



[2017] JMSC Civ 184

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. 2015HCV00900**

<b>BETWEEN</b>	<b>YVETTE MARSHALL BRYAN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>DONOVAN BRYAN</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the claimant.

Ms. Carol Davis for the defendant.

Heard: 14<sup>th</sup> & 21<sup>st</sup> July, & 17<sup>th</sup> November, 2017

**Family Law – Division of property – Equal share rule- Family home acquired before marriage - Other matrimonial property - Division of properties registered post separation - Entitlement to company shares. Property (Rights of Spouses) Act S. 6 (1) (a), 7 (1), 10, 14 (4) & 15.**

**EVAN BROWN, J**

**Introduction**

[1] The claimant, Mrs. Yvette Marshall Bryan, filed a Fixed Date Claim Form on the 4th February 2015 under sections 6, 14 and 15 of the *Property (Rights of Spouses) Act (PROSA)* seeking a number of orders. One, that the property at 10 Brumalia Gardens, Mandeville in the parish of Manchester is the family home (Brumalia). Two, that the claimant and the defendant own Brumalia in equal shares of 50%. Three, that the property at Lot 5 Struan Castle, Christiana in the

parish of Manchester registered at Volume 1034 Folio 356 in the Register Book of Titles (Struan Castle) is owned by the claimant and the defendant in equal shares of 50%. Four, that the property at Spitzbergen in the parish of Manchester registered at Volume 1263 Folio 384 in the Register Book of Titles (Spitzbergen) is owned by the claimant and the defendant in equal shares of 50%. Five, that the property located at 24c Caledonia Road, Mandeville in the parish of Manchester (Caledonia) is owned by the parties in equal shares of 50%. Six, that the shares of BF Pavement and Construction Company Limited (the Company) are owned by the parties equally. Consequential orders were also being sought.

- [2]** The defendant filed a counterclaim on the 6th March 2017 in which he made four claims. First, the defendant is entitled to 100% interest in Brumalia or such other part as determined by the court. Second, the defendant is entitled to one lot from the three lots at Lot 5 Struan Castle, Christiana pursuant to an agreement between the parties. Third, the defendant is entitled to four lots at Spitzbergen, Manchester, in accordance with an agreement between the parties. Fourth, the defendant is entitled to a 50% share in the property registered at Volume 1304 Folio 834 of the Register Book of Titles (Wesley Manor).
- [3]** At the commencement of the trial the parties announced that they had arrived at an agreement in respect of the Struan Castle and Spitzbergen properties. Struan Castle was subdivided into three lots: 4, 5 and 6. Lots 4 and 6 are to be transferred to Mrs. Bryan and the remaining lot 5 is to be transferred to Mr. Bryan. Spitzbergen comprises six lots: 2, 4, 5, 6, 8 and 9. Lots 2 and 4 are to be transferred to Mrs. Bryan, while lots 5, 6, 8 and 9 are to be transferred to Mr. Bryan.
- [4]** The trial therefore proceeded in respect of Brumalia, Caledonia, the Company and Wesley Manor. Before embarking upon the analysis, I will set out a short background to the claim and counterclaim, along with a summary of the case for the claimant and the defendant. The salient points made in the submissions of counsel for both sides follow the background and summarized cases.

## **Background**

- [5] Yvette Marshall Bryan and Donovan Bryan were married on the 31<sup>st</sup> December, 1994. The union lasted for eighteen years. The union produced one child but there were two children of the family (Mr. Bryan's daughters), as well as his under aged niece. The marriage was dissolved on the 5<sup>th</sup> September, 2012. After the dissolution of the marriage, the parties attempted to settle their property entitlements without resort to the court but those efforts did not fructify to their liking. Hence, the filing of the claim and counterclaim.
- [6] Brumalia was purchased by Mr. Bryan and was registered in his sole name on 4<sup>th</sup> August, 1988. He commenced the construction of the house on this property which was completed prior to the marriage, at which time, Mr. Bryan began to reside at the premises. After the marriage in 1994, Mrs. Bryan began residing at Brumalia. This was the parties' only family residence during the marriage. At the time of trial, they continued to reside there.

## **The case for the claimant**

- [7] Mrs. Bryan recalled that the lot upon which Brumalia was later constructed was chosen by her. Although she did not contribute to the cost of building the house, she contributed to its repair and expansion. At paragraph 19 of her Affidavit filed on the 27<sup>th</sup> October, 2015, she said that she obtained a loan jointly with Mr. Bryan to effect repairs to the damaged roof of the house following the passage of hurricane Ivan in 2004. The funds were also used to make the following additions to the house: an area for a study, a gym and sauna room, a patio, and an additional garage.
- [8] Mrs. Bryan also made contributions to the maintenance of the household from her salary and accounts. She recounted that, in 1999, all her salary went into the maintenance of the household. In that year, Mr. Bryan went to Holland to study full time while Mrs. Bryan remained at Brumalia with his two daughters, niece and

their daughter. She prepared meals for them and assisted them in their schooling. She said the funds he left for the maintenance of the household was insufficient to last for the period of his study.

- [9]** Upon Mr. Bryan's return to Jamaica either in 1999 and 2000, Mrs. Bryan continued to maintain the household for the first six months. It was during those months that Mr. Bryan and a Mr. Fisher formed the Company. She contributed \$150,000.00 to assist Mr. Bryan in that undertaking as he was unemployed. The sum of \$150,000.00 was a loan from the Manchester Cooperative Credit Union, which was repaid by direct deductions from her salary.
- [10]** In her Affidavit filed on the 4<sup>th</sup> February, 2015, Mrs. Bryan said that she did most of the clerical work of the Company. Upon Mr. Fisher's departure from the Company, his shares were allotted to her. She also said, under cross examination, that she was a director and the official secretary of the Company. She was not, however, employed to the Company. Her contribution to the Company was seasonal as she was a full time lecturer.
- [11]** Mrs. Bryan would dedicate her holidays and weekends to working for the Company. Mr. Bryan, she continued, would ask her to run errands on behalf of the Company and to do additional clerical work. Her work for the Company ceased in 2004 when the parties separated. She contended that the profits generated by the Company are owned by both her and Mr. Bryan. The household expenses at Brumalia were paid from the Company's resources.
- [12]** The Company's profits were also used to pay the balance of the purchase price for Caledonia while the deposit was paid from their joint resources. Caledonia was transferred to Mr. Bryan after their divorce. At the completion of this purchase, Mr. Bryan commenced the construction of a commercial building on this property which was partially funded from the Company's profits.
- [13]** However, under cross examination, Mrs. Bryan said that she did not pay anything beyond the deposit towards the purchase price of Caledonia. This deposit was

paid from their joint account by way of a cheque. The cheque was sent from the bank to the Attorney-at-Law with carriage of sale. She made indirect contributions to the joint account.

- [14] In respect of Wesley Manor, Mrs. Bryan said she purchased it on behalf of her aunt who resided abroad. A portion of the deposit for the purchase was remitted to her from her aunt, while the balance of the deposit was paid by both herself and her sister. According to Mrs. Bryan, she was instructed by her aunt and sister to register this property in her sole name. It was thereafter leased and the rent used to pay the monthly mortgage.

### **The case for the defendant**

- [15] Mr. Bryan said that, at all times, he maintained and repaired Brumalia while Mrs. Bryan refused to assist. The joint bank account was funded solely by him while she would use those funds to meet the household expenses and to buy her personal items. All her transactions with this account were done by way of cheques. Mrs. Bryan had her own private account to which she lodged her earnings. She spent those monies on herself and did not contribute it to the maintenance of the household.
- [16] In relation to the Company, he said Mrs. Bryan did not contribute to its formation. He was employed to the Ministry of Works up to 1996 when he resigned and commenced private contracting work. He was employed at all times except for the one-year period of his study in 1999 and, at the end of that period, he began to manage the Company. His schooling was financed from his savings and the proceeds from a property he sold.
- [17] The Company's clerical work was done by him and his daughter, not by Mrs. Bryan. Where additional assistance was required for this task, he employed persons to meet the demand. Upon Mr. Fisher's departure from the Company, all his shares were transferred to Mrs. Bryan by Mr. Bryan, free of cost. He also

added her as a director. She was made a signatory to the Company's account. In his Affidavit filed on the 6<sup>th</sup> March, 2017, at paragraph 16 Mr. Bryan said:

*"I did transfer all of his shares in the company to her without any cost to her, and she did not participate in company affairs. I did that for convenience since I thought that she could deal with the company if anything happened to me".*

- [18] Concerning Caledonia, Mr. Bryan asserted that Mrs. Bryan has no interest in this property. Caledonia was purchased by him after their separation and registered in his name after the decree absolute was granted. He explained that the land was purchased in 2007 for \$2,000,000.00. The sale agreement, he said, was signed by both himself and Mrs. Bryan as purchasers.
- [19] It was he who paid the purchase price in multiple instalments. He traded his motor vehicle to the vendor, which was valued at \$1,000,000.00. That was the deposit. The last \$500,000.00 was paid probably a month before the land was transferred and other payments were made in between.
- [20] The building at Caledonia was constructed by him after the purchase of the land was completed. The construction commenced in or around late 2007 and spanned about three years. At the end of the construction, Mr. Bryan allowed Mrs. Bryan to operate a shop in the building.
- [21] Mr. Bryan recounted that Brumalia's roof was damaged in 2004, during the passage of hurricane Ivan. The house was however insured. He was responsible for the payment of the insurance premiums. He contradicted himself under cross examination, however, when he said he paid for the repairs to the roof with his funds in addition to the indemnity from the insurance.
- [22] Further to that testimony, he said: *"after the hurricane, by virtue of the opportunity to expand the house, I did expand the house. The insurance money was for the existing roof prior to the hurricane"*. The roof, he continued, extended between 40 and 50 feet. As a result, the cost of the additional design was higher than the indemnity payments.

**[23]** Mr. Bryan further recalled that Mrs. Bryan used his vehicle to secure a loan from her credit union in 2000. However, he had no recollection of her handing to him that money. He said that her failure to contribute to the household expenses and his management of those expenses, enabled her to purchase the Wesley Manor.

### **Submissions for the claimant**

**[24]** Mrs. Cooper-Batchelor submitted that although significant emphasis was placed on financial contribution, Mrs. Bryan's contribution to the acquisition of assets was primarily non-financial. Those non-financial contributions came in the form of her daily care giving responsibilities towards the parties' daughter, Mr. Bryan's daughters, and his niece. Mr. Bryan, counsel argued, did not deny that Mrs. Bryan prepared the children's daily meals and assisted in the schooling.

**[25]** Counsel further argued that Mrs. Bryan sourced a loan between 1999 and 2000 to assist Mr. Bryan in starting up a business. This was evidence of her financial contribution to the Company. Mr. Bryan's evidence in response was contradicting as he firstly denied that account, then later under cross examination admitted that he had no recollection of receiving those funds from her.

**[26]** The intention of the parties, counsel posited, was clearly evidenced in: (i) the allocation of Mr. Fisher's shares of the Company to Mrs. Bryan, and (ii) both parties being signatories to the sale agreement for Caledonia. Mrs. Cooper-Batchelor continued that Mr. Bryan did not place anything before the court to displace Mrs. Bryan's right to the shares of the company.

**[27]** Counsel advanced further arguments that Mr. Bryan had no interest in Wesley Manor. There was evidence that Mrs. Bryan's sister was also vested with interest in this property. Counsel submitted that that third party interest should not be disturbed by the court. Additionally, counsel continued, the date of the acquisition of this property ought to be considered.

**[28]** Wesley Monar was registered in Mrs. Bryan's name on the 4<sup>th</sup> July, 2006 post the parties' separation. Counsel argued that this property was acquired after the

separation date and was ineligible for distribution. Counsel placed reliance on section 12(2) of **PROSA**.

- [29] Mrs. Cooper-Batchelor further submitted that Brumalia was the family home within the meaning of section 2 of **PROSA**. Brumalia was legally owned by Mr. Bryan and was the principal place of residence by the parties during the marriage. Mrs. Bryan, therefore, by operation of law, was entitled to an automatic 50% interest in the property.
- [30] In support of that claim, counsel relied on *Carol Stewart v Lauriston Stewart* [2013] JMCA Civ 47, paragraphs 51 and 77 to make the submission that the court should be reluctant to depart from the equal share rule. The court should bear in mind all the principles surrounding that statutory rule, including the fact that marriage is a partnership. However, where the court is satisfied that that rule should be varied, then it must consider whether it would be unreasonable or unjust.
- [31] In determining the parties' interest in properties other than the family home, counsel submitted, the court must consider their intention when those properties were acquired. Mrs. Cooper-Batchelor argued that the case of *Carlene Miller, et al v Harold Miller et al.* [2015] JMCA Civ 42, paragraphs 54 and 55, supports this point.
- [32] Mr. Bryan's claim against Wesley Manor, counsel continued, must fail for his failure to give notice to the third parties who have interest in this property. Counsel placed reliance on *Hyacinth Gordon v Sidney Gordon* [2015] JMCA Civ 39, paragraph 20, that it is a basic tenet of our common law that a person could not be deprived of his interest in property without having an opportunity to be heard. The court cannot therefore grant an order affecting this property in their absence.

## Submissions for the defendant

- [33] Ms. Davis submitted that it was undisputed that Brumalia was the family home. Counsel argued, however, that this case was suitable for a variation of the “equal share” general rule pursuant to section 7(1) of **PROSA**. This section provides that the court may vary the one-half share division of the family home where it considers that such entitlement would be unjust or unreasonable.
- [34] Counsel continued that the section 7(1) of **PROSA** also sets out three factors that the court may consider in its determination of whether the equal share rule is unjust or unreasonable. One of those factors is whether the family home was already owned by one spouse at the time of the marriage. This factor, according to Ms. Davis, was apt for the circumstance of this case as Mr. Bryan was the sole legal owner of Brumalia before the parties were married.
- [35] Counsel argued that the court must consider whether, in this claim, it would be unjust or unreasonable for Mrs. Bryan to be entitled to one half share of Brumalia. Counsel relied on ***Allicent Kelly-Lasisi v Jimoh Lasisi*** [2016] JMSC Civ. 25, paragraphs 20 to 24, that the court may consider factors such as: “the level of contribution by each party to the matrimonial home, their respective ages, and behaviour and other property holdings” in determining the appropriate adjustments.
- [36] Ms. Davis further submitted that the court, pursuant to section 14 of **PROSA**, has the power to declare entitlement to properties other than the matrimonial home. Counsel relied on ***Carlene Miller et al v Harold Miller et al. supra***, and submitted that the court must consider both the intention of the parties at the time of the acquisition of these properties, and their appropriate interests.
- [37] Counsel made the argument that Mrs. Bryan’s conduct was not one of sharing the family home. She kept her own money and left her husband to bear the burden of the maintenance of the household. Mrs. Bryan instead used her

resources to purchase Wesley Manor for her own benefit. Upon these facts, counsel argued that the equal share rule ought to be varied.

- [38] As it relates to Wesley Manor, Ms. Davis conceded that Mrs. Bryan acquired this property after the parties separated and therefore it cannot be the subject of a claim under **PROSA**. The court however, may consider the fact of Mrs. Bryan's acquisition of this property while they were still residing at the matrimonial home although they were separated. Counsel then submitted that a fair share of the family home to be awarded to Mrs. Bryan, would be 20%.
- [39] Counsel again argued that Caledonia was acquired by Mr. Bryan after the parties separated. Like Wesley Manor, this property also fell outside of **PROSA** and therefore Mrs. Bryan has no interest in it. In support of that submission counsel placed reliance on section 12(2) of **PROSA**, which states that a spouse's share in property shall be determined as at the date on which the spouses ceased to live together as man and wife.
- [40] Finally, counsel submitted, Mrs. Bryan should be awarded 20% interest in the Company. She continued that, although the shares of the Company are owned 50% to the Mr. Bryan and 50% to Mrs. Bryan, section 15(1)(b) of **PROSA** empowers the court to grant orders requiring a party to transfer property to another as it thinks fit.
- [41] Ms. Davis argued that Mr. Bryan transferred Mrs. Bryan's shares to her without any cost to her, and that she was never remunerated from the profits of the Company. Counsel posited that although Mrs. Bryan contributed \$150,000.00 to the setting up of the company, Mr. Bryan was principally responsible for its operation.

## Analysis

### Brumalia

- [42] Both sides agreed that Brumalia was the family home. That is, although it was wholly owned by Mr. Bryan, it was used habitually by both as their only family residence. The claimant contends for a 50% share while the defendant rejoins a 100% entitlement. Having regard to the statutory presumption of one-half share in the family home upon dissolution of the marriage, the issue for determination is whether the statutory presumption should be applied with full force or varied.
- [43] Under section 6 (1) (a) of **PROSA**, each spouse is entitled to one-half share of the family home upon the dissolution of the marriage. This is commonly referred to as the equal share rule. The equal share rule rests upon the philosophical foundation that marriage is a partnership of equals in which there is mutual commitment to a sharing of lives and working together for the benefit of the union. Therefore, absent good cause shown, each is entitled to an equal share of the assets upon termination of the partnership (see **Graham v Graham** (unreported), Supreme Court, Jamaica, Claim No. 2006 HCV03158, Judgment delivered 8th April 2008;). Since it is a partnership of equals during its subsistence, upon its cessation, whether by dissolution, annulment or hopeless estrangement, the assets referable to it should be equally shared.
- [44] This equal share rule may be varied where the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home: section 7 (1) of **PROSA**. In making the determination to vary the equal share rule the court is enjoined to take into consideration all relevant factors, including those listed in the subsection. Of the three factors listed only one is of relevance here, namely:

*"that the family home was already owned by one spouse at the time of the marriage".*

- [45] The presence of this factor, however, does not lead inexorably to a variation of the equal share rule. In the language of ***Stewart v Stewart*** [2013] JMCA Civ 47, the antecedent ownership of the property by one spouse is only a gateway for the court to consider other elements of the relationship between the parties to determine whether to depart from the equal share rule. Of relevance to this consideration are matters such as, the level of each party's contribution to the matrimonial home, their respective ages, behaviour and other property holdings (***Stewart v Stewart***, at para 34).
- [46] The variation of the equal share rule is not a matter to be entered upon lightly. Apart from having to be sure that at least one of the gateway factors is present, the court is enjoined to "be very reluctant to depart from that rule", per Brooks JA in ***Stewart v Stewart***, at para 51. It perhaps is not overstating the position to say that the equal share rule is nigh inviolable. Consequently, it must be demonstrable that its application would be either unreasonable or unjust before it can be displaced. That is the standard set in section 7 (1) of ***PROSA***. The evidence required to displace the equal share rule must therefore be very cogent (***Stewart v Stewart*** at para 31).
- [47] The defendant rested his claim for a 100% beneficial share of the family home on two limbs. First, the fact of the purchase before the marriage and secondly, his sole responsibility for its maintenance and expenses.
- [48] The evidence disclosed that the parties met in 1986 and a visiting relationship ensued. Although Mr. Bryan claimed he bought the land in 1986 it was not transferred to him until 1988. Construction of the house was completed in 1994. Although Mrs. Bryan asserted in her affidavit of the 25th May, 2017 that she assisted with payroll from a student loan, under cross-examination she accepted that the house was constructed entirely from Mr. Bryan's resources. Indeed, that was her position in her earlier affidavit of 4th February, 2015. I therefore find as a fact that Brumalia was constructed without any contribution from Mrs. Bryan, financial or otherwise.

- [49] There was some controversy concerning when Mrs. Bryan commenced living at Brumalia. In her affidavit of 4th February, 2015 she said both of them lived in the house from May 1994. Mr. Bryan countered that she moved in after their marriage. She admitted under cross-examination that she "moved in full-time" in 1994 after the marriage. That is what the court accepts. In the circumstances of their pre-existing visiting relationship it is not unlikely that she was a part-time dweller at Brumalia before the marriage.
- [50] The parties therefore lived at Brumalia as man and wife from 1994. They continued to do so beyond their separation as man and wife, up to the time of the trial. Issue was joined on the date of their separation. Whereas Mrs. Bryan said it was in 2004, Mr. Bryan said it was in 2008. It suffices to say that Mr. Bryan was utterly discredited on the point and I accept Mrs. Bryan's evidence that their separation was in 2004 after hurricane Ivan.
- [51] So then, at the time of their separation in 2004 each was entitled to a one-half interest in the family home, by operation of section 6 (1) of **PROSA**. Mr. Bryan seeks a variation by virtue of his superior, or more pointedly, absolute financial contribution to the maintenance of the household, including statutory outgoings. Mrs. Bryan did no more than point to isolated occasions when she made direct financial contributions to the union. For example, during the year Mr. Bryan was away studying and six months after his return, financial assistance to start the company with Mr. Fisher and a joint loan to do remedial and expansion work on the house in the aftermath of hurricane Ivan. While she agreed under cross-examination that Mr. Bryan paid all maintenance costs and taxes, she sought to dilute that admission by saying household expenses and taxes were paid from the Company's account of which she was part owner.
- [52] In my opinion, Mrs. Bryan's direct financial contribution to the union was not substantial. Where Mrs. Bryan majored was in the area of non-financial contribution. While the union produced only one child, there were two children of the family (Mr. Bryan's daughters from another relationship), as well as a niece of

his living in the home. Mrs. Bryan, therefore, had responsibility for their care and upbringing. In addition, the children's high school fees were waived as a result of being listed as dependents of Mrs. Bryan. That was a direct consequence of her being a lecturer and government policy. In short, in addition to the care of the relevant children, Mrs. Bryan was responsible for the management of the home and the performance of household duties.

[53] Mr. Bryan asserted that Mrs. Bryan refused to contribute to the repairs and maintenance of the house. That, I categorically reject. First, there was no evidence that their disparate financial contribution to the union was an issue before the filing of the claim. It was not alleged that it was raised, discussed and any agreement reached or that there was a failure to arrive at any consensus. Absent too was any evidence that they were at daggers drawn over the issue.

[54] Second, the image of Mr. Bryan being the preponderant financial provider was characteristic of the parties' relationship. Mr. Bryan's role as the chief financial provider antedated the marriage during the course of their eight year courtship. That is evidenced by his assistance to Mrs. Bryan in obtaining two university degrees, one a graduate and the other a post graduate. When they met, she was a woman of straw, while he was sufficiently resourced to become landed, either in that year or soon thereafter, while assisting her financially. He, therefore, took her from straw to status, marital and professional. That he continued in his role as chief bread winner, in spite of her improved status, after the celebration of their nuptials, without rancour or murmur, is hardly surprising.

[55] Against that background, the statutory injunction concerning how contribution ought to be weighed must be borne in mind. There is "no presumption that a monetary contribution is of greater value than a non-monetary contribution" (see section 14 (4) of **PROSA**). This was underscored by the Court of Appeal in **Stewart v Stewart**, *supra*, at paragraph 77. According to Brooks JA:

*"in considering whether the equality rule has been displaced, the court ... should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution".*

It is clear that superior financial consideration cannot, by itself, tip the scale of justice to result in a variation of the equal share rule.

**[56]** I should at this time turn my attention to the question of other property holdings. It is fair to say that both parties have significant holdings, some of which were the subject of agreement at the start of this trial. Learned counsel for the defendant, quite properly, asked that Wesley Manor, property registered in the sole name of Mrs. Bryan, be taken into consideration. However, viewed against the background of the wider picture of their respective holdings, Wesley Manor is but a silhouette. Consequently, not much weight can be given to it.

**[57]** The parties are both propertied as well as senior in years. Mr. Bryan was born on the 26th February, 1960, while Mrs. Bryan was born on the 8th December, 1965. At the time of trial both were therefore in their fifties, although Mr. Bryan is five years Mrs. Bryan's senior. The likely impact of the parties' age is in its capability to prove to be a handicap to either in obtaining mortgage financing. If that is correct, then at fifty-two and fifty-seven years old respectively, Mr. Bryan could not be said to be significantly more disadvantaged than Mrs. Bryan, nor that Mrs. Bryan would be greatly advantaged.

**[58]** Aside from the parties' respective ages, their intention as to what should be the entitlement of each at or about the time of their separation is of some relevance. Mrs. Bryan alleged in her affidavit of the 27th October 2015 that both struck an oral agreement for a one-half share of the family home in post separation property settlement discussions. She also asserted that in 2015 Mr. Bryan asked her if she wished to purchase his 50% share. Mr. Bryan admitted to the agreement under cross-examination but disclaimed it on the basis that it was made in advance of legal advice.

**[59]** Ms. Davis correctly submitted that this agreement is unenforceable. There are two conditions precedent which must be fulfilled before a court can countenance an agreement for the settling of property differences between spouses. Firstly, the agreement must be in writing, signed by both parties and their signatures

witnessed by a Justice of the Peace or an Attorney-at-Law if the agreement is signed in Jamaica. **PROSA** lists the persons competent who may act as witnesses where the agreement is signed outside Jamaica (see section 10 (4) (a) and (b) of **PROSA**). Secondly, each spouse must obtain independent legal advice before signing the agreement. The implications of the agreement must be explained to spouse obtaining the legal advice and the legal adviser must certify that that was done (see section 10 (3) of **PROSA**).

[60] Mrs. Cooper-Batchelor for the claimant does not seek to rely on the oral agreement qua agreement. She contends, however, that it is indicative of the parties' intentions. I agree with that submission. That intention of a 50% entitlement for each spouse is rooted in the equality philosophy undergirding the very institution of marriage. So, while the court cannot give effect to an unenforceable oral agreement, in so far as it speaks to Mr. Bryan's state of mind, it is legitimate to take it into consideration.

[61] So then, should Mrs. Bryan suffer any diminution of her interest in the matrimonial home as a result of the effect of the factors discussed, severally or cumulatively? In seeking to answer that question, I direct my mind to the philosophy informing the equal share rule. I also bear in mind that I must be very reluctant to vary the rule. Having given the matter anxious consideration, I am not of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half share of the family home. Accordingly, I cannot agree with the submission of the defence that Mrs. Bryan's share should be reduced to 20%.

### **Wesley Manor**

[62] It is perhaps convenient to address item four of the defendant's counterclaim at this time. The defendant claimed to be entitled to a 50% interest in this property. Ms. Davis, in the spirit of the finest tradition of the Bar, conceded in her submission that "*on the evidence the claimant's house at Volume 1304 Folio 834 was acquired after the parties separated and therefore cannot be the subject of a claim pursuant to PROSA*". With that concession, it is hardly necessary to say

that Mr. Bryan is not entitled to any interest in Wesley Manor, registered in Mrs. Bryan's sole name after their separation.

### **Caledonia**

- [63] Mrs. Bryan also seeks a 50% share in Caledonia. Mr. Bryan says that she has no interest in this property as it was bought after their divorce and is registered in his sole name. The transfer was registered on the 4th April 2015 and in Mr. Bryan's sole name. Mr. Bryan's uncontroverted evidence was that the property was purchased in 2007, notwithstanding the transfer approximately eight years hence. It was his further evidence that the purchase price was paid over time, the last payment of \$500,000.00 being made probably one month before the transfer.
- [64] Ms. Davis was correct in submitting that a spouse's share in matrimonial property is to be reckoned from the date of their last separation. Under section 13 (1) (c) of *PROSA*, a spouse is entitled to apply to the court for a division of property on the grant of a decree of dissolution of their marriage. By virtue of section 12 (2) of *PROSA*, the spouse's share in the property shall be determined as at the date on which they ceased living together as man and wife. Therefore, a predicate finding to determining a spouse's share in property is the date of their separation. Earlier in this judgment I found that the parties separated in 2004.
- [65] It is therefore evident that Caledonia was purchased and transferred to Mr. Bryan after the parties separated. Since a spouse's share in property is to be ascertained as at the date of separation, it is axiomatic that Mrs. Bryan cannot claim a share of what did not exist at the time of their separation. That should be sufficient to dispose of this aspect of the claim but the waters were muddied by Mr. Bryan's admission that both parties had signed the agreement for sale.
- [66] The execution of the agreement for sale provided fodder for Mrs. Cooper-Batchelor to submit that "Caledonia was also to be a joint purchase between husband and wife". The evidence to support a joint purchase did not go beyond

the inference to be made from the fact of joint execution of the agreement for sale. First, although Mrs. Bryan asserted that she contributed to the purchase price, I was not persuaded by her evidence that she did. Mrs. Bryan asserted payment of the deposit of \$900,000.00 by a cheque drawn on their joint account. She failed to produce the returned cheque. She said she made unsuccessful efforts to acquire a copy. Her failure to locate the anonymous lawyer who had carriage of sale appears to have been part of that effort. Mrs. Bryan, however, had first said that her contribution was in cash. Secondly, even if a cheque was drawn on an account in both names, which I do not accept, Mrs. Bryan was discredited on the question of her contribution to that account. Her evidence was that she lodged money to that account "indirectly". That is a question which does not admit of equivocation. She either did or did not lodge money to the account.

**[67]** Mr. Bryan admitted under cross-examination that the deposit was paid before the parties separated. I, however, did not understand him to be saying the deposit was paid before 2004. His contention was that the separation occurred in 2008. Understood in the context of the whole of his evidence, he was really saying the deposit was made in 2007, and that is what I accept.

**[68]** Beyond making an unsubstantiated contribution to the deposit, Mrs. Bryan admitted that she made no other contribution to the purchase of Caledonia. The reason Mrs. Bryan also executed the agreement for sale post separation was not explored during the trial. Mrs. Bryan was very clear in her affidavit evidence that there was no agreement between them concerning the sharing of Caledonia. If Mr. Bryan was disposed to sharing Caledonia with her at the time of signing the agreement for sale, he had clearly resiled from that position.

**[69]** The evidence does not therefore disclose that any interest in Caledonia accrued to Mrs. Bryan either before or after the date of separation. Consequently, she is not entitled to any share in the beneficial interest of this property.

## The Company

[70] As was said above, Mrs. Bryan's claim is for 50% share in the Company. That was her allotment in the shares of the Company at the time of filing the claim. Mrs. Davis submitted that in the circumstances Mrs. Bryan's share should be varied to 20% and Mr. Bryan's to 80%.

[71] Under section 15 (1) of **PROSA** the court has the authority to make such order as it thinks fit, altering the interests of spouses in matrimonial property other than the family home. Before making such an order the court must be satisfied that it is just and equitable to do so (see section 15 (2) of **PROSA**). Subsection (3) of section 15 sets out the range of matters that the court ought to have regard to in making the order, not all of which are relevant to this case. I will now consider the factors adjudged to be relevant in determining how to fairly allocate the parties' interest in the Company.

[72] The first factor I am to have regard to is their direct or indirect contribution, financial or otherwise, to the acquisition of the Company. Mrs. Bryan alleged that she contributed \$150,000.00, the entire proceeds of a loan, to the start of the Company. Although she did not provide any documentary proof, I found her to be credible. Mr. Bryan, on the contrary, did not convince me that he was disposed to speaking the whole truth on the point. He first said he did not know about Mrs. Bryan borrowing any money from her credit union. He appeared to think about it then admitted that she did, using his motor car as collateral. He then suffered a memory lapse on the question of receiving that money from her. I therefore conclude that Mrs. Bryan made a direct financial contribution to the formation of the Company. What other contribution did she make?

[73] In my opinion, Mrs. Bryan's non-financial contribution to the Company was insubstantial. She was listed as the secretary from its formation in 1999 until her name was removed in 2005. She was also a signatory on the Company's account. Between 2000 and 2005, Mrs. Bryan was a full-time lecturer. Added to that, she was the homemaker and caregiver. That would have left her very little

time to deploy in the service of the Company. So that, as she said, her contribution was on and off. In one breath she said she was employed to the Company and in the next, she was not.

**[74]** The second relevant factor to be considered is the duration of the marriage. As was said earlier, the parties were married for approximately eighteen years. I bear in mind that they separated after ten years. So, for all practical purposes their marriage lasted for ten years. By no stretch of the imagination therefore can their marriage be described as one of short duration. The third factor I must have regard to is the agreement with respect to the ownership and division of the two properties referred to at the beginning of this judgment. In this vein, the fourth factor to be considered is the division of the family home according to the equal share rule. Fifth and last, the impact of the proposed order on the earning capacity of either spouse. Mrs. Bryan drew no salary from the Company and will, therefore, suffer no loss of income if her share is reduced.

**[75]** On the other hand, the Company was Mr. Bryan's endeavour, the vehicle through which he marketed his skills and learning as an engineer to make a living. Hence, his partner at the beginning was a fellow engineer, not Mrs. Bryan who has neither training nor education in that discipline. Viewed against that background, Mr. Bryan's explanation for transferring his former partner's shares to Mrs. Bryan upon his departure from the Company may appear to be entirely reasonable, at first blush. The transfer of shares, Mr. Bryan said, was in preparation for the vicissitudes of life.

**[76]** The bona fides of Mr. Bryan's declaration must, however, be assayed. Accepting, for the sake of argument, that the shares were transferred to Mrs. Bryan to hedge against life's misfortunes, that safety net evaporated upon their separation. In spite of that, no evidence was led to show any effort on Mr. Bryan's part to have the shares transferred either back to him or any other member of his family. That stands in contradistinction to his positive efforts to remove Mrs. Bryan as a

director and secretary of the Company after their separation and eventual divorce.

[77] That begs the question, why did Mr. Bryan take no steps in respect of the shares transferred to Mrs. Bryan? The short answer is a recognition and acknowledgement that the transfer of shares to her was meant to give her a 50% share of the Company to which she had made some contribution as his wife. That gift was to her absolutely. I did not find Mr. Bryan to be credible on the point. Perhaps the best indication that Mr. Bryan intended a 50% interest to Mrs. Bryan when the shares were transferred is his treatment of them in his will dated 4th July 2008. At item three these words appear, "The asset of BF Pavement and Consultants Ltd. **The 50% share that is mine** should be share (sic) accordingly". The emphasis is mine. That was an open acknowledgement that he had but one half of the Company's shares to bequeath, the other half having been gifted to Mrs. Bryan.

[78] So then, the clear intention was to make Mrs. Bryan an equal partner in the ownership of the Company. Taking that intention, together with the other factors adverted to above, the case has not been made that it is just and equitable to alter Mrs. Bryan's ownership of 50% of the shares in the Company.

## **Conclusion**

[79] In consequence of the foregoing discussion I make the orders which appear below:

1. The claimant and the defendant each own Brumalia in equal shares of 50%.
2. The claimant has no beneficial interest in Caledonia.
3. The shares in the Company are owned by the claimant and defendant equally.
4. The defendant has no beneficial interest in Wesley Manor.

5. Brumalia is to be valued by a valuator agreed upon by the claimant and defendant. The cost of the valuation is to be borne equally by the claimant and defendant.
6. If the parties are unable to agree a valuator within twenty-one (21) days of the date of this judgment, the Registrar of the Supreme Court shall appoint a valuator.
7. Brumalia is to be sold on the open market by public auction or by private treaty.
8. The Registrar of the Supreme Court is empowered to sign any and all documents necessary for the sale of the property if either party is unable or refuses to do so.
9. Liberty to apply.
10. Each party to bear its own costs.