[**2018**] **JMSC Civ 110**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2016HCV03901

BETWEEN	**NEVILLINE FROOME**	**CLAIMANT**
AND	**ORVILLE FROOME**	**DEFENDANT**

IN CHAMBERS

Angela Cousins Robinson instructed by Robinson Gentles & Co. for the Claimant

Mr. Gordon Steer and Mrs. Kay-Anne Parke instructed by Chambers Bunny & Steer for the Defendant

Heard: October 25, 2017 and August 2, 2018

Family Law - Division of Property - Matrimonial Property - Family Home - Other Property - Property (Rights of Spouses) Act - Sections 4, 6, 14 and 15

THOMPSON-JAMES J

INTRODUCTION

[1] This is a claim for the division of three (3) properties brought by the claimant, Nevilline Froome, against the defendant, Orville Froome. The parties were married December 4, 2004. There are two (2) children of the marriage. A petition for dissolution of marriage was filed by the defendant August 16, 2016.

[2] September 20, 2016, the claimant filed a Fixed Date Claim Form seeking maintenance and division of properties. By way of Amended Fixed Date Claim Form filed December 1, 2016, the claimant seeks the following orders:

1. *That the defendant Orville Froome contributes the sum of One Hundred and Twenty Thousand Dollars ($120,000.00) per month for the maintenance of our two minor children....*

2. *That the said defendant contributes to half of the medical expenses, full educational expenses, and half dental expenses and optical expenses incurred by the said children.*

3. *A declaration that the claimant is entitled to fifty percent (50%) share and interest in the matrimonial home known as Apartment #63B, Strata #322, 96B Old Hope Road, Kingston 6 in the parish St. Andrew.*

4. *A declaration that the claimant is entitled to fifty percent (50%) share and interest in all that parcel of land situate at 12 Janet Crescent, Edgewater, Portmore in the parish of Saint Catherine being the Land registered at Volume 1080 Folio 571 of the Register Book of Titles.*

5. *A declaration that the claimant is entitled to eighty percent (80%) share and interest in all that parcel of land situate at Fyall Estate Four Paths n the parish of Clarendon and being the Land registered at Volume 1446 Folio 200 of the Register Book of Titles.*

6. *That a competent valuator be appointed by the parties to value the said properties and the costs of the valuation be borne equally by the parties.*

7. *That the Registrar of the Supreme Court be empowered to sign all Instruments of Transfer in the event that the defendant neglects or refuses to sign.*

8. *Any other order that this Honourable Court deems just in the circumstances.*

[3] At the time of trial issues relating to maintenance were already settled. Therefore, the division of the properties at (i) 12 Janet Crescent, (ii) 63B Old Hope Road, and (iii) Fyall Estate remained to be determined. The properties at 12 Janet Crescent and 63B Old Hope Road are registered in the defendant's name, whilst the Fyall property is registered in the names of both parties.

THE CLAIMANT'S EVIDENCE

[4] The claimant's evidence is that the parties met in 1995 when they were both students at Glenmuir High School in Clarendon and began dating. The relationship broke up in or around 1997 or 1998. The defendant went to train as a soldier. They met up again in 2000 and she would visit him at Up Park Camp. At that time she was working in Clarendon as a receptionist, but moved to a job in Kingston at the

Mines and Geology Division of the Ministry of Works in 2001, where she currently works. They continued dating.

[5] It is her evidence that, while the two were dating, in or around 2003, the defendant purchased the Old Hope Road Apartment using his National Housing Trust (NHT) benefits and a loan from the Victoria Mutual Building Society (VMBS). She gave the defendant $150,000.00 towards the closing costs. Money she had received as retroactive payment for a post upgrade at her workplace. The defendant told her that since she was not a contributor to the NHT at the time her name could not go on the title, but he would add her name when they got married. The apartment was rented out at after it was purchased, whilst they lived at rented premises at Hamilton Drive. She deposited the retroactive payment received from Mines and Geology in her JDF Credit Union account. They lived at the apartment for eight years as their principal place of residence, and only lived at Janet Crescent for about two and a half years.

[6] The couple got married in 2004. Their first child was born in August 2005. That same year, they moved into the apartment at Old Hope Road.

[7] She states that in September 2005, she commenced an undergraduate degree programme in chemistry and management. She had to put her studies on hold so she could devote herself to the child as she was mostly alone and had to manage everything by herself resulting in a difficulty in managing her studies.

[8] She intended to resume her studies when their daughter was one year and six months old, but was unable to, as the defendant's sister, who was in her first year of university abroad, had a child. The defendant decided to assist her with the child. The child, Jaden, was taken to them at one month old after her husband asked her to care for him. She agreed to do so. She struggled with baby Jaden and her own daughter who was about two years old at the time. When Jaden came to live with them her husband was on a military course in the United States for six months. She also struggled with the children, groceries, gas cylinder and laundry up and

down the stairs at the apartment, as it had no elevator. When her husband returned, she continued to struggle with the two children, as he was stationed at camp.

[9] She asked her husband to get a helper. They got a helper, but Jaden was sent to live with his grandmother in 2008, as she was again pregnant and could no longer manage on her own. This child was born in March 2009.

[10] During the time that she put her studies on hold, the defendant completed online degrees in Law and Security and Risk Management. He was able to do this while she was busy working and caring for the children.

[11] In or about 2014, the parties discussed moving back to live in Clarendon after he retired and decided to buy a piece of land there to build on. They subsequently purchased the Fyall property as joint tenants, using her NHT benefits and a deposit provided by the defendant. The mortgage is paid from her salary each month.

[12] Around the same time, owing to discussions by the parties surrounding the increasing unsuitability of the apartment, the defendant looked for a three bedroom house, and acquired a loan from the Jamaica National Building Society (JNBS) to purchase same. The defendant told her that it did not matter that her name was not put on the title, as, if anything happened to him, she would get the property for herself and the kids. When she called the NHT to enquire if her name could be put on the title, she was advised that she would lose her build on own land benefits. They moved into this house in Portmore November 2014.

[13] Although falling apart before, the marriage started to deteriorate moreso in 2015. Things came to a head in May of 2015, when the parties had a disagreement. She alleges that the defendant was physically abusive and threatened her on more than one occasion. He asked her to leave and refused to allow her to move into the apartment with the kids. He also stated he would rather sell the apartment or drag it out through the courts than allow her to get it.

[14] In November 2015, the defendant froze the accounts she used to care for the children and took away the car she used for transporting the children in December when he returned from Canada. She moved out of the house in May of 2016, and made a report to the police and at Up Park Camp regarding threats she alleges the defendant made against her.

[15] The claimant states that she earns a net salary of $43,000.00 per month. During the marriage she would transfer $20,000 from her pay to his account. She was unable to do this in November 2015. The defendant makes in excess of $300,000.00 per month. She has been struggling with taking care of the children as well as adequate accommodation since the separation.

[16] In **cross-examination**, in relation to the claimant's assertion that she contributed to the closing costs of the apartment, it was revealed that the claimant did not join the JDF Credit Union, until after the parties were married. The property was purchased before they were married. The claimant stated that she started a business course online but did not complete it because she still had to struggle with the children. At no time did she give up her job during the marriage. She also admitted that her husband did employ a helper, but stated at trial that the helper was only there for about three (3) or four (4) months in 2008 when Jaden was staying with them. They had no helper when she was pregnant with the second child.

[17] In **re-examination**, she stated that the money was actually taken from the UWI Credit Union. When asked by Mr. Steer if she is claiming 50% of Old Hope Road because she lived there with the defendant, the claimant responded 'yes, because it was the matrimonial home for eight (8) years'. She agreed that it was her husband alone who found the money to purchase the Portmore property, and he took the Portmore house and Old Hope Road apartment in his name alone. She also agreed that her husband was the one who paid the household expenses and saw to it that the mortgage on both properties was paid, and had also contributed when her father was sick.

THE DEFENDANT'S EVIDENCE

[18] The defendant's evidence is that the claimant did not make any contribution towards the Old Hope Road property as she contends. He borrowed most of the money from NHT and VMBS, leaving a shortfall of $427,365.48 on the purchase price and other administrative fees. He did not say, however, how he paid that amount. They were not together in 2003. The defendant attached to his second affidavit, a JDF credit union bank statement showing activities on his account in 2003, including the withdrawal of over $175,000.00 between March to April 2003. He alone paid the NHT and VMBS mortgages and he has paid the mortgage in respect of the Janet Crescent premises since the date of separation.

[19] His testimony is that he was not consulted in relation to his nephew coming to stay with them, and the first he knew of it was when his wife and sister called him while he was away and advised him that the child was staying at the house. He admitted that he worked at Camp for odd and long hours but asserts he lived at home with his wife, as there was nowhere for him to sleep at Camp since he moved from there. He even took six (6) weeks leave to stay at home with the baby when the claimant had to return to work. He stated that it was not the responsibility of taking care of the child that caused the claimant to fail her studies, but rather that the claimant did not like to study, and when he started his programmes he suggested they pursue online courses together but she was never interested. He also stated that at the time the issue with his sister's child arose, it was their plan to adopt a child. He had already started the process but, his sister's child put an end to it.

[20] In **cross-examination**, the defendant stated that his relationship with the claimant started in October of 2003 when she was working at Mines and Geology. It was not true that the claimant used to give him $20,000 from her salary each month after they were married, or that he had ordered her to put $20,000 into a Scotia Bank account each month. They did not pool their funds during the marriage, and there were only two occasions on which she collected rent for the apartment on his behalf.

[21] He admitted that since the separation, the children have been living with the claimant and during this time, the apartment at Old Hope Road was tenanted. He was living in the Janet Crescent home between May 2015 to August 2016. The property was not rented at that time. At the time of trial the property was not rented.

[22] Whilst he was living with his wife he paid the mortgage. He has never asked her to pay the mortgage. He denied telling the claimant to leave the house, but admitted that he said in a whatsapp conversation 'tell me when you are packed and ready'. He stated he still continued to pay mortgage on the Janet Crescent property he did not pay any rental for where the claimant was living. He also admitted that he was the sole occupant of the Janet Crescent premises after the claimant left.

[23] In relation to the Fyall property, the defendant stated that he has made mortgage payments but admitted that he had not presented any evidence of this to the court and, up until they were separated, he would give the claimant cash in the amount that was deducted from her salary.

[24] In relation to the shortfall on the purchase price for the apartment of $427,365.48, he covered the amount outstanding. It was not partially covered by $150,000 given to him by the claimant. He noted that the current mortgage payments were $30,000 to VMBS and $8,000 to the NHT.

[25] In relation to his resignation from JDF he stated that he was asked to resign as a result of the report made to them by his wife.

[26] In relation to Jaden, he stated that he was not consulted about the child staying with his wife. He only became aware of this when his wife and sister called him whilst he was in Canada and advised him that Jaden was staying at the house.

[27] In relation to the undergraduate programme pursued by his wife, the defendant's evidence is that his wife did not discuss the difficulty she was having with the course and caring for the child. Further, he tried to find out from her why she did

not finish the course. He disagreed that it was because she couldn’t manage alone with caring for the child, but rather, that she had a challenge studying and understanding the concepts of chemistry.

[28] In **re-examination**, the defendant explained that the claimant moved out of the Janet Crescent premises May 2016. He moved out about a month to a month and a half later to 44 Revamp Road and moved back to the premises in September of 2017.

THE SUBMISSIONS

A. *THE CLAIMANT’S SUBMISSIONS*

[29] The claimant filed skeleton submissions October 23, 2017, contending that the issues for determination are (a) which property is to be declared the family home; (b) whether the claimant is entitled to fifty (50%) share in any property that is not the family home; and (c) whether the claimant is entitled to 100% interest in the Fyall property.

[30] The claimant relies on the entitlement of a spouse to a half share in the family home under section 6 of PROSA, as well as the definition of family home espoused in the case of Weir v Tree (2014) JMCA Civ 12. The claimant also relies on the cases of Hogg v Hogg [2013] JMSC Civ 7 and Gardiner v Gardiner [2012] JMSC Civ. 54 in respect of how the Court should treat with ‘other property’ under section 14 of PROSA.

[31] The court made an order for the parties to prepare, file and exchange written submissions on or before December 4, 2017. The defendant complied filing submissions and index thereto December 4, 2017. The claimant was non-compliant, hence the skeleton submissions are relied on for assistance.

THE DEFENDANT’S SUBMISSIONS

[32] In relation to the three (3) properties in dispute, the defendant submits that the claimant is only entitled to 50% of the beneficial interest in *12 Janet Crescent*, which is the family home, 50% in the *Fyall property*, but no share at all in the *Old Hope Road* apartment.

[33] In relation to *12 Janet Crescent*, notwithstanding that the claimant conceded at trial that this was the family home, the defendant sought to illustrate in his submissions that this is so because the law indicates that only the last place where the parties resided (in accordance with section 2 of PROSA) is capable of being the family home. The case of Duncan v Duncan [2015] JMSC Civ 75 is relied on for this proposition. It is submitted that the property being the family home means that it should be shared equally pursuant to section 6 of PROSA, and this equal share can only be varied upon an application by an interested party under section 7. No such application has been made, therefore, it is submitted, there is no basis to depart from the equal share rule.

[34] In relation to the *Fyall* property, the defendant contends that, the claimant has failed to discharge the heavy burden placed on her to rebut the presumption of a beneficial joint tenancy, and as such, the property ought to be shared equally. The case of Jones v Kernott [2011] UKSC 53 is relied on in this regard.

[35] The defendant asserts that, in accordance with section 14 of the Act, although the claimant pays the monthly mortgage by way of salary deductions, he has contributed directly and indirectly to the acquisition of the property, in that, in addition to making the down payment on the property, he was the primary provider for the family, paying the bills and for groceries, thus putting the claimant in a position to be able to service the mortgage.

[36] In relation to the *Old Hope Road* property, the defendant submits that the claimant is not entitled to a share as the property was purchased by him and was wholly owned by him prior to the marriage. His evidence is that the claimant did not contribute $150,000.00 to the closing costs as she claims (this being unsupported

by evidence). The defendant urges the court to examine the credibility of the claimant, particularly the changes in her story: first that she gave the defendant $150,000.00; then that she had taken the money from the JDF credit union; and when it was established that at the time of the purchase of the property the claimant was not yet a member of the JDF credit union, her statement that she had taken the money from another credit union.

[37] Since it is not the family home, it has been submitted that the property is to be considered under section 14 of the Act, which contemplates that there must be some contribution to the acquisition, conservation or improvement of the property in dispute, and that the orders that the Court can make in these circumstances must only be made where the justice of the case so requires. In this regard, the defendant asks the Court to consider that the claimant already enjoys a 50% entitlement to the family home.

[38] The cases of Stewart v Stewart [2013] JMCA Civ 47 and Carlene Miller, Ocean Breeze Suites and INN Limitedv Harold Miller, Ocean Breeze Suites [2015] JMCA Civ 42 are relied on for the approach the Court ought to take in considering a departure from the equal share rule. Hyacinth Gordon v Sidney Gordon [2015] JMCA Civ 39 is also relied on in respect of the ambit of the contribution factor in section 14(2) of PROSA.

[39] It is argued that, in relation to the claimant's assertion that she gave non-financial contribution in that she sacrificed her education for her family and cared for her nephew, this, in and of itself, cannot be considered as contribution to the relevant property. It is contended that the claimant's evidence on this issue is inconsistent and that the claimant eventually asserted under cross-examination that the decision to take in the defendant's baby nephew was made by both parties, albeit that the defendant's evidence is that he was overseas when he was contacted about the decision made by the claimant after her discussions with his sister. The Court is asked to consider the evidence that the claimant admitted that the defendant substantially paid the bills for the home, paid the mortgage, paid for a

helper for a period of time, and sent the claimant back to school, although she never completed her studies. Therefore, it is submitted, claimant made no contribution to the acquisition, preservation or improvement of the property. Further the defendant's evidence should be preferred.

[40] In respect of the issue of contributions, the defendant submits that the Court should consider the claimant's admission that the defendant was the primary breadwinner because of his income from the JDF. Further, he was forced to resign from the JDF due to the claimant admittedly making a report (one which remains untested) that the defendant threatened her. Consequently, it is argued there is no justification to grant the claimant a share in the Hope Road property.

[41] The defendant therefore seeks the following orders:

> 1. *That the property at Janet Crescent is the family[home].*
> 2. *That the parties are equally entitled to a share in the family home.*
> 3. *That the parties are equally entitled to the property at Fyall.*
> 4. *That the Claimant has no interest in the property at Old Hope Road.*
> 5. *That the mortgage payments paid on the property situated at Fyall and Janet Crescent out [sic] to be accounted for since the date of separation in 2015 until the settlement of these properties.*
> 6. *That a competent valuator be appointed by the parties to value the said properties and the costs of the valuation be borne equally by the parties.*
> 7. *That the Registrar of the Supreme Court be empowered to sign all Instruments of Transfer in the event that the defendant neglects or refuses to sign.*
> 8. *No order as to costs.*

LAW & ANALYSIS

[42] The **Property (Rights of Spouses) Act** (**PROSA**) primarily governs the division of property between spouses in Jamaica. **Section 13(1)** of **the Act** entitles a spouse to apply to the Court for the division of property in specified circumstances, including where the parties have separated and/or are divorced.

[43] In the case at bar, there are three (3) properties in dispute: 12 Janet Crescent, 63B Old Hope Road, and Fyall Estate. The Court is tasked with deciding which of these properties is to be considered the 'family home' and how it is to be divided, as well as, how the other properties are to be divided.

THE FAMILY HOME

[44] It was always the contention of the defendant that the Janet Crescent property was the family home. The claimant, who had initially asserted that the Hope Road apartment was the family home, conceded at trial that the family home was indeed the Janet Crescent property. Despite this concession the Court finds it necessary to briefly outline why this is acceptable.

[45] "Family home" is defined in **section 2** of the **Act** as:

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

[46] During the marriage, the parties lived at three (3) premises; rented premises at Hamilton Drive from about 2003 to 2005; the Old Hope Road apartment from about 2005 to 2013, where they resided for most of the marriage; and lastly, the Janet Crescent property from about late 2013, up until their separation in 2016.

[47] The defendant relied on the case of **Duncan v Duncan** for the proposition that only the last place at which the parties resided is capable of being the considered the family home.

In **Duncan's** case Batts J relied on the definition of 'family home' formulated by Sykes J in **Stewart v Stewart**, 2007 HCV 0327, delivered March 3, 2014, which was approved by the Court of Appeal in **Weir v Tree** [2014] JMCA Civ. 12. Phillip JA, propounds:

> *The dwelling house*

> *[39] In **Peaches Stewart v Rupert Stewart**, Claim No HCV 0327/2007, delivered 6 November 2007, Sykes J in delivering the judgment dealing with sections 2 and 13 of PROSA analysed excellently, the definition of "family home" and the interpretation to be given to it. I endorse his comments in the main and have set out below most of his discussion in relation thereto, with which I agree. He stated the following in paragraphs 22 and 23:*
>
>> *"22. It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended…*
>>
>> *23. It should be noted that the adjectives only and principal are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. Only means sole or one. Principal means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression family residence. Indeed even the noun residence is qualified by the noun family which is functioning as an adjective in the expression family residence. Thus it is not any kind of residence but the property must be the family residence. The noun residence means one's permanent or usual abode. Thus family residence means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses."*
>
> *He then referred to the fact that in the definition of family home it was vital that the "property" was used habitually or from time to time by the spouses as the only or principal family residence, and those adverbs indicated how the property was to be used.*

[48] The 'family home' must be the dwelling house that is the 'principal residence' used by the spouses habitually or from time to time, mainly for the purposes of the household. That there can be only one dwelling house regarded as such is evident from the definition, and the fact that the definition is stated in the present tense (using 'is'), to me suggests that the premises ought to be the current dwelling house that is the main place of residence at the time of separation. The intention of the parties is important. In the present case it is clear from the evidence that the parties moved into 12 Janet Crescent with the intention to make it their home, live as man and wife, and raise the children. The evidence is that the apartment had become too small to accommodate their growing family. They did not return to the apartment to live, nor did they go elsewhere. I therefore agree that 12 Janet Crescent was the family home.

[49] Consequently, in keeping with the general rule in **Section 6** of **PROSA,** the family home is to be shared equally by the parties. **Section 6** states:

> *"(1) Subject to subsection (2) of this section and sections 7 and 10,* ***each spouse shall be entitled to one-half share of the family home*** *–*
>
> *(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
>
> *(b) on the grant of a decree of nullity of marriage;*
>
> ***(c) where a husband and wife have separated and there is no likelihood of reconciliation***
>
> *...*
>
> *[emphasis Added]*

[50] The Court may depart from this general rule in cases where it is satisfied that to apply the equal share rule would be unreasonable or unjust. However, the Court is only so empowered where an interested party applies for same to be done. **Section 7** provides:

> *"7(1)* ***Where in the circumstances of any particular case the court is of the opinion that it would be unreasonable or unjust*** *for each spouse to be entitled to one-half the family home,* ***the court may****,* ***upon application by an interested party****, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following –*
>
> *(a) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
>
> *(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
>
> *(c) that the marriage is of short duration.*
>
> *...[emphasis added]*

[51] In the instant case, neither of the parties has asked the Court to vary the equal share rule. In fact, the defendant is urging the court to divide the property on a 50/50 basis. I therefore agree that each party is beneficially entitled to 50% of the Janet Crescent property, thesaid property being the family home.

THE OTHER PROPERTIES

[52] **Section 14** of **PROSA** empowers the Court to divide property other than the family home based on the factors outlined at subsection (2). It provides**:**

> *"14-(1) Where under section 13 a spouse applies to the Court for a division of property the Court may –*
>
> *(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
>
> *(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),*
>
> *or, where the circumstances so warrant, take action under both paragraphs (a) and (b).*
>
> *(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 agreement with respect to the ownership and division or property;*
>
> *(e) Such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*

[53] **Section 15** (1) further empowers the Court to make an order altering the interest of either spouse in property other than the family home "*as it thinks fit*". **Sub-section (2)** prohibits the Court from making such an order unless it is satisfied that *it is just and equitable to do so*. **Sub-section (3)** requires the Court to consider the following:

> *"(3) Where the court makes an order under subsection (1), the Court shall have regard to –*
>
> *(a) The effect of the proposed order upon the earning capacity of either spouse;*
>
> *(b) the matters referred to in section 14(2) in so far as they are relevant; and*
>
> *(c) any other order that has been made under this Act in respect of a spouse.*

[54] **Section 4** of the Act states:

> *"The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions are made by this Act, between spouses and each of them, and third parties.*

However, Morrison JA, in **Glenford Greenland v Camille Greenland** (unreported) SCCA: 71/08 oral judgment delivered January 20, 2009, noted that this does not entirely rule out *'a consideration of the earlier approach under the common law because the factors in section 14(2) to some extent replicate what was the former law'*.

At page 6 of the judgment it is stated:

> *"It will be seen immediately that although section 4 of the Act speaks to the former presumptions of the common-law and equity having no effect in respect of property that comes within the Act, what section 14 (2) does is in effect to import the same things that would have been of significance in determining the legal position when the property was owned jointly before the Act, which is to say contribution, agreement between the parties, duration of the marriage and other relevant factors.*
>
> *It seems to us that although the Act intends to be a complete code for the division of matrimonial property, it does not entirely rule out **a consideration of the earlier approach under the common law** because the factors mentioned in section 14 (2) to some extent replicate what was the former law."*

The Old Hope Road Property

[55] This property is registered in the sole name of the defendant. The claimant is contending she is entitled to 50%, whilst the defendant asserts she is not entitled to any share.

Contribution is defined in **section 14(3)** as follows:

> *In subsection (2)(a), "contribution" means –*
>
> *(a) the acquisition or creation of property including the payment of money for that purpose;*
>
> *(b) the **care of any relevant child** or any aged or infirm relative or dependent of a spouse;*
>
> *(c) the giving up of a higher standard of living than would otherwise have been available;*

> (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 which –*
>
> > *(i) enables the other spouse to acquire qualifications; or*
> >
> > *(ii)* ***aids the other spouse in the carrying on of that spouse's occupation or business****;*
>
> (e) ***the management of the household and the performance of household duties****;*
>
> (f) *the payment of money to maintain or increase the value of the property or any part thereof,*
>
> (g) *the performance of work or services in respect of the property or part thereof,*
>
> (h) *the provision of money, including the earning of income for the purposes of the marriage or cohabitation;*
>
> (i) *the effect of any proposed order upon the earning capacity of either spouse*
>
> *(2) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.(emphasis added)*

[56] In assessing the contributions made by the parties to the acquisition, conservation and improvement of the property, I find that a review of the evidence in this respect is necessary.

There is no dispute that this property was purchased prior to the marriage and funded mainly by the defendant, who made all the mortgage payments. The claimant's testimony is that she contributed $150,000.00 to closing costs. The claimant has, however, admitted that she has placed no evidence before the Court to prove this. I find her evidence in relation to contribution inconsistent. Initially she claimed that she got the money from the JDF Credit Union, but it was revealed in cross-examination that she did not join that entity until after the parties were married. The property was purchased before they were married. In re-examination, she stated that the money was actually taken from the UWI Credit Union.

[57] When asked by Mr. Steer if she is claiming 50% of Old Hope Road because she lived there with the defendant, the claimant responded "yes" because it was the

matrimonial home for eight (8) years. She agreed that it was her husband who found the money to purchase the Portmore property alone, and that he took the Portmore house and Old Hope Road apartment in his name alone. She also agreed that her husband was the one who paid the household expenses and saw to it that the mortgage on both properties was paid, and also contributed when her father was sick.

[58] The defendant's evidence is that he borrowed most of the money from the NHT and VMBS, leaving a shortfall of $427,365.48 on the purchase price and other administrative fees. However, he did not say how he paid that amount. The defendant was adamant that at the time of the purchase of Old Hope Road, he and the claimant were not a couple, nor were they even communicating. This despite her insistence that they were dating. He also asserted that he had rented out the apartment prior to the couple resuming their relationship, and when they got back together the Hamilton Drive apartment was rented.

[59] I prefer the evidence of the defendant in this respect in the main as being more credible, and find, on a balance of probabilities that the claimant made no financial contribution to the Old Hope Road property.

[60] In relation to non-financial contributions, the claimant's evidence is that she sacrificed her studies for the family. She asserts that she had started a degree program at University in 2005, but failed because she had difficulty managing her studies with her baby and everything else. Her husband was stationed at Camp and she was mostly alone. She had to put her studies on hold to take care of the defendant's sister's child as she was in the first year of university abroad. Her husband, who was on a military course overseas at the time, asked her to help take care of the baby who was one month old when he came to live with her. She had the responsibility of taking care of him, in addition to her own child who was about two years old at the time. Her husband was away. The claimant states that she started a business course online but did not complete it as she still had to struggle with the children. At no time did she give up her job during the marriage.

She admitted that her husband employed a helper, but stated at trial that the helper was only there for about three (3) or four (4) months in 2008 when his nephew was staying with them. At the time that she was pregnant with the couple's second child they had no helper.

[61] The defendant's evidence in relation to non-financial contribution is in direct contrast. He was not consulted in relation to his nephew coming to stay with them. He was only advised that the child was staying there. He admitted that he worked at Camp for odd and long hours but he lived at home with his wife. He even took six (6) weeks leave to stay at home with the baby when the claimant had to return to work. It was not the responsibility of taking care of the child that caused the claimant to fail in her studies, but rather that the claimant did not like to study.

[62] On a consideration of the above facts, I find, on a balance of probabilities, that the defendant did in fact ask the claimant to assist with his sister's child. I prefer the claimant's evidence in this respect. The claimant was alone at home with a 2 year old child of her own. It seems unlikely to me that she would have taken it upon herself to take her sister-in-law's child without consulting the defendant. There is nothing to suggest why she would have taken it upon herself to assist her sister-in-law without consulting her husband. I take the view that if the claimant had not taken care of the child, the defendant quite likely would have had to pay someone to care for him or assist with his care. I am also of the view that the added pressures of caring for that child, in addition to her own and primarily by herself, may well to a certain extent have deprived the claimant of the opportunity to take on and manage other endeavours, including improving herself by way of schooling.

Therefore based on the above I find that the claimant made a non-financial contribution that entitles her to a share of the property. I would estimate this to be a 10% share.

The Fyall Property

[63] The claimant is seeking 80% in this property, whilst the defendant seeks 50%. The property is in the names of both parties as joint tenants. In cross-examination the claimant agreed that they purchased the property together. The title was taken in their names jointly. It is not disputed that the down-payment for the property was paid by the defendant and the claimant serviced the monthly mortgage by way of salary deductions. However, the defendant asserted that, up until April 2016, he would refund the mortgage money to the claimant. A payslip exhibited by the claimant in her affidavit shows the monthly mortgage to be $10,100. There is no indication as to how much money was paid for the deposit. What is clear is that both parties have made financial contributions to the property.

[64] In addition to his financial contribution, the defendant submitted he also made non-financial contributions in that he was the primary provider for the family, paying the bills and for groceries, thus putting the claimant in a position to be able to service the mortgage.

[65] The claimant did not dispute that the defendant was the primary provider for the family. The evidence shows that the claimant earned considerably less than the defendant, and that, in addition to the above, he paid both mortgages for the Janet Crescent and Old Hope properties. There is no evidence that the claimant made any other financial contribution to the family or household expenses other than the Fyall mortgage, which amounts to $10,100.00 monthly. The evidence is that the mortgage for the Janet Crescent premises alone is $99,000.00. I agree with the contention that, were the defendant not taking care of the other financial responsibilities, the claimant would not have been in a position to take on this mortgage.

[66] In the case of **Jones v Kernott** [2011] UKSC 53, relied on by the defendant, Lord Walker and Lady Hale, in their joint judgment, after perusing a number of authorities, including **Stack v Dowden** [2007] UKHL 17, stated the following as the applicable principles in cases such as these:

> *51. In summary, therefore, the following are the principles applicable in a case such as this, 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.*
>
>> *(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.*
>>
>> *(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.*
>>
>> *(3) Their common intention is to be deduced objectively from their conduct: "the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party's words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party" (Lord Diplock in Gissing v Gissing [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in Stack v Dowden, at para 69.*
>>
>> *(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset, or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, "the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property": Chadwick LJ in Oxley v Hiscock [2005] FAm 211, para 69. In our judgment, "the whole course of dealing … in relation to the property" should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties' actual intentions.*
>>
>> *(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4)).*

[67] I find that the intention of the parties was for both to have beneficial interests in the property as a family. This is evident from the fact the parties were both originally from Clarendon where the land is situated both parties contributed, directly and indirectly to the acquisition of the land. From the evidence I deduce that, at the time of the purchase the parties were in harmony with each other and were still interested in making a life together. It is the claimant's evidence that they discussed moving back to Clarendon after the defendant retired and decided to buy a piece of land to build on. Therefore, I conclude that the beneficial interest

accords with the legal interest in the property. Consequently, the parties are each entitled to a 50% beneficial interest in the Fyall Property.

ORDER

1. 12 Janet Crescent is the family home.

2. The parties are equally entitled to a fifty percent (50%) share and interest in all that parcel of land situate at 12 Janet Crescent, Edgewater, Portmore in the parish of Saint Catherine being the Land registered at Volume 1080 Folio 571 of the Register Book of Titles.

3. The parties are equally entitled to a fifty percent (50%) share and interest in all that parcel of land situate at Fyall Estate Four Paths in the parish of Clarendon and being the Land registered at Volume 1446 Folio 200 of the Register Book of Titles.

4. The claimant is entitled to a 10 percent (10%) share of the property known as Apartment #63B, Strata #322, 96B Old Hope Road, Kingston 6 in the parish St. Andrew.

5. The parties are equally liable for the mortgages in respect of the family home and the Fyall property since the date of separation.

6. An account is to be done of all mortgage payments made in relation to the family home and the Fyall property.

7. A competent valuator be appointed by the parties to value the said properties and the costs of the valuation be borne equally by the parties.

8. In respect of all properties, each party is given first option to purchase the other party's share.

9. The Registrar of the Supreme Court is empowered to sign all Instruments of Transfer in the event that either party neglects or refuses to sign.

10. No order as to costs.