



[2015] JMMC MC 2

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM No. 2012 HCV 04872

BETWEEN GORETH GORDON ANCILLARY/CLAIMANT/DEFENDANT

AND ELVIS GORDON ANCILLARY/DEFENDANT/CLAIMANT

**Mr Leonard Green & Ms Sylvan Edwards instructed by Chen, Green & Co.,
for Ancillary Defendant/Claimant**

Ms Lascine A. Wisdom-Barnett for Ancillary Claimant/Defendant

Heard on: 2nd July, 2014 and 23rd April, 2015

***Whether husband's business and other assets purchased therefrom are
matrimonial property – Application by Wife who worked in business for
division of matrimonial property – The Property (Right of Spouses) Act,
Section (14) – Whether wife entitled to a share of matrimonial property***

Coram: Morrison, J.

[1] The main claim between the parties at bar, concerning the family home, was announced as having been determined. However, the Ancillary Claimant/Defendant (The Claimant) has enjoined this Court to grant certain declarations. Here is how the Counterclaim which incorporates the sought-after declarations is set out:

“This Counterclaim has been brought by the Defendant/Ancillary Claimant against you the Claimant/Ancillary Defendant as being ancillary to the

Defendant/Ancillary Claimant. Copies of the Defendant's Defence and Particulars of Counterclaim are also served on you with this Notice.

The Defendant in the principal (claim) and the Ancillary Claimant herein claims against you the Claimant in the principal claim and the Ancillary

- (1) For a Declaration from this Honourable Court that the Ancillary Claimant/Defendant is entitled to a ½ share in the 1998 Green Toyota Corolla Sedan Motor Car, Engine Number 5AH114879 Chassis Number AE1105255030 or alternatively such other interest as determined by the Honourable Court;
- (2) For a Declaration from this Honourable Court that the Ancillary Claimant/Defendant is entitled to a ½ share in the 2003 Grey Nissan Window Caravan, Motor Truck Engine Number ZB30145455A Chassis Number VWE25052609 and the 1998 Grey Toyota Corolla Sedan Motor Car, Engine 5AH114879 Chassis Number AE1105255030 be sold and the sums divided between the Ancillary Claimant/Defendant and Ancillary Defendant/Claimant according to their respective shares;
- (3) For an order from this Honourable Court that the 2003 Grey Nissan Window Caravan, Motor Truck Engine Number ZB30145455A Chassis Number VWE25052609 and the 1998 Green Toyota Corolla Sedan Motor Car, Engine Number 5AH114879 Chassis Number AE1105255030 be sold and the sums divided between the Ancillary Claimant/Defendant and the Ancillary Defendant/Claimant according to their respective shares;
- (4) That the Ancillary Defendant/Claimant be given the first option to purchase the motor vehicles;
- (5) For an Order from this Honourable Court that MSC McKay (JA) Ltd be the approved Valuers of the Motor Vehicles

- (6) Further or alternatively that in the event that the motor vehicles are no longer in existence or in the possession or control of the Ancillary Defendant/Claimant there be an account by the Ancillary Defendant/Claimant to the Ancillary Claimant/Defendant of the amount of the sale proceeds or insurance claim and the said sum be divided in accordance with the respective shares of the parties;
- (7) For a Declaration from this Honourable Court that the Ancillary Claimant/Defendant is entitled to a ½ share in Dynamic Electronic Service or alternatively such other interest as determined by the Honourable Court;
- (8) For an Order that Winsome Minott, Chartered Accountant be deemed the Valuator of the business or such other Chartered Accountant as appointed by the Court;
- (9) For an Order that the costs of the valuations and assessments be paid by the Ancillary Defendant/Claimant;
- (10) That the Ancillary Defendant/Claimant bear the costs of the Ancillary Claim;
- (11) For an Order that the Ancillary Claimant/Defendant has such further or other relief as this Honourable Court may deem fit;
- (12) Liberty to apply;

This is what subsequently ensued:

[2] On May 6, 2013 the Honourable Mrs G. Fraser (Ag) made the following, two (2) orders, one of which is unperfected:

“UPON A FIXED DATE CLAIM COMING UP FOR HEARING THIS DAY
and after hearing Mr Leonard Green instructed by **Chen, Green & CO.**
Attorneys-at-Law for the Claimant/Ancillary Defendant herein and **Mrs**

Lascine Wisdom-Barnett, Attorney-at-Law for the Defendant/Ancillary Claimant herein, **IT IS HEREBY ORDRED AND DIRECTED AND DECLARED THAT:-**

1. The Applicant/Claimant is entitled to a one-half legal interest in All That parcel of land part of Sydenham in the parish of Saint Catherine being the property now known as Lot Two Claudette Drive being the land registered at Volume 1264 Folio 418 of the Register Book of Titles pursuant to Section 6 of the Family Property (Rights of Spouses) Act;
2. The Respondent is entitled to the first option to purchase the interest in the said property;
3. That Allison Pitter & Co. Chartered Valuers & Surveyors be appointed Valuers for the purpose of determining the market price for the sale of the house;
4. That the Respondent do deliver to the Applicant's Attorneys-at-Law, Chen, Green & Company, Attorneys-at-law within forty-five (45) days of the signing the said Sale Agreement, a letter or letters of commitment from a reputable financial institution for the balance purchase price on the Agreement;
5. That if the Respondent should choose not exercise the option to purchase that the property be sold by private treaty or public auction with the valuation being the reserved price. The Applicant's Attorneys-at-Law Chen, Green & Company, Attorneys-at-Law shall have carriage of sale of the said property in any event;
6. That upon the failure of any other parties to execute any of the documents relevant to execute a registrable Transfer of the said property then the Registrar of the Supreme Court be empowered to sign on their behalf.

7. Costs are to be costs in the cause
8. The Orders herein are to be filed and served by the Claimant/Ancillary Defendant's Attorney-at-Law"

This is the unperfected Order:

“UPON A FIXED DATE CLAIM COMING UP FOR HEARING THIS DAY and after hearing Mrs Lascine Wisdom-Barnett, Attorney-at-Law for the Defendant/Ancillary Claimant herein and Mr Leonard Green instructed by Chen, Green & Co. Attorneys-at-Law for the Claimant/Ancillary Defendant herein, **IT IS HEREBY ORDERED AND DIRECTED THAT:-**

1. Leave is granted to the Claimant/Ancillary Defendant to enlarge time within which to file an Affidavit in Reply, the Affidavit filed on the 6th of May, 2013 is to stand;
2. The Defendant/Ancillary Claimant is to file any response on or before the 22nd day of May 2013 if necessary;
3. All final affidavits are to be filed and served by the 26th day of July, 2013;
4. The Trial date be on the 9th day of January, 2014 in open Court by Judge alone;
5. There be a Pre-Trial Review on the 25th day of November, 2013 at 12:00 noon for ½ an hour.
6. Costs are to be costs in the cause.
7. The Orders herein are to be filed and served by the Defendant/Ancillary Claimant's Attorney-at-Law.”

It will be observed that here leave was granted to the Claimant/Ancillary Defendant

Further to the aforesaid orders the Honourable Mrs Justice F. Williams on the 25th day of November, 2013, ordered that:

- “1. The matter now be dealt with as a Trial in Chambers on the 9th of January, 2014;
2. The Claimant/Ancillary Defendant is permitted to file and serve an Affidavit of Mr Andrew Campbell and on Mr Rohan Robb on or before the 3rd of December 2013;
3. The Defendant/Ancillary Claimant is permitted, if so advised, to file and serve Affidavits in response on or before the 17th of December, 2013;
4. Affiants to attend for cross-examination;
5. Defendant/Ancillary Claimant’s Attorney-at-Law to file a Judge’s core bundle of documents on or before the 3rd of January, 2014 and serve a copy of the Index thereto on the Claimant/Ancillary Defendant’s Attorney-at-Law on or before the 3rd of January, 2014;
6. Outline of Submissions and list of authorities to be served on or before the 3rd of January 2014;
7. Costs are to be costs in the cause;
8. The Defendant/Ancillary Claimant’s Attorney-at-law to prepare, file and serve the Orders herein.”

From all of the above, it appears that the Order of Mrs Justice Fraser (Ag) that,

“The Applicant/Claimant is entitled to a one half legal interest in ALL that parcel of land part of Sydenham in the parish of Saint Catherine being the property now known as Lot Two Claudette Drive being land registered at Volume 1264 Folio 418 of the Register Book of Titles pursuant to Section 6 of the Family Property (Rights of Spouses) Act”, was made by way of an agreement and/or consent between the parties without a determination of the factual contentions. The substance of the counterclaim being

reserved for determination by the Court, I am now to embark on a resolution of the disputed facts.

THE BACKGROUND FACTS

[3] The evidence of the Applicant is comprised in two (2) affidavits filed on November 21, 2012: one in support of the Ancillary Claim Form and the other in reply to that of Elvis Gordon; affidavit in reply of Goreth Gordon filed May 21, 2013; and, affidavit in reply of Goreth Gordon filed December 20, 2013. The Defendant relied on two (2) affidavits that were filed on September 6, 2012 and May 6, 2013.

[4] Essentially, from the points of convergence, it emerges that the Ancillary Claimant and Defendant tied the nuptial knot on July 28, 1995. The couple had (2) relevant children one of whom was brought to the marriage by the wife. In the course of their marriage the couple lived and cohabited as husband and wife for approximately fifteen (15) years. Their marriage soon floundered against the rocks of disharmony when pursuant to a complaint filed by the Ancillary Claimant in the Resident Magistrate Court, Spanish Town, Saint Catherine, against the Ancillary Defendant the court granted against the Ancillary Defendant an Occupation Order. This was on September 10, 2010. Thereafter, their marriage continued to fall away when the Ancillary Defendant was obliged to move out of the matrimonial home. Subsequently, the Occupation Order being lifted the Ancillary Defendant went to the matrimonial home only to retrieve his belongings.

[5] At the time of their marriage the Ancillary Defendant owned and was operating a business entity Elvis Gordon T/A Dynamic Electronics.

THE ISSUES

[6] In adopting the Applicant's formulation of the issues I now state what they are:

- a) Whether during the period 1995-2008, the Applicant was a paid employee of the business?

- b) Whether the Applicant is entitled to an interest in the business and the amount of such interest, if any?
- c) Whether the motor vehicles form a part of the matrimonial property/
- d) Whether the Applicant is entitled to an equal share in the said motor vehicles and her interest, if any, in the same?

THE SUBMISSIONS

[7] The Ancillary Defendant's submission is that since The Property (Right of Spouses) Act codifies the legal position on the matter of the parties' entitlement to trust property it follows that it is to the decided cases to which we must resort for guidance. As such the Ancillary Defendant relies on –

- a) **Nixon v Nixon** [1969] 3 All.E.R. 1133;
- b) **Grant v Edwards**
- c) **Audrey Chin v Lascelles Chin**, Suit No. E. 467/93
judgment delivered on 6/12/2001

The Ancillary Claimant's submissions are to the contrary and she relied on the first instance judgments of –

- a) **Donna Graham v Hugh Graham**, Claim No. 2006 HCV03158,
judgment delivered on 8/4/2008; and
- b) **Narine Lewis v Anthony Lewis**, Claim No. 2007 HCV03544,
judgment delivered on 29/10/2009

THE EVIDENCE

[8] The Ancillary Claimant joined the business of her husband in the same year of their marriage. At that time her evidence is that, "the fixture [in the business] consisted of only a countertop, there were not assets or anything in the building save and except for a few hand tools".

[9] According to this witness, she worked alongside a Mr Riley, who had come in as an independent accountant, in setting up the filing of tax returns and

a record keeping system. She sourced the filing cabinets, chairs and tables and set and managed the administrative arm of the business. She managed the latter on a daily basis until 2009.

[10] According to paragraph 15 of her November 21, 2012 affidavit, her job included doing the banking transactions, supervising the workmen who were then there, establishing a customer base, picking up and returning items for repair from customers, helping to secure and maintain large contracts, establishing customer service relations, calling customers to collect goods or do follow up services. On the occasions when the Ancillary Defendant was away on business trips, the Ancillary Claimant asserts that, she would run the business with the assistance of the workmen who would do the repair aspect. Oftentimes, she continues, the money called in by her, would be used to clear goods brought in by the Ancillary Defendant. In fact, she avouches that, they both were involved in the sale of electronic items.

[11] This affiant continues at paragraph 20 onwards:

“... the business belonged to both of us and all of the profits and losses were shared between us;

That all of our assets were purchased through the business including motor vehicles and the house;

That prior to the marriage there were no assets, save and except for a Blue Mazda motor car owned by the Respondent which he sold shortly after we got married;

That the first asset purchased was the Nissan Sunny which was purchased after we got married”.

It is this affiant's evidence that they began to have difficulties due to the infidelity of her husband which resulted in their quarrelling often and which caused them to go for marriage counselling:

“That based on the advice of the counsellors we agreed that I would begin receiving a salary of Ten Thousand (10,000.00) a week;

That for less than a year I received sums from my husband but the payment time was never consistent in that sometimes it would depend on what the business brought in;

That I did not mind as I verily believe that I was entitled to a half of all our assets including a half of the equity in the business and so I continued to work”.

According to this deponent they both had to go for further counselling:

“That we returned to counselling and it was agreed that I would be given Thousand Dollars (\$5,000.00 per month however, I received only Three Thousand Dollars (\$3,000.00) which was discontinued after three (3) months;

I had begun getting involved in ministry at the church and I also began attending the Jamaica Theological Seminary in August 2009 in the evenings, that because of the lack of support from my husband sometimes I would even run out of gas on the road;

That I relied heavily on the financial support of friends and family during that period”.

According to this deponent “I am unable to maintain our daughter without support of my husband as since his departure from the house I have also been solely responsible for the mortgage and I have other expenses including motor vehicle expenses as my job requires that I own or have access to a reliable motor vehicle”.

As to the rest of her affidavit I will quote the salient parts:

“That up until September 2010 I had always driven a dark green, 1998 Toyota Sedan Motor Car and my husband a Nissan 2005 Motor Van;

That both vehicles were in my husband’s name even though they had been acquired during the course of the marriage;

That my husband maliciously dismantled the vehicle I controlled one morning and thereby deprived me of access to the same;

That the motor vehicle was never returned to me but it was removed from the house”.

[12] The Ancillary Defendant has striven to extirpate any claim by Mrs Gordon that she is entitled to any of her declarations that she has earnestly asked this Court to grant her. His defence, more accurately speaking, his defiance, is contained in two (2) affidavits dated September 3, 2009 (Affidavit 1) and another dated and filed May 6, 2013 (Affidavit 2).

[13] I shall here focus on the areas of divergence as is reflected in the parties competitive affidavits.

[14] From Affidavit #1 made in support of his Fixed Date Claim Form filed on September 5, 2012, he says at paragraph 5, “That when the Respondent and myself got married I was already an established electrical technician and since we were married she assisted me over those years and from the business neither of us collected a salary since it was our agreed intention that the earnings from our joint endeavours would go toward not only for our joint benefit but for the benefit of the child of the marriage Kelsey and also for the maintenance of the Respondent’s daughter Shalanda Nicholson” This is not a mere noteworthy concession but a significant and pivotal solution to the problem.

[15] Further, according to paragraph 6, he emphasises that the services he provides as an electrical technician is often mistakenly referred to as a business when, in fact,

what it allows him to do on occasions is to sell a few electrical appliances as a means of supplementing his income and that it has never been a flourishing business enterprise. The above statement was no doubt made to deflect and dash any notion by the Ancillary Claimant as to any perceived interest in any and all property, in which the Ancillary Claimant has staked a claim. He continued in paragraph 6, "In any event this arrangement existed prior to my marriage to the Respondent in July 1995 and as such she does not have an interest in any property that I had prior to her marriage to me".

[16] Still yet, in paragraph 9 of Affidavit #2, he asserts that his business existed in advance of his marriage and was not struggling. Accordingly, he says, "I had a secretary and staff members on full time employment. It is my initiative that caused the business to grow as I dedicated long hours to seeing to the satisfaction of my customers. It is not true to say, as the Defendant did ... that the business had only a few hand tools since I came into that business not only with two transformers machines but also with other bits of test equipment which she would not understand because she had no understanding about the technical side of the business."

[17] Paragraph 10 of Affidavit #2 again, throws into relief, the major points, of departure as between the parties' rival assertions:

"To give the impression that she was a major or significant contributor to the growth and success of my business, that is, "Elvis Gordon trading as Dynamic Electrical Services", is absolutely untrue as she made contribution but was paid for the work that she did and made no free contribution so as to acquire a share in my business. Further it is not true to say or to give the impression that I spent long periods overseas what happened was that when I travelled to buy parts, appliances and equipment I would not stay for any longer period than five days and on those occasions I would have left my senior technical employee Mr. Andrew Campbell in charge of the business since the defendant could not run a technical electrical business in my absence."

[18] This affiant goes on to say that the Ancillary Claimant “did no more than she was paid to do and she maintained no contract as he alleged. It is obviously untrue to say that she negotiated any contract since the contract with Courts Jamaica Limited was arranged with that body through the intervention of Mr. Ruel Robb of Rubric Limited who gave invaluable assistance in this regard. The Defendant was never a part of any contract. It was and has always been the quality of my work that recommended me to customers and cause me to achieve what I did.”

[19] As to paragraph 12, 13, and 14 of Affidavit #2, I will let this deponent speak his unfiltered words:

“That it is a slight of hand to say as the Defendant did in paragraph 16 of her affidavit that my contribution was by way of repairs when the fact is that my business was a repair business which expanded to do some sales and not the other way round;

... all the assets owned by the business were belonging to my business and does not form part of family property. The records and documents will show that my business was started before the marriage to the Defendant and she acquires no interest in my business and the vehicles purchased by the business belong to me and my business and was deliberately done like that because I had no intention to give her a share in the business. The fact that she drove one of the cars that I purchased is simply for convenience and was not intended to give her any interest in that car;

That she never requested and was never given a share of my business legally since she knew that as my wife if my business did well our family would benefit since I have always bourn my fair share of my responsibility and obligations;

... it is true that we had difficulties that we tried to resolve by way of counselling and on occasions when she got less money it was simply a situation where the business could not afford any further payment to her and I am not aware that she was receiving financial support from family

members and friends and if that were so she could have told me this and she never made me aware that she was getting any such support;

... it is my opinion that the Defendant receives more than a monthly salary of Forty Thousand Dollars (\$40,000.00) and I require that she proves her earnings from some proper, authoritative source;

...I assert emphatically that both vehicles are my personal property that were bought from my personal earnings and the Defendant was fully aware of this. It is my contention that she is not entitled to a share of any of those vehicles. It is not true to say that the Claimant suffered hardship since I took our daughter to school.”

FINDINGS OF FACTS

[20] I am to say, at the very outset that, generally, where there are factual contentions on the evidence, I prefer the evidence of the Ancillary Claimant to that of the Ancillary Defendant.

[21] The Ancillary Claimant's evidence is preferred on account of its reliability and candour. She spoke with the very voice of unpretentious truth. As to the Ancillary Defendant, his evidence was an effort, in the main, to reconstruct the past so as to allow himself to be seen as the haloed victim of a marriage that had run aground. In order to meet the claim, the Ancillary Defendant was inapt in trying to squeeze defiance into the mold of a defence.

[22] It is very important to note that in the same year when the parties got married, the Ancillary Claimant's name was added to the account of the company on the Ancillary Defendant's own volitional act. The Ancillary Claimant's prior training and experience in office administration, secretarial and customer relations services while in the employ of the Jamaica Public Service Company Limited, was found to be expedient by the Ancillary Defendant in the operation of the business. The Ancillary Claimant worked alongside an independent accountant and others in setting up the filing of tax

returns and a record keeping system. She sourced filing cabinets, chairs and tables and managed the administrative arm of the business on a daily basis up until 2009.

[23] Her job included doing the banking transactions supervising the workmen, establishing a customer base, picking up and returning items for repair from customers, helping to secure and maintain contacts and establishing customer service relations. All this she did for a period of fourteen (14) years without ever being paid a salary as an employee. It has to be emphasised that the successor to the Ancillary Claimant; predecessor, one Ms Fiona Thompson, had received a salary as an employee in the business and that it was after the latter left the business that the Ancillary Claimant took over her mantle of responsibility and with more responsibility to boot. This rather belies any contention that the Ancillary Claimant was a paid employee. In fact, I will now here, with becoming alacrity, add what I consider to be a very crucial if not, conclusive paragraph in the unadorned words of the Ancillary Defendant: “since we were married neither of us collected a salary since it was our agreed intention that the earnings from our joint endeavours would go toward not only for our joint benefit but for the benefit of the child of the marriage Kelsey and also for the maintenance of the Respondent’s daughter Shalanda Nicholson” which I accept.”

Finally, I wish to say that the affidavit evidence of the Ancillary Claimant amply details the pertinent factors which is in accord with Section 14 of PROSA.

[24] At this juncture, I wish here to address, on my own motion, an area of critical legal importance which went unaddressed by both counsel. This is in respect of the affidavits of Mr. Andrew Campbell and Mr. Rune Robb, both of whom the Ancillary Defendant made reference to in his affidavits, as being able to throw substantial light on the Ancillary Defendant’s deflection of the claim. Both affidavits were in fact served on counsel for the Ancillary Claimant. Nevertheless, none of the two affiants were present for cross-examination despite orders for them to do so by the court.

[25] From the relevant perspective of what is generally known as the ‘facts in issue’ in a case, apropos the case at bar, it would seem that the issue of whether the Ancillary Defendant’s testimony in its aspects that, “he would have left Andrew Campbell in

charge of the business” and that the contract with Courts Jamaica Limited was “arranged through the intervention of Mr. Rune Robb of Ruric Limited”, being writ large and being germane to the issue of each parties’ credibility, then some explanation for their absence should have been forthcoming.

[26] Useful guidance is offered by the case of **Epi Environment Technologies Inc. v Symphony Plastic Technologies plc** [2004] EWCH 2945 (Ch.) [2005] 1 WLR 3456, when it comes to evaluating evidence given at a trial. First, it is essential to evaluate a witness’s performance in the light of the entirety of his or her evidence. Witness can make mistakes, but those mistakes do not necessarily affect other parts of the evidence. Second, witnesses can regularly lie. However by themselves, lies do not mean necessarily that the entirety of that particular witness’s evidence is rejected.

[27] A witness may lie in an attempt to bolster a case, but actual case nevertheless remains good irrespective of the lie. Alternatively, a witness may lie because the case is a lie. Third and last, it is essential that a witness is challenged with the other side’s case. This involves putting the case positively. It is then of the judge to assess the witness’s oral response and demeanour overall context of the litigation. Having adopted that approach, I now go on to consider what inferences are to be drawn from the unexplained absence of witnesses who were apparently available and whose evidence would have been of great assistance in unravelling the case.

[28] In **Wisniewski v Central Manchester Health Authority** [1992] Lloyd’s Rep med 223, Brooke LJ distilled certain principles from cases on the point. I also adopt his Lordship guidance. They are, first, in certain situations, a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action. Second, if a court is willing to draw inferences they may go to strengthen the evidence adduced on that issue by the other party to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness. Third, there must have been some evidence, however weak, adduced to the former on the matter in question before the court is entitled to draw the desired inference. In other words, there must be case to answer on that issue. Fourth, if the reason for the witness’s absence or silence satisfies the court

then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his absence or silence may be reduced or nullified.

[27] In applying the above principles to the case at hand I am to say that no explanation having been given for the absence of the two witnesses for the Defendant that I am prepared to draw an adverse inference against the Defendant.

The Law

[28] The relevant law here is The Property (Rights of Spouses) Act “PROSA,” which is “An Act to make provision for the division of property belonging to spouses and to provide for matters incidental thereto or connected therewith”.

[29] It is also worth noting what Section 4 says: “The provisions of this Act shall have effect in place of the rules and presumption of the common law and of equity to the extent that they apply to transactions between spouses and each of them ...” The only exception recognised by “PROSA” as per Section 3(1), is “... after death of either spouse ...”, in which event, “every enactment and rule of law or equity shall continue to operate and apply in such case as if this Act had not been enacted.”

[30] It seems to me then, that, any reference to decisions which pre-date PROSA should be looked at in the context of the prescription of Section 4 and should be approached as guardedly useful.

[31] I shall here now set out the relevant sections of “PROSA”. Before doing so I must bring emphatic reference to the interpretation section of “PROSA” with regards to the expression “property”.

[32] It is defined by Section 2 as, “any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other --- in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled.”

[33] It is of course made very plain that the expression “spouse” is not a restrictive one but one which seeks to capture not only married couples but other domestic arrangements commonly referred to as common law unions of a certain duration.

[34] Since for present purposes we are not here concerned with the “Family Home,” but “Property,” it is to Section 11 that we fall under an obligation to consult. It reads, “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 ... may apply by summons ... to a Judge of the Supreme Court ...”. The Judge according to Section 1(2) may make such orders with respect to the property in dispute.

[35] Now Section 13 deals with “Division of Property” in its incidence as to the time when an application may be made to the Court whereas, Section 14 empowers the Court upon an application being made to divide such property, as it thinks fit, by such a court taking into account certain specified factors: Section 14(1)(b).

[36] The factors referred to are, according to Section 14(2)

- 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 ...
- b) ...,
- c) the duration of the marriage or the period of cohabitation;
- d) ...;
- e) such other fact or circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.

[37] The last mentioned factor, in my view, represents a fluid and beneficent consideration given the social cultural realities which obtain in relationships, whether loosely defined or not, where no agreement was reached by the parties as to what is to happen should circumstances eventuate as to their respective interest in such property

or that it did not come up for consideration, having regard to the vulnerabilities to which a weaker bargaining party may well be subjected to, come the time of reckoning.

[38] This, it is in this context that the expression “contribution” as used in Section 14(2)(b) is to be construed, according to subsection (3) of Section 14. Here, “contribution” has ascribed to it –

- a) the acquisition or creation of property including the payment of money or that purpose;
- b) the care of any relevant child or ...;
- 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 which –
 - i) ...;
 - ii) aid 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 purpose of the marriage or cohabitation;
- i) ...

So as to make it superabundantly clear, Section 14(4) enacts that “there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.”

[39] Having regard to the above it seems then that the case law referenced by the Ancillary Defendant is of limited value. Nevertheless, I shall here be making a passing reference to one such case law, not out of indifference, but owing to the commonality of the principles contained in them.

[40] In **Nixon v Nixon** [1969] 3 All.E.R. the facts of the case showed that prior to his marriage, the husband had owned his farm for some ten years. After his marriage he bought, in his own name, a house by paying part in cash and mortgaging the property for the balance. The wife helped to run the stall on the farm while the husband collected the produce for the stall. No wages were paid to the wife by the husband. However, he paid her for housekeeping. Owing to their joint efforts the mortgage was paid off. Subsequently, the house was sold and the proceeds from the sale plus some savings were used to buy a shop and house in the husband’s name. The wife helped in the shop. Again, the shop and house were subsequently sold and again the proceeds were used by the husband to buy yet another house in his name with the balance of proceeds of the sale being invested.

[41] Later, the parties opened a stall in another market which the wife operated. Again, the husband bought a cottage in their joint names from the proceeds of sale of the house in which they had been living. This cottage was also sold and S farm was bought from the proceeds of sale in the husband’s name only. The wife also helped on S. Farm. The husband also purchased W.T. farm from private finance. The marriage sundered. The wife claimed, under the Married Women’s Property Act, a half share in each of the three farms.

[42] In respect of S. Farm the Court of Appeal held that the wife had a beneficial interest in it as it was acquired through the joint effort of both her and her husband. Further, that her beneficial interest was not restricted to the extent of her interest in the cottage. However, in respect of the stall which the husband had owned prior to their

marriage and, of his cash contribution to the first matrimonial home, the court would restrict the wife's interest to S. Farm and she would not be given an interest in either of the other two farms.

[43] In the course of his judgment Lord Denning, MR asked whether tellingly: "what is the position of a wife who helps in the business? ... If the shop and business belonged to him before they married, no doubt it will remain his after they marry. But she by her work afterwards should get some interest in it. That perhaps an equal share, but some share. If they acquire the shop and business after they marry – and acquire it by their joint efforts – then it is their joint property, no matter that it is taken in the husband's name" ...

While the **Nixon** case is useful as to the approach taken by that particular jurisdiction, it is the legislative framework of PROSA and to local decisions on PROSA that is the guiding light. I now turn to two such cases.

[44] In **Narine Lewis v Anthony Lewis**, *supra* R. Anderson, J had to decide under PROSA, whether, *inter alia*, the wife was entitled to a share in a business owned by the husband but in which the wife worked, vehicles in their joint names and joint investments at various financial institutions. His Lordship in extrapolating from the judgment of **Nixon v Nixon** *supra*, as well as from **Stack v Dowden** [2007] A.C. 432, [2007] 2 All.E.R. 929, concluded in respect of the business that was formally registered in the name of the Respondent, that, "I have no reservation however in holding that there is nothing in the evidence which suggests that up to the time of the formal registration of that business, the parties were other than a cooperating couple doing things to advance their future together." Later on in his judgment, R. Anderson, J said, "the question is however, what interest should be appropriated to the Claimant?,,, I hold that there is, in addition to the evidence that the parties ... had been acting in a cooperative manner in providing for their future evidence that the Claimant did in fact assist in the operation of the shop." His Lordship took into account, what I shall here refer to as, the Section 14(2) factors and allocated to the Claimant a 15% interest in the net value of the business as a going concern.

[45] In **Donna Graham v Hugh Graham**, *supra*, Her Ladyship, Justice McDonald-Bishop in dealing with the “equal share rule” observed that the object of PROSA is to attain fairness in property adjustments between spouses upon the dissolution or termination of cohabitation. In adverting to **White, White v White** [2000] 2 F.L.R. 981, she quoted an expert from Lord Nichols of Birkenhead which, because of its poignancy, I shall here repeat: “divorce creates many problems. One question always rises. It concerns how the property of the husband and wife should be divided ...” He then opined that the outcome should be fair. But, His Lordship asked rather trenchantly, “what is the best method of seeking to achieve a generally accepted standard of fairness?” He answered his own posed question thus: “On approach is for the legislature to prescribe in detail how property should be divided, with scope for the exercise of judicial discretion added on. A system along these lines has been preferred by the New Zealand legislature ... Another approach is for the legislature to leave it all to the judges. The courts are given a wide discretion, largely unrestricted by statutory provisions.”

[46] The above words of Lord Nichols are rather apt and sagacious for in 2004 the legislature of Jamaica, mindful of the social relationship dynamics in its ramification of property ownership and division, come the end of that partnership, that the parties, if left to their own devices and designs, it has, and often does lead to material inequality. Having regard to the comments above, Her Ladyship McDonald-Bishop observed that, “Jamaica has adopted the line similar to New Zealand and Scotland, that is, a mixture of legislative prescription with the scope for the exercise of judicial discretion added on.” It is a position to which I readily assent as it is quite an important observation for as Section 14 (10(b) of PROSA dictates, “the Court may, 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) [of Section 14].” In emanating the factors referred to in Section 14(2) I take the view that the factors are not cumulative. Each factor is self-standing.

[47] If I am correct, it follows that the Ancillary Claimants “contribution” as is referred to in Section 14(2)(a) and as is defined at Section 14(3)(a) – (i) and Section 14(4) it puts

it beyond a peradventure that the Ancillary Claimant is entitled to a share in the business, **Elvis Gordon T/A Gordon's Electronic Service**. The reason: Section 14(2)(a) refers to "the contribution financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of the property ...". Here, I wish to urge the view that the use of words 'acquisition, conservation or improvement', are in the disjunctive. It seems to follow then that among the things the Ancillary Claimant is allowed to point are the conservation or preservation of the business or its improvements which are to be regarded to as her contribution.

[48] It is obvious to me that the Ancillary Claimant is entitled to a share of the business. What would it be? I observe that there is no sliding-scale of division of property and that the court in the exercise of its discretion must do so judicially, not whimsically.

[49] In **Stack v Dowden**, *supra*, to paraphrase, it is said that the task of the court is to determine, in the light of all the evidence, what shares the parties intended, rather than to determine what shares are fair: See also **Holman v Howes** [2007] EWCA Civ. 877, paragraph 32. In other words, the approach is to be a holistic one.

[50] When one considers that at the time of the Ancillary Claimant's joining of the fledging business, her not being paid a salary for such a protracted period: of her being paid a salary, inconsistently or that, in its incidence of period, duration and amount, this after they had attended counselling sessions where it was agreed; and the self-statement of Mr. Gordon "since we were married she assisted me over these years and from that business neither of us collected a salary since it was our agreed intention that the earnings from our joint endeavours would go towards not only for our joint benefit but for the benefit of the child of the marriage Kelsey and also for the maintenance of the Respondent's daughter Shalanda Nicholson."

[51] It is clear to me that Mr. Gordon not only intended his wife to benefit from the business but also from the acquisitions of the business including the motor vehicles. I would grant to the Claimant a 40% interest in the business and a 50% interest in both vehicles.

[52] Accordingly, I now invite counsel to draft the consequential orders.

- a) The Ancillary Claimant is entitled to a 50% share in both the 1998 Green Toyota Corolla Sedan Motor Car, Engine Number 5AH114879 Chassis Number AE1105255030 and the 2003 Grey Nissan Window Caravan, Motor Truck Engine Number ZB30145455A Chassis Number VWE25052609;
- b) The Ancillary Claimant is entitled to a 40% share in the business Elvis Gordon trading as Dynamic Electronic Service;
- c) A valuation of the relevant motor vehicles shall be conducted within fourteen (14) days of the date hereof and for this purpose MSC McKay (JA) Ltd shall be appointed Valuers of the motor vehicles;
- d) That the cost of the valuations of the motor vehicles shall be borne by the parties equally;
- e) The relevant motor vehicles shall be sold within thirty (30) days of the receipt of the valuation and the sums divided between the Ancillary Claimant and Ancillary defendant in accordance with their respective shares;
- f) The Ancillary Defendant shall be given the first option to purchase the motor vehicles and shall exercise his said option within fourteen (14) days of the receipt of the valuation;
- g) If the Ancillary Defendant should choose not to exercise the option to purchase the motor vehicles the same may be sold on the open market;
- h) In the event that the motor vehicles are no longer in existence or in the possession or control of the Ancillary Defendant, the Ancillary Defendant to the account to the Ancillary Claimant/Defendant of the amount of the sale proceeds or insurance claim and the said sum be divided in accordance with the respective shares of the parties;

- i) Upon the failure of the Ancillary defendant to execute any of the documents relevant to execute a registrable Transfer of the motor vehicles then the Registrar of the Supreme Court shall be empowered to sign on his behalf;
- j) That Winsome Minott, Chartered Accountant of Mint Management Services Limited, 19 Ripon Road, Kingston 5 in the parish of Saint Andrew be deemed the Valuator for the purpose of determining the value of the business Elvis Gordon trading as Dynamic Electronics Service;
- k) That the Ancillary Defendant shall compensate the Ancillary Claimant for her 40% share in the business within thirty (30) days of the valuation of the business;
- l) Costs of the valuation and assessment of the Business to be paid by the Ancillary Defendant;
- m) Costs of the proceedings awarded to the Ancillary Claimant to be agreed or taxed;
- n) The parties are granted further Liberty to apply.