain or to have her in what was his business. It certainly demonstrated that he did not view it as their business if he was able to deal with it in this manner.

[146] Miss Benain also gave evidence to suggest that even if she believed and accepted that she had an interest in the properties at Alexandria, she had abandoned it. She said she had told him she was willing to "forget" about Alexandria if he "allowed" her to operate her own business from one of the shops in Browns Town. Mr. Brown is said to have "agreed" and given her a shop on the second plaza in Browns Town from which she decided to operate a boutique. The fate of this business ultimately was the same as that of the business in Alexandria – Mr. Brown with no discussions with her and to her surprise also effectively closed it down.

[147] On the evidence I am not satisfied that any inferences can be drawn that it was the intention of Mr. Brown that Miss Benain should have interest in the properties. She has not satisfied me that there was any common intention shared between them that the business was theirs. Despite the volumes of evidence presented, I find on the balance of probabilities that in the absence of that common intention any contributions made were not made in the context of establishing ownership or interest in the property.

[148] Miss Benain has also claimed for goods she said were lost when her business was closed. Simply, her evidence is not credible on this regard. Presenting, a list some eleven (11) years after the event in the manner that she has, is not without more sufficient. An assertion of a loss of approximately one million dollars cannot be seen to

be proven by the presentation of a list indicating a loss of more than ten million dollars. In any event, given the nature of the man as I assess Mr. Brown to have been, I find it more credible he would have removed the goods from that location to the other.

**Re: case for Mrs. Iola Brown**

[149] The undisputed evidence is that Mrs. Brown separated from Mr. Brown from the 1990's. I have a difficulty accepting that in the circumstances as she outlined them, the marriage can be viewed as in subsistence in 2010 when she launched her claim. Adopting the approach of Sykes J in **Gordon v Gordon** (supra) the parties having separated lived in that state for the remainder of this marriage. They did not reconcile.

[150] From the time of separation Mrs. Brown has admittedly not established having made any meaningful contribution to the businesses. It is to my mind significant that at the time the business in which she had some interest in was sold (i.e. the bakery), Mr. Brown gave his wife seven hundred and fifty thousand dollars. The sum can only be viewed as his assessment of her stake in the business. She had no real input in what happened in any business after that.

[151] Mrs. Brown's claim can ultimately be viewed as her seeking an entitlement only because she remained the wife up until the death of Mr. Brown. He seemingly was willing to acknowledge this fact by speaking about her role in helping in the business. The evidence given however does support the arguments advanced on behalf of his estate that he in fact exaggerated this role. Further as already noted there was no evidence presented that Mr. Brown was doing anything to endanger the value of the properties. The fact that Mrs. Brown was wife in name only cannot give her an interest in the properties under the provisions of PROSA on which she relies. The fact that she remained wife gives her other avenues to an interest now in his estate.

**The decision**

[152] In the circumstances, both claimants have failed to establish entitlement to any of the properties as claimed.

There is therefore Judgment for the defendant – the estate of the late Mr. Karl Brown on both claims.

No order as to cost.