IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 HCV 00731

IN THE MATTER of the Property (Rights of Spouses) Act 2004

BETWEEN	**VILMA WILSON MALCOLM**	**CLAIMANT**
AND	**JUNIOR WASHINGTON MALCOLM**	**DEFENDANT**

CONSOLIDATED WITH:

CLAIM NO. 2011HCV 01107

IN CIVIL DIVISION

IN THE MATTER of the premises registered at Volume 1309 Folio 578

AND

IN THE MATTER of the Partition Act

BETWEEN	**JUNIOR MALCOLM**	**CLAIMANT**
AND	**VILMA MAE WILSON-MALCOLM**	**DEFENDANT**

Carlene McFarlane, instructed by McNeil & McFarlane for Junior Malcolm, in both claims.

Donovan Williams, instructed by Donovan Williams & Co., for Vilma Wilson Malcolm, in both claims.

Heard: June 12, 13, 2012 and November 1, 2013

APPLICATION UNDER PROPERTY RIGHTS OF SPOUSES ACT - PARTITION ACT APPLICATION – APPLICATIONS FOR DIVISION OF MATRIMONIAL PROPERTY – FAILURE TO DENY ALLEGATION IN CLAIMANT'S STATEMENT OF CASE – FAILURE TO PROVIDE REASONS FOR PUTTING CLAIMANT TO PROOF OF ALLEGATION – HOW TO MAKE APPLICATION IN RELATION TO SECTION 7 OF PROSA –

EFFECT OF FAILURE TO MAKE APPLICATION IN RELATION TO SECTION 7 OF PROSA - APPLICABILITY OF PRESUMPTION OF EQUAL DIVISION – SECTION 6 OF PROSA – DIVISION OF PERSONAL PROPERTY ITEMS – SECTION 14 OF PROSA

Anderson K., J.

[1] This matter pertains to claims which were consolidated, by earlier order of this court. In respect of Claim No. 2011HCV00731, Vilma Wilson Malcolm, (hereinafter referred to as 'Ms. Wilson'), instituted her claim against Junior Washington Malcolm (hereinafter referred to as 'Mr. Malcolm'). These two persons are hereafter referred to in these reasons for judgment and the order following upon same, as, 'the parties.' That claim was commenced with the filing of a fixed date claim form, on February 11, 2011. The primary reliefs sought therein, are that the premises which is jointly owned by the parties at 58 'Waterhouse Pen,' now called, 'Portview Mews,' in the parish of St. Andrew and being all the land comprised in the Certificate of Title registered at Volume 1309, Folio 578 of the Register Book of Titles, be put up for sale, with Mr. Malcolm being given first option to purchase Ms. Wilson's share thereof, which is to be determined by this court, as part and parcel of said claim. In said claim, Ms. Wilson is seeking for this court to order that she be entitled to an equal share of the said premises, which in essence, translates to an equal share of the net value of same since she is asking that the same either be sold on the open market, or alternatively, that her 50% interest in same, be purchased by Ms. Malcolm. Ms. Wilson is also seeking certain ancillary reliefs, if this court orders Lot 58, Portview Mews, which presently has a townhouse situated on it, to be sold. Additionally, Ms. Wilson is seeking though her claim, an order that Mr. Malcolm pay to her an 'occupation rent' in the amount of $30,000.00 per month for the period of six years immediately preceding the filing of her claim and continuing until, 'the family home' is sold, or Mr. Malcolm acquires her interest therein, or gives up his occupation thereof, whichever is earlier. The only other primary relief being sought in said claim, is for all goods and property that were in 'the matrimonial home,' at the time when the parties' marriage was dissolved by this court, be divided between the parties, 'in a fair and equitable manner.' (The quoted words are some of the precise words used by Ms. Wilson in her fixed date claim form).

[2] Ms. Wilson's claim was brought before this court, pursuant to the provisions of **Section 13 of the Property (Rights of Spouses) Act** (hereinafter referred to as '**PROSA**'). In that regard, it is important to note that Ms. Wilson and Mr. Malcolm were once married, but that marriage was dissolved, by order of this court, on October 6, 2009. Since her fixed date claim form was filed on February 11, 2011, this would therefore mean that an application for relief under **PROSA**, could only properly have been made by Ms. Wilson, if she obtained an extension of time for the filing of her claim in that regard. This is so because, **Section 13(2) of PROSA** makes it clear that where a spouse applies to this court for a division of property on the grant of a decree of dissolution of marriage, such application shall be made within twelve months of that dissolution of marriage, 'or such longer period as the court may allow after hearing the applicant.' It was therefore, no doubt, because Ms. Wilson was mindful of that particular statutory provision that she had applied for an extension time. Following on her application for that extension of time, the same was granted by order of this court as made on May 2, 2011 and by virtue of that court order, it was further ordered that Ms. Wilson's fixed date claim form and affidavit in support – which was also filed on February 11, 2011, shall stand. That order granting an extension of time, although following on an application for an extension of time having been filed post – one year after dissolution of the parties' marriage, was perfectly in order, since Jamaica's Court of Appeal has recently ruled, in the case: ***Angela Bryant-Saddler and Samuel Saddler*** – Supreme Court Civil Appeal No. 57/2009, that an application for an extension of time under **Section 13(2) of PROSA** can be filed even after the one year limitation period, in the absence of an application for an extension of time having been successfully made by a party, has expired. In that regard, it is important to note that the Court of Appeal did not, on that particular legal point, that being as to whether an application for an extension of time can only be successful, if filed before the one year limitation period has expired, follow its earlier ruling in the case: **Allen v Mesquita** - [2011] JMCA Civ 36.

[3] The other claim which is now at hand was brought by Mr. Malcolm against Ms. Wilson, by means of fixed date claim form and is recorded as Claim No.

2011HCV02007. His claim was filed on March 10, 2011. In that claim, Mr. Malcolm is primarily seeking an order of this court that Ms. Wilson be adjudged as being entitled to a 25% interest, 'in the matrimonial house' situated at Lot 58 Portview Mews, in the parish of St. Andrew, or in the alternative, that the court determines the parties' respective interest in said premises and permit Mr. Malcolm, the option to purchase whatever may be determined by this court, as being Ms. Wilson's interest in said premises within 30 days of this court's order in that regard. Mr. Malcolm is also seeking certain ancillary reliefs pertaining to the proposed sale of that which Mr. Malcolm has pertinently described as being, 'the matrimonial home' and which Ms. Wilson has pertinently described as being, 'the family home.'

[4] It is clear therefore, that the parties are united in their desire to have this court determine their respective share in the relevant premises at Lot 58 Portview Mews and also, to order that the same be sold, either by Ms. Wilson, in terms of her share thereof, to Mr. Malcolm or alternatively, on the open market. The extent of the parties' share in that premises is what is being seriously disputed in the first instance, and in addition, the claim by Ms. Wilson for 'occupation rent' is also being seriously disputed.

[5] Interestingly enough, Mr. Malcolm has instituted his claim pursuant to the provisions of Jamaica's **Partition Act**. This is surprising to this court, because, the **Partition Act** is an earlier statute than the **Property (Rights of Spouses) Act**. The **Partition Act** was enacted into law on June 5, 1873, whereas the **Property (Rights of Spouses) Act**, was enacted into law in 2004, but did not come into force and effect until April1, 2006. The former in time, contains within it, general provisions authorizing this court, in appropriate circumstances, to order that property be partitioned between persons. The provisions of the **Partition Act**, were never intended to apply as between spouses, in circumstances wherein, a partitioning or property as between themselves, was being sought. This court so concludes, because otherwise, why then would Parliament have thought it necessary to pass into law and put into force and effect on January 1, 1887, the **Married Women's Property Act**? That last-mentioned Act, which is the precursor to the **Property (Rights of Spouses) Act**, was subsequently repealed and replaced by **PROSA**.

The Property (Rights of Spouses) Act has significantly altered the legal landscape as regards property disputes, not only where such disputes occur as between spouses, but also, where such disputes occur as between former spouses. **The Married Women's Property Act** (hereinafter referred to as the **MWPA**), provided absolutely no protection, in terms of a property dispute, to either former spouse, since the provisions of **MWPA** were only available to determine questions arising between persons who were husband and wife at the time when an application under that Act was made (See: ***Mowatt v Mowatt*** – [1979] 16 JLR 362, esp. at p. 363, per Carberry, JA). This legal scenario has been changed since the coming into force and effect of **PROSA**. Additionally, **PROSA** has expanded the definition of 'spouse' to include persons who have been in a common law union with one another, being man and woman, for a period of five years or more. See **Section 2(1) of PROSA**, in this regard. On the other hand, the **MWPA's** provisions had never, at anytime, applied as between a male and female in a common law union with one another, regardless of the period of time during which such union had subsisted and also, regardless of the amount of property, whether real or personal, derived by either or both of those parties during the subsistence of the common law union between them.

[6] Jamaica's Court of Appeal has further extended the significant and far-reaching impact of **PROSA**, by having adjudged, in the case – **Brown v Brown** – Supreme Court Civil Appeal No. 12/2009, that **PROSA** is to be interpreted and applied by this nation's courts, as having been intended by parliament, to have retrospective effect and as such, Jamaican courts are required to give effect to such parliamentary intention. Thus, as was stated by Morrison, J.A. in one of his typically thorough and scholarly judgments in **Brown v Brown** at paragraph 76, in reference to **PROSA** – '*the statement in Section 4 that the provisions of the Act 'shall have effect in place of the rules and presumptions of the common law and of equity' is further evidence in my view of the intention of the legislature that the 2004 Act should, as of the date it came into force, have effect in respect of all disputes as to matrimonial property, irrespective of the date of separation or divorce of the parties, as the case may be*.'

[7] In the circumstances, this court does not hold the view that Mr. Malcolm was even entitled, as a matter of law, to seek a partition of the relevant matrimonial property, pursuant to the provisions of the **Partition Act**. If such could be done, then there would exist a clear and apparent contradictory approach, in a case such as this, where two claims have been consolidated in respect of which applications for division of matrimonial property are respectively being made by each spouse, under different legislation and thus, requiring this court to apply completely different and distinct legal principles as to how the relevant matrimonial property ought to be divided/partitioned. This court should not, to my mind, adopt such a contradictory approach. The **Partition Act**, if in fact its provisions, can at all, properly be determined by a court in Jamaica as being applicable in respect of matrimonial property, has been followed upon in time by **PROSA**, which, unlike the general provisions as regards the partition of property as between persons, instead, contains special provisions related to disputes concerning matrimonial property, as between spouses and former spouses. The rule of statutory interpretation, as embodied in the Latin maxim *'generalia specialibus non derogant,'* which means 'general powers, do not override special powers,' is worthy of note at this juncture, although it must be stated that more typically, this now well-established principle of statutory interpretation, is typically applied in circumstances wherein a statute containing special provisions concerning a particular subject-matter, is followed on in time, by another statute containing general provisions which could be viewed as relating to that same subject – matter and other subject-matters. See: **The London and Blackwall Rail Co. v The Board of Works for the Limehouse District** – [1856] 3 K and J 123, at p. 127, per Wood, VC.

[8] A similar approach to that embodied in the *'generalia specialibus non derogant'* principle of statutory interpretation, is applied when this court is called upon to determine which of two sets of statutory provisions is applicable, in a circumstance wherein there exists general statutory provisions capable of addressing a particular subject – matter and subsequently enacted statutory provisions of a special nature, designed to deal only with that particular subject – matter. In such a circumstance, the special provisions ought always to be interpreted by a court, as being excepted out of the general. See: **Taylor v Corporation of Oldham** – [1876] 4 Ch. D. 375, at p. 410,

per Jessel, M.R; and **Cardinal Rules of Legal Interpretation** – Edward Beal (3rd edition) (1924), at pp. 425 and 426.

[9] There are also occasions when it may be appropriate for a court, when called upon to address its mind to conflicting provisions between two statues, one of which has been passed into law, later in time than the other, to conclude that the statute which has been passed into law, later in time than the other, has impliedly repealed the earlier statute, either wholly, or at the very least, in respect of a particular subject matter which has been legislated on in different ways, in each statute. There does though exist, a presumption against implied repeal. Thus, as has been stated in **Hill v Hall** – [1876] 1 Ex. D. 411, at page 414:

> *'It is common learning that one statute may be impliedly repealed by a subsequent statute in general terms is not to be construed to repeal a previous particular statue, unless such an intention appears by necessary implication,'* per Grove J.

Thus, in the text – **Maxwell on the Interpretation of Statues** (10th edition) [1953], at p. 68, the learned authors have stated:

> *'Again, if the co-existence of two sets of provisions would be destructive of the object for which the later was passed, the earlier would be repealed by the later.'* See: ***Daw v Metropolitan Board*** *– [1862] 31 LJCP 223;* ***Cortis v Kent Waterworks*** *– [1827] 7 B & C 314,* ***R v Middlesex*** *– [1831] 2 B & Ad. 818.*

Further on, at p. 169 of the same text, the learned authors state:

> *'In other circumstances, also, the inconvenience or incongruity of keeping two enactments in force has justified the conclusion that one impliedly repealed the other, for the legislature is presumed not to intend such consequences.'*

[10] This court is unwilling to conclude, without having first heard from the respective parties to this court dispute, legal submissions on the issue as to whether or not **PROSA** has impliedly repealed any aspect(s) of the **Partition Act** which could be taken as containing general statutory provisions which could relate to an application for a

partition of property as between persons who either are married or were married, or who are in or have been in, a common law union with one another.

[11] What this court has no doubt whatsoever about though and what must be concluded by this court, is that the applicable legislation for the purpose of resolving this claim, is **PROSA**. Mr. Malcolm's attorney came to that conclusion very belatedly, as she expressed that view to the court, during the oral closing submissions which she presented to this court in respect of this case. This court nonetheless, believes that it may provide some useful future guidance to all, to make the comments that follow in paragraphs 11 and 12 of these reasons for judgment. If it were to be otherwise, confusion would be caused, both to the court and potential and actual litigants. Such would also lead to manifestly diverse judicial outcomes for disputed cases, depending on whether a litigant has pursued his or her claim utilizing the provisions of the **Partition Act**, or utilizing **PROSA**. Such a scenario would undoubtedly render the law of binding precedent as being nothing more than illusory.

[12] In the case at hand, the reality is that Mr. Malcolm need not have instituted a separate claim at all. His interest in the relevant property would undoubtedly fall to be determined, during and as part and parcel of this court's consideration of the judgment to be rendered in Ms. Wilson's claim. If it is that Mr. Malcolm hoped to achieve a better outcome for himself, in respect of the extent of the share which this court will determine that he is entitled to, in respect of the disputed property, by claiming for such share, under the **Partition Act**, rather than founding his arguments on **PROSA**, he will be disappointed, because the law and this court will not lend its processes to such a course of action. In the circumstances, for the purposes of these claims, this court will be guided by the provisions of **PROSA** only. The **Partition Act** cannot properly be relied upon by either party in respect of either of these consolidated claims. In the circumstances, in respect of Mr. Malcolm's claim, that being – Claim No. 2011 HCV01107, judgment on same must be and is awarded in favour of Ms. Wilson.

[13] In adjudicating upon the issues arising from Ms. Wilson's claim, it is not intended for reference to be made to all of the evidence given. This should not however, be

taken even as indicating, much less meaning, that this court has not paid due regard and/or considered all of the evidence provided to this court in respect of the consolidated claims. Equally, the respective skeleton submissions of the parties, along with their oral closing submissions, have all been duly considered and will be applied to the matter at hand, to the extent deemed by this court, as being appropriate.

[14] This court has thus, given careful consideration to the following affidavit evidence of Mr. Malcolm, being his affidavits filed on March 10, 2011, January 11, 2012 and June 11, 2012, respectively. Equally, careful consideration has been given to the following affidavit evidence of Ms. Wilson, these being her affidavits filed on February 11, 2011 and May 1, 2012. By order of this court, at trial, the respective parties' affidavit evidence stood as their evidence-in-chief and each of the parties were cross-examined by counsel for the opposing party.

[15] It is undisputed evidence, that the disputing parties were married on August 21, 1994 and that during their marriage, they gave birth to two children. The parties separated in 2002 and during that year, it was Ms. Wilson that left the matrimonial home and took their two children with her. Initially during the course of the marriage, the parties were living together in rented premises. Mr. Malcolm was, as at the dates of trial, a financial controller whereas, Ms. Wilson was, at least as of then, an internal auditor.

[16] There is also no dispute that the parties acquired their relevant premises at Lot 58 Portview Mews, St. Andrew on February 16, 1999 and that they own the same as tenants-in-common and that it is situated in a gated community and was purchased at a cost of $2,375,000.00 which was partially financed by means of a mortgage in the joint names of the parties, in the sum of $2,256,250.00. Until the parties separated in November 2002, the parties were jointly paying the mortgage loan for that premises. After the parties separated though, Ms. Wilson initially moved into a rented premises owned by her sister, whereafter she moved into another rented premises. At all times, after the parties acquired the relevant premises, Mr. Malcolm lived in the townhouse. As such, since having separated, Ms. Wilson has had to be paying rent for the premises

which she has been occupying since then and on the other hand, Mr. Malcolm has been solely paying the monthly mortgage payment, for the matrimonial home which he has been, ever since then and which he, as far as is known to this court, continues to occupy solely.

[17] This court obtained no evidence from either of the parties, as to the ages of either of their two children, but it did receive evidence from Mr. Malcolm, which it accepts, that the parties were married on August 21, 1994. This court also obtained, as an exhibit attached to Ms. Wilson's affidavit which was filed on February 11, 2011, the decree absolute as granted by this court in respect of the parties, in Claim No. M2005 D2073. This court has perused this court's records pertaining to that marital claim and from those records, the respective dates of birth of the children have been revealed to this court in respect of these consolidated claims. This court has taken judicial notice of the parties' children's respective dates of birth. The eldest of the two children, is: Victoria Malcolm and she was born on June 18, 1996, whereas the other child's name is Jourdaine Malcolm and he was born on November 25, 1998.

[18] The only direct evidence provided to this court, as to the extent to which either party contributed to the maintenance of the children of the marriage, was when, while Ms. Wilson was being cross-examined, the suggestion was made to her by the counsel representing Mr. Malcolm, that Mr. Malcolm contributed to the children's school fees, whereupon, Ms. Wilson's response to that suggestion was - 'He paid school fees for one and I paid for one.' Immediately prior to that suggestion having been made to and then answered by Ms. Wilson, the following questions were posed to her and her answers to those questions were as now set out:

Q. 'When you left, you took the children with you, correct?'

A. 'Yes.'

Q. 'What school were they going to?'

A. 'Ardenne Prep.'

It was following those questions and answers that the suggestion was made to Ms. Wilson, that Mr. Malcolm contributed to the children's school fees. In that regard, this

court has noted that the said suggestion as indeed, also the two preceding questions, were all framed by the then cross-examining counsel – that being Mr. Malcolm's counsel, in the past tense. The context therefore, in which the suggestion as recorded above, was answered, was up until the time when the children left with Ms. Wilson to then reside with her in a separate location from the location in which their father has been residing up until now, that being the townhouse premises at Lot 58 Portview Mews.

[19] What this court has no doubt about, is that, since the children of the marriage were residing with their mother, ever since they left their prior residence at the relevant premises, this must and does lead this court to draw the inescapable inference that Ms. Wilson has played and continues to play the primary role in contributing to the children's welfare and overall well – being, with such contribution on her part, undoubtedly being both of a significant financial as well as an emotional nature. Certainly, during the trial, no suggestion was ever made to Ms. Wilson, as would serve to even remotely enable this court to properly draw any other inference. This must be so, bearing in mind that the parties were married in August of 1994 and permanently separated from each other, in the latter part of the year 2002. This would therefore mean that the parties directly and fulsomely contributed to their children's development and overall well – being, for no more than six years – with respect to Victoria Malcolm and four years – with respect to Jourdaine Malcolm. Thereafter (after 2002), this court concludes that since the children were residing with Ms. Wilson (their mother), she became, as of then, at the very least, their primary care-giver and financial contributor in terms of their maintenance. If it were otherwise, then Mr. Malcolm should have either given evidence-in-chief before this court in that respect, or at the very least, through his counsel, made suggestions to Ms. Wilson, while she was testifying, as to the situation in terms of the financial maintenance and overall care for the children of the marriage, being such that Mr. Malcolm has made contribution to both of same (financial maintenance/overall care), even since the children no longer resided at the relevant premises.

[20] One may be wondering at this juncture, why the extent of each parties' contribution to the care of the children of the marriage, is of importance in a case such

as this, wherein, no claim for maintenance of either of those children, is being made by either party. In order to answer that query (if such exists), it is necessary to pay careful regard to the provisions of **Sections 14 and 23 of PROSA**, at least to the extent that the provisions of some of those Sections, are applicable thereto.

[21] **Section 14(1) (b)**, read along with **Section 14(2) (a) and Section 14(3) (b)** of **PROSA**, in essence, provides that when considering how property other then the 'family home' (that quoted term being one which is specially defined in **PROSA**), should be divided as between 'spouses,' the court may divide such property as it thinks fit, taking into account the factors as specified in subsection 2.' One such factor is 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 (**Section 14(2) (a) of PROSA**). Such 'contribution' can, as provided in **Section 14(3) (b) of PROSA**, take the form, *inter alia*, of the care of any 'relevant child.' In the **Definition Section of PROSA**, the term 'relevant child,' is defined, *inter alia*, as being a child who is a child of both spouses.

[22] From the aforementioned, it can clearly be recognised that in respect of property which is not considered by a court as being a 'family home' under the provisions of **PROSA**, whenever that court is considering how such property should be divided, the extent to which each spouse has cared for a child of those spouses, is a relevant factor to be considered.

[23] The parties both described the relevant premises which they own as tenants-in-common, that being the townhouse and land located at 58 Portview Mews, Portview Avenue, Kingston 20, as their 'matrimonial home' or 'family home.' For the purposes of **PROSA** though, the label that one or the other or perhaps even both of the 'spouses' place on a particular house/home, is not what is pertinent for this court, in the present context. What is pertinent is the definition given to the term 'family home' in **PROSA**. In **Section 2(1) of PROSA**, the term 'family home' is defined as meaning:

> *'... 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 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.'*

[24] The court had not, during the trial of this claim, received evidence from anyone, that either of the parties owns any real estate/real property, other than the townhouse at 58 Portview Mews, which is jointly owned by the parties as tenants-in-common. Equally, there is no evidence that either of the parties has ever owned any real estate/real property, either before, during, or even after the marriage between them, ended.

[25] The evidence clearly is that the parties lived at 58 Portview Mews for only three years, prior to having permanently commenced their separation from one another. They lived at that premises together, between 1999 – which was the year when the parties acquired that property and 2002 – which was the year when the parties commenced their permanent separation from one another. It must be recalled that the parties became married in 1994. Thus, the parties did not, throughout most of the time period when they were a married couple, reside on a premises and in a home situated on that premises, which was owned by either or both of them. Furthermore, there exists no evidence as to where each of the parties resided, prior to their having become married. For the purposes of this claim therefore, the parties' 'family home' is the relevant premises, which is situated at 58 Portview Mews. As far as the evidence led by the parties at trial has disclosed, that is the only real property/estate owned by both of the parties, or to put it another way, owned by each of the parties, as tenants-in-common. Thus, the townhouse that is situated on that real property/estate and which is the only dwelling-house owned by the spouses or by either of them and which was used by the spouses, as a place of residence during a period of time when they lived together, is not merely their, 'principal family residence,' but in both truth and fact, their only family

residence, as jointly owned by them. In other words, that townhouse is, for the purposes of **PROSA**, the parties 'family home.'

[26] It must be recognized that there are two elements inherent in a dwelling house being able to be properly considered by a court as being a, 'family home,' under **PROSA**, these being, firstly that said dwelling house was or is owned by both, or one or the other of the relevant 'spouses' and secondly, that said property was or is used habitually, or from time to time, by the spouses, as their principal family residence. It should be noted also, that the 'family home' is not only constituted by said dwelling house, but also includes any land, buildings or improvements appurtenant to said dwelling house and used wholly or mainly for the purposes of the household.

[27] Having concluded that the parties' townhouse premises at 58 Portview Mews is their 'family home' for the purposes of the division thereof, in accordance with the provisions of **PROSA**, how then should that 'family home' be divided as between them? **Section 6 of PROSA**, read along with **Section 7 of PROSA**, will for the purposes of this claim, provide the answer to that question. **Section 6 (1) of PROSA** provides, to the extent as is relevant for the purposes of this claim, that subject to **Section 7 of PROSA**, each spouse shall be entitled to one-half share of the family home. **Section 7 of PROSA** provides, to the extent as is relevant for the purposes of the present claim, that – '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 inherited by one spouse;

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

c. that the marriage is of short duration.'

Section 7 (2) provides that the term, 'interested party' means, *inter alia,* a spouse.

[28] In respect of Ms. Wilson's claim, Mr. Malcolm has not made any 'application' in accordance with the provisions of **Section 7of PROSA**, or for that matter, in accordance with any provision of **PROSA** whatsoever. He did make an application under the **Partition Act**, for the Portview Mews townhouse and land on which it is situated, to be divided to the extent of 75% of the value thereof, to him and 25% of the value thereof, to Ms. Wilson. Can that application be considered as being an 'application' as referred to in **Section 7 of PROSA**? **Section 7 of PROSA** does not expressly set out the form which such 'application' should take. Furthermore, there is no other Section of **PROSA** which expressly requires such 'application' to be made in any particular way. The Civil Procedure Rules (hereinafter referred to as 'the CPR') should therefore be paid regard to, for the purpose of determining whether there is any specific rule of court therein, which sets out the form which such an 'application' should take.

[29] **Rule 8.1 of the CPR** specifies the circumstances in which a fixed date claim form 'must be used.' That rule of court provides that fixed date claim forms must be used in mortgage claims; claims for possession of land; in hire purchase claims; where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact; whenever its use is required by a rule or practice direction; and where by an enactment proceedings are required to be commenced by petition, originating summons or motion.2 q1`

[30] From the wording of **rule 8.1 of the CPR**, this court concludes that an 'application' under **Section 7 of PROSA**, is not required by the rules of court, in all circumstances, to be made by means of the filing by the applicant, of a fixed date claim form, setting out therein, what reliefs are being applied for. Such is not required as a matter of course, because it is not mandated by rule 8.1 of the CPR. There should be no doubt that this is so, since an 'application' under **Section 7 of PROSA** is only mandated by our rules of court, to be pursued by means of fixed date claim form, if such 'application' will not likely involve any substantial dispute of fact. Cases of such a nature will likely be exceedingly rare, since it is typically an 'application' which will be

disputed by the other 'spouse,' and in addition, such an 'application' will typically require the court hearing same to resolve the dispute regarding same, by paying careful regard to what ought to be expected to be, significant disputes of fact, bearing in mind of course the provisions of **Section 7 of PROSA**.

[31] An 'application' for the purposes of **Section 7 of PROSA** can, in this court's view, be made in accordance with the provisions of **Part 11 of the CPR** and thus, as per a typical application for court orders. **Part 11 of the CPR**, deals with applications made before, during or after the course of proceedings. **See rule11.1 of the CPR** in that regard. An 'applicant' is, according to **rule 11.2 of the CPR**, a person who seeks a court order by making an application. In the circumstances, an applicant seeking relief under **Section 7 of PROSA** can do so, utilizing the provisions of **Part 11 of the CPR**. If though, an applicant is seeking relief, in accordance with the provisions of **Section 17 of PROSA**, prior to any claim having been filed, at the very least, an undertaking would have to be provided to the court that such a claim will be filed. **Rule 17.2(3) of the CPR** requires that such be done, in circumstances wherein an interim application is made, before any claim has been filed.

[32] I have gone through this in depth because it is pertinent to do so, for the purpose of determining whether any 'application' in accordance with the provisions of **Section 7 PROSA**, can properly be considered by this court, as having been made by Mr. Malcolm. In that regard, it is worthy of note, firstly, that Mr. Malcolm, made his application to this court for relief in terms of a 75% share of Portview Mews, solely by means of reliance upon the provisions of the **Partition Act** and therefore by means of a fixed date claim form intituled, *inter alia*, 'In the matter of the **Partition Act**.' For reasons earlier given, this court does not hold the view that the **Partition Act** could have afforded to Mr. Malcolm, any relief whatsoever, in respect of the specific circumstances which led him to have sought such relief. Mr. Malcolm's application for relief should have been made, in reliance, not upon the **Partition Act**, but rather, upon the provisions of **Section 7 of PROSA** read along with **Part 11 of the CPR**. Such an application for court orders could even have been made orally, albeit that it would have needed to have been supported by affidavit evidence - which indeed, Mr. Malcolm has

filed and served. **Rule 11.6(2) of the CPR** permits an application for court orders to be made orally, if such is either permitted by a rule or practice direction, or if the court dispenses with the requirement for the application to be made in writing. An application to this court for such to have been dispensed with, in the case at hand, could therefore have been made orally, during the trial of Ms. Wilson's claim.

[33] In respect of the present matter, no request was ever made of this court, for an oral application to be permitted, pursuant to **rule 11.6(2) of the CPR**. Additionally, no rule or practice direction exists, which expressly permits an application for court orders pursuant to the provisions of **Section 7 of PROSA**, to be made orally. In the circumstances, Mr. Malcolm has chosen to rest his case entirely, on a weak and indeed, faulty foundation, that being, the **Partition Act**. This court does not have any application before it, for relief to be afforded to Mr. Malcolm, pursuant to the provisions of **Section 7 of PROSA**. Such an application was neither made in writing, nor orally, to this court, in accordance with the procedure as set out above. On the other hand, there is an application, properly made to this court by Ms. Wilson, for the townhouse premises at 58 Portview Mews to be sold and for the net proceeds of sale to be divided equally between the parties. Ms. Wilson has made that application, in addition to application for other relief, pursuant to the provisions of **PROSA**. By virtue of the provisions of **Section 6 of PROSA**, read along with the provisions of **PROSA** which define the term, 'family home' (Section 2(1)), Ms. Wilson is presumptively entitled to succeed in obtaining the primary relief which she has sought, that being, for the said net proceeds of sale to be divided equally between the parties.

[34] This court is indeed empowered by **Section 7 of PROSA**, in circumstances wherein it considers that it would either be unreasonable or unjust for each spouse to be entitled to one-half share of the family home, upon the application of a 'spouse' (which quoted term includes within its statutory definition, a former spouse), make such order as it considers reasonable, in respect of that 'family home.'

[35] As such, in order for the court to properly be able to apply the powers which it has been granted under **Section 7 of PROSA**, not only must the court consider it to be,

in the particular circumstances of the particular case, unreasonable or unjust to order that the parties equally share the family home, this being such that if said home were thereafter to be sold, each party would be entitled to receive no more than 50% of the net proceeds of same; but also, the court must have before it, an application by an interested party, such as, for example, a former spouse, for the family home either not to be shared or divided at all, or, to be shared/divided in a proportion which is other than equal. In the consolidated claims at hand, no such 'application' as referred to in **Section 7(1) of PROSA**, has ever been made to this court, by Mr. Malcolm.

[36] It is not open to this court, even if this court were to view it as being either unreasonable or unjust to do so, to order that the 'family home' be shared by the relevant parties in anything other than equal proportion, unless an 'interested party' as that term is defined in **Section 7(2) of PROSA**, has applied for this court to, 'make such order as it thinks reasonable.' Such is not open to this court, because, if it were to be open, it would mean that the court would be the legislator, rather than the body entrusted with the important responsibility of interpreting and applying the legislation as was duly enacted by Jamaica's Parliament and the Governor-General. It is the legislature of Jamaica, that has made it law, that spouses are presumptively entitled to an equal share of the, 'family home.' Equally, it is the legislature of Jamaica that has clearly specified the circumstances in which this court may order otherwise, as regards the, 'family home.' It is not for this court to frustrate the intention of the legislature, as regards either such. As such, there having been no 'application' under **Section 7 of PROSA**, this court is bound to and will give effect to the provisions of **Section 6 of PROSA**, and will therefore order that, 'the family home' at 58 Portview Mews, inclusive of course of the land on which that townhouse is situated, be either sold and the net proceeds of sale, be divided equally between the parties and alternatively that Mr. Malcolm be given the first option to purchase Ms. Wilson's 50% net share of the 'family home.'

[37] With respect to the parties' personal property, Ms. Wilson has applied for such items of personal property as belonged to her and Mr. Malcolm, as were in the matrimonial home as at the date when the parties' marriage was dissolved, to be

divided between the parties, 'in a fair and equitable manner.' This court heard no submission from Mr. Malcolm's counsel, either during closing submissions or at any other stage of the trial, opposing this particular aspect of Ms. Wilson's claim. This court nonetheless must and will pay careful regard to the relevant provisions of **PROSA**, in determining said aspect.

[38] Before addressing the provisions of **PROSA** which would be applicable thereto though, this court must state that it is not minded to accede to and thus, grant any relief to Ms. Wilson, in respect of items of personal property which were in the matrimonial home as at the date when the marriage was dissolved. To do so would be problematic, since some of those items may no longer exist in either party's possession and in addition, the making of such an order would require as a prerequisite, that the parties also be able to remember which were the personal property items that were present in the matrimonial home as at the date when the marriage was dissolved, that having been approximately four years ago. The making of an order in those terms, would, in the view of this court, be particularly problematic. This court will though, be prepared to and will actually make, an order regarding such items of personal property owned by either or both of the parties, as are, as of the date when the final judgment/order is made by this court, in either of the parties' possession, to be divided as between the parties. This court can divide any property of either Mr. Malcolm or Ms. Wilson, as presently is in the possession of either of them, provided that either such party is entitled to any such item. The definition of the word 'property' in **PROSA**, at Section 2(1) thereof, has enabled this court to reach that conclusion. Furthermore, in that same **Section of PROSA**, it is specified that the term 'spouse' includes a divorcee. Accordingly, this court will now consider how the personal property items that presently exist in the 'family home' ought to be divided, applying the relevant provisions of **PROSA** in that regard.

[39] For the purpose of deciding on how the parties' personal property ought to be divided, this court must carefully consider and apply the provisions of **Section 14(1) (b) and 14 (2) of PROSA**. Those sub-sections of Section 14 require this court, to the extent as is relevant for the purposes of this case, to divide such property, other than

the, ‘family home,’ in the manner that this court thinks fit, taking into account the factors specified in Section 14 (2). The most important of those factors as would be pertinent to the matter at hand, would be:

i. The acquisition of such other property through the payment of money, or contribution to the acquisition of same by an indirect means, such as, for example, the care of a child of the marriage.

ii. The duration of the marriage.

iii. That there is an agreement with respect to the ownership and division of property.

iv. Such other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account.

[40] The parties were married for fifteen years (1994-2009), albeit that they were permanently separated ever since 2002 – this therefore having been eight years post – marriage. The parties would undoubtedly have assisted each other, whether directly by means of a financial contribution to the acquisition of some personal property items or by the actual provision of some of the personal property items which even until now, remain in the ‘family home,’ or even by means of an indirect contribution, such as by, for example, the care of a child of the marriage, which thereby would have enabled the parties to have had more financial resources available to both of them, than would otherwise have been the case.

[41] If the parties can reach agreement between themselves as to how the personal property items which existed in the ‘family home’ up until the date of the dissolution of their marriage, should be divided as between themselves, then this court will give full force and effect to such agreement. If though, regrettably, the parties are not able to reach such agreement within a limited time-frame which shall be specified by this court, then such personal property items as existed in the ‘family home’ up until the date of dissolution of the marriage shall, to be extent that such now exist, be firstly, fully accounted for by Mr. Malcolm, in terms of the provision to Ms. Wilson by him, within a limited time-frame, of an inventory of all such items and specification as to any such

items as may have, prior to the date of delivery of this judgment, been disposed of, whether by sale, gift, or otherwise. In addition, all such items shall remain in the, 'family home,' until divided between the parties in accordance with any agreement that they may hereafter reach between themselves as to same, or until, if no such agreement is reached, such items of personal property, are divided from a monetary standpoint, by means of the sale of same, in accordance with this court's judgment order, which will be set out in detail, after these reasons for judgment have been fully set out. If in fact, such items of personal property have to be divided from a monetary standpoint, as a consequence of the sale of same, this court adjudges that the net proceeds of sale of such items of personal property as are sold, should be divided equally between the parties and this court will so order. Such items as are not sold though, should remain with the party who has possession of the same at present, that being Mr. Malcolm, unless he, in exercise of his sole discretion, decides otherwise.

[42] Ms. Wilson is seeking to obtain through her claim, amongst other reliefs, an order that Mr. Malcolm pay to her, 'occupation rent' in the sum of $30,000.00 per month for six years immediately preceding the filing of this claim and continuing until the 'family home' is sold or until Mr. Malcolm gives up his occupation of that home (whichever is earlier).

[43] The basis, as placed before this court by Ms. Wilson's attorney, for the proposed making of this order by the court, is essentially that Mr. Malcolm had, by his actions during the course of the parties' marriage during the period whilst they resided with each other in the townhouse at 58 Portview Mews, 'forced' Ms. Wilson to leave that home along with the children of the marriage. Following on her having left the last home in which they had resided together – that being the, 'family home,' Mr. Malcolm changed the home's door locks and security code and as a consequence, Ms. Wilson was unable to return there solely as a matter of her own discretion. As such, Mr. Malcolm then had exclusive use and occupation of the family home, from as of late 2002 until the date of the parties' divorce and even beyond then, even though the parties presently own that family home and indeed, have always owned the same jointly, as tenants-in-common. By use of the word, 'exclusive' in the present context, what is meant is that the use and occupation of that home, was being carried out by Mr.

Malcolm without any input whatsoever, from Ms. Wilson. Insofar as Ms. Wilson was, due to the actions of Mr. Malcolm, 'forced' to leave the 'family home' and reside elsewhere, she (Ms. Wilson), was thereby also, in essence, 'forced' to pay rent. That is the essence of Ms. Wilson's contention as regards this particular aspect of her claim.

[44] Mr. Malcolm has alleged, in respect of the aspect of Ms. Wilson's claim whereby she claims for 'occupation rent,' and in response to the summary of Ms. Wilson's evidence in relation to same as provided in the previous paragraph of this judgment, that prior to Ms. Wilson's departure from the 'family home,' she gave no indication to him that she intended to leave that home, other than to the extent that she had called him one afternoon and then advised him that 'it was not working out,' and that she was in the process of moving. He has further contended that when he arrived home, later that same day, she was gone. Since then, he has taken no steps to exclude Ms. Wilson from 'the family home,' but to his knowledge, she has never made any effort to return to their home. Mr. Malcolm had, as part and parcel of his evidence-in-chief, in paragraphs 10 and 11 of his witness statement which was filed on January 11, 2012, given evidence as follows:

> *'... I agree that I eventually changed the locks to the house sometime after the defendant moved, as I considered her behaviour erratic and I felt vulnerable and exposed, and her moving out was so unpredictable that I did not leave the locks unchanged, as I thought we should have discussions before we resumed cohabitation. At no time did the defendant indicate that she wanted to return to the house' (paragraph10). 'That the defendant's decision to become a rent payer was solely her decision and for which I should not be held liable, since I did not cause her to move out' (paragraph 11).*

[45] Mr. Malcolm's evidence though, as given in-chief, as regards his reason for having changed any lock (note the use of the singular expression) to the 'family home' and also his evidence-in-chief as to having changed, 'the locks to the house' (note the use of the plural expression – 'locks'), were both expressly contradicted by him, during his evidence as given while he was under cross-examination by Ms. Wilson's counsel.

This is clearly revealed by the ensuing quotation of his evidence as given under cross-examination, with respect to same. That evidence, following on respective questions (Q) or suggestions (Sugg.), being his answers (A) thereto, was as follows:

Sugg. 'After Mrs. Malcolm moved out of the property in November 2002, you stated that you changed the lock to the house, correct?'

A. 'No.'

Q. 'Are you saying that you changed the locks, in 2009?'

A. 'Around that time.'

Q. 'Is it correct to say that you changed the lock six years after your then wife moved out?'

A. 'Yes, due to some repairs I was doing on the front door, I actually changed the front door.'

Q. 'And this was the only lock that was changed after she moved out?'

A. 'Yes.'

Q. 'So the changing of the lock had nothing to do with her moving out?'

A. 'No.'

Q. 'You were changing a door?'

A. 'Yes.'

[46] What the evidence as quoted immediately above, as was provided to this court by Mr. Malcolm has clearly revealed, is that it is either that he was untruthful under oath, in his sworn affidavit evidence as contained in paragraph 10 of his affidavit which was filed on January 11, 2012, or alternatively, he was untruthful during his evidence as given during cross-examination, at least to the extent as quoted in the last paragraph of these reasons for judgment. This court does not accept that evidence as quoted above, in these particular respects, as provided to this court by Mr. Malcolm during cross-examination. This court holds the view that not only did Mr. Malcolm change more than

one lock of the 'family home,' he in fact changed all of the locks at the family home and that he did so, because he did not wish to resume cohabitation with Ms. Wilson unless he had prior thereto, expressly agreed to same. This court also does not accept Mr. Malcolm's evidence that he changed those, 'family home' door locks in 2009. This court instead believes that he changed those door locks sometime long before 2009, bearing in mind that Ms. Wilson moved out of that home in November of 2002 and from that time that she moved out of same, he did not want her to resume cohabitation of that home, without first engaging in discussions with him concerning same. That view of his, as expressed in paragraph 10 of his affidavit as filed on January 11, 2012, would undoubtedly have led him to have changed those door locks, not long after Ms. Wilson left the 'family home.'

[47] What were the circumstances which, according to Ms. Wilson's evidence, forced her to move out of the, 'family home?' According to her, while she was living in the, 'family home,' her then husband – Mr. Malcolm, was engaging in an extra-marital affair, as a result of which, the parties frequently quarrelled and did so in the presence of the children of the marriage. As a consequence, her testimony remained consistent throughout the trial, that she was 'forced to leave the 'family home,' since those quarrels were detrimentally affecting the parties' children.'

[48] On the other hand, it was Mr. Malcolm's evidence on this, which evidence also remained consistent throughout the trial, that although the parties did sometimes quarrel and did so sometimes in the presence of the children of the marriage, nonetheless, he does not believe that the said quarrels were sufficiently grave to justify Ms. Wilson's departure from the, 'family home,' or that they were negatively affecting the children of the marriage. He also testified that although the parties had, 'problems,' he had not considered them as being 'sufficiently grave.'

[49] As earlier stated in these reasons for judgment, Ms. Wilson has specifically alleged that Mr. Malcolm was engaging in an extra-marital affair while the parties were residing together in the 'family home.' Interestingly enough, Mr. Malcolm, in response to the affidavit evidence of Ms. Wilson as regards that alleged extra-marital affair, has

provided sworn evidence to this court, by means of that which he has deposed to in paragraph 8 of his affidavit which was filed on January 11, 2012, as follows: *'...I make no admission as regards any affair that I am alleged to have had.'*

[50] By virtue of rules of court applicable to fixed date claim form proceedings, the affidavits filed by the respective parties, constitute the respective parties' statements of case. See in that regard, **rules 8.1(1) (b)** read along with **rule 10.2 (2) of the CPR** in that regard. As such, **rule 10.5(1),(3) and (4) and (5) of the CPR** should be considered for the purpose of deciding on whatever it was legally appropriate for Mr. Malcolm to have put Ms. Wilson, 'to proof' of her allegation that at the relevant time, he was involved in an extra-marital affair. **Rule 10.5(1) of the CPR** requires a defendant, in his defence, to set out all of the facts on which he relies to dispute the claim. **Rule 10.5(3) of the CPR** requires a defendant to set out in his defence, which (if any), of the allegations in the claimant's statement of case, are admitted; and which (if any) are denied; and which (if any) are neither admitted nor denied, because the defendant does not know whether they are true, but which the defendant wishes the claimant to prove. **Rule 10.5(4) of the CPR** requires a defendant who is denying any allegation in the claimant's statement of case, to not only state the reason(s) for denying such allegation, but also, if such defendant intends to prove a different version of events from that given by the claimant, to set out that alternate version of events, in his defence. **Rule 10.5(5) of the CPR** states that where in relation to any allegation in the claimant's claim form or particulars of claim ('statement of case'), the defendant neither admits that allegation, nor denies the same and puts forward a different version of events, the defendant must state the reasons for resisting the allegation.

[51] Following from this, it is clear to this court, that the factual issue as to whether or not between late 1999 and 2002, Mr. Malcolm was involved in an extra-marital affair, is undoubtedly an issue which Mr. Malcolm must have personal knowledge of. It is either that he was engaged in such an extra-marital affair at that time, or he was not. Surely, he would know if he was or was not so engaged at that time. In the circumstances, it was not open to him, to have merely put Ms. Wilson to proof of her allegation in that particular respect. He could only properly have exercised such an option in his defence,

if he had no personal knowledge of that particular factual issue. Even if so, having neither denied nor admitted that particular allegation, Mr. Malcolm was required by rules of court, to have set out his reason(s) for putting Ms. Wilson to proof of same. He did not do that. His failure to deny the same therefore, is taken by this court, as being equivalent to an admission of that particular factual allegation. In the circumstances no oral evidence need have been led at trial as regards same. As things turned out, this court's evidentiary records from trial, do not show that any oral evidence was led on this particular issue at trial. This court though, does not hold the view that Ms. Wilson was required to have, through her attorney, cross-examined Mr. Malcolm on that issue since Mr. Malcolm, had not, in reality, appropriately defended himself, in these court proceedings, against same. In essence, his putting of Ms. Wilson to proof of same, without having set out any reasons for having so done, was tantamount to a failure to deny an allegation which he would have been able to and indeed, for the purposes of this case, would have been the person best poised to have denied. His failure to have so done, has thus, led this court to conclude that the said allegation of Mr. Malcolm having engaged in an extra-marital affair while residing with Ms. Wilson, his then wife, in their, 'family home,' has been duly proven.

[52] It is undisputed evidence, that after Ms. Wilson left the 'family home,' it was Mr. Malcolm who exclusively paid the mortgage payments for that home and who also, exclusively paid the taxes for same and carried out regular maintenance work upon same, as a result of all of which, significant sums of money would have been spent, exclusively by Mr. Malcolm. The benefit of all such expenditure, whether it be in terms of the mortgage, taxes or maintenance, would ensue undoubtedly, to the benefit of the parties, but such payments having been made by Mr. Malcolm solely, will lead ultimately, to greater financial benefit for Ms. Wilson than it will for Mr. Malcolm, this since, this court will, for reasons earlier set out in this judgment, order that the parties are each entitled to receive an equal share of the net proceeds of sale of the, 'family home.'

[53] It will lead to greater financial benefit for Ms. Wilson than it will for Mr. Malcolm, since there can hardly be any doubt that any properly maintained townhouse in St.

Andrew, such as is the parties' 'family home,' which is situated in Kingston 20, will likely have significantly appreciated in value through the years. Thus, what the same would be valued for in 2013 will likely be a significantly greater monetary sum that it would have been valued at when Ms. Wilson left that townhouse in 2002. Furthermore, since she has left that townhouse, Ms. Wilson has not contributed financially towards same, either in terms of the making of any payment towards lowering the mortgage debt incurred in the acquisition (purchase) of same by the parties, or even in paying property taxes or contributing to the maintenance of same. On the other hand, it is Mr. Malcolm who has solely made all such payments in respect of that townhouse since the date in late 2002, when Ms. Wilson moved out of same. Thus, Mr. Malcolm has incurred far more expense in respect of the said 'family home,' than has Ms. Wilson, yet, by virtue of the presumption as set out in **Section 6 of PROSA**, which has not at all been rebutted, the parties will obtain, by order of this court, an equal share of the net proceeds of sale of same, in the event that Mr. Malcolm is either unwilling or unable to, within the time to be allotted, purchase Ms. Wilson's 50% net share of the value of same. This is an important consideration to be had by this court, just as is the undisputed evidence that Ms. Wilson had to pay rent, after she permanently left the 'family home' and that since then, she has been paying rent of $25,000.00 each month.

[54] Ms. Wilson though, interestingly enough, even though having providing un-contradicted evidence to this court, that she has, since having moved out of the 'family home,' been paying rent of $25,000.00 each month, is nonetheless, claiming for 'occupation rent' in the sum of $30,000.00 each month and is claiming same for the period of six years immediately preceding the filing of her claim on February 11, 2011 and continuing until either the, 'family home' is sold, or Mr. Malcolm acquires her interest therein, or he gives up his occupation thereof, whichever is earlier. This court is unable to answer the question as to why Ms. Wilson is claiming against Mr. Malcolm, for the sum of $30,000.00 per month as, 'occupation rent,' in circumstances wherein it is Ms. Wilson's sworn affidavit evidence, as set out in paragraph 12 of her affidavit which was filed on February 11, 2011 and which therefore was, by earlier order of this court, as made at a case management hearing, to stand, along with all of the other affidavit evidence filed by the parties in these consolidated claims, as part and parcel of her

evidence-in-chief. In the circumstances, this court takes the view that Ms. Wilson cannot properly claim for a sum larger than $25,000.00 per month, as, 'occupation rent.' Furthermore, this court wishes to make it clear at this juncture, that whilst this is the most that can be properly be claimed for as, 'occupation rent,' by Ms. Wilson, this is not at all to be taken as even so much as implying, much less expressing, that this court considers that Ms. Wilson has proven, in any respect, her claim for, 'occupation rent.' This aspect will be looked at more closely, further on in these reasons for judgment.

[55] In the case of **Jones (AE) v Jones (FW)** – [1977] 2 All ER 231, the facts of which case will not be set out herein, Lord Denning M.R. stated as follows:

> *'First the claim for rent. It is quite plain that these two people were in equity tenants-in-common having a three-quarter and one-quarter share respectively. One was in occupation of the house. The other not. Now the common law said clearly that one tenant in common is not entitled to rent from another tenant in common, even though that other occupies the whole. That appears from* ***McMohan v Burchell*** *– [1846] 2 Ph 127, at p. 134, per Lord Cottenham, LC and* ***Henderson v Eason****. [1851] 17 QB 701, at p. 720. Of course if one of the tenants let the premises at a rent to a stranger and received the rent, there would have to be an account, but the mere fact that one tenant was in possession and the other out of possession did not give the one that was out any claim for rent. It did not do so in the old days of legal tenants-in-common. Nor does it in modern times of equitable tenants in common... As between tenants-in-common, they are both equally entitled to occupation and one cannot claim rent from the other. Of course, if there was an ouster, that would be another matter; or if there was a letting to a stranger for rent that would be different, but there can be no claim for rent by one tenant in common against the other whether at law or in equity.' (P. 235 B - E)*

[56] Taking said dicta from Lord Denning MR (as he then was) into account and fully relying on same insofar as this legal issue as regards Ms. Wilson's claim for 'occupation rent' it is Mr. Malcolm's primary contention in response to that aspect of Ms. Wilson's

claim, that there was no 'ouster' of Ms. Wilson form the, 'family home' and in the circumstances, no 'occupational rent' ought to be awarded by this court to Ms. Wilson.

[57] Counsel for Ms. Wilson has submitted to this court, in the skeleton submissions prepared by him, that even if this court were to conclude that there has been no, 'ouster' of Ms. Wilson from the, 'family home,' nonetheless, Ms. Wilson would still be entitled to occupation rent. Counsel for Ms. Wilson has relied on the following cases, which he contends, support that legal proposition. Those cases are ***Byford v Butler*** – [2004] 1FLR 56; ***Leake (formerly Bruzzi) v Bruzzi*** – [1974] 2 All ER 1196 and **Suttil *v Graham*** – [1977] 1 WLR 819. In paragraph 16 of the court's judgment in the ***Byford v Butler*** case, Lawrence Collins J., stated that:

> *'A court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary in order to do equity between the parties that an occupation rent be paid.'*

This court accepts the validity and applicability of this proposition as stated by Lawrence Collins J in the ***Byford v Butler*** case, rather than the inflexible rule as expressed by Lord Denning, MR (as he then was) – that being a rule which, it seems, was supported by the much older caselaw. This court does not support such an inflexible rule for two reasons – both being of equal importance. The first is that it a rule which is not supported by caselaw decided subsequent to the decision rendered by the England and Wales Court of Appeal and reported in 1977 in the case – ***Jones (AE) v Jones (FW)*** (*op. cit*). This is not only so in the ***Byford v Butler*** case (*op. cit*), which was a Chancery Division (CL.D.) judgment emanating from England's then High Court, and therefore, is less persuasive precedent, insofar as this court is concerned, than is the England and Wales Court of Appeal judgment in the **Jones (AE) v Jones (FW)** case. It is also not more persuasive precedent than the case of – **Re Pavlou (A bankrupt**) – [1993] 1 WLR 1046, that being a judgment which also emanated from the Chancery Division of England's then High Court. In the **Pavlou** case, Millett J. stated the applicable principles in this way:

> *'First, a court of equity will order an inquiry and payment of occupation rent, not only in the case where the co-owner in occupation has ousted the other, but in any other case in which it is necessary to do equity between the parties that an occupation rent should be paid. The fact that there has not been an ouster or forcible exclusion therefore is far from conclusive. Secondly, where it is matrimonial home and the marriage has broken down, the party who leaves the property will, in most cases, be regarded as excluded from the family home, so that an occupation rent should be paid by the co-owner who remains. But that is not a rule of law; that is merely a statement of the prima facie conclusions to be drawn from the facts. The true position is that if a tenant-in-common leaves the property voluntarily but would be welcome back and would be in a position to enjoy his or her right to occupy, it would normally not be fair or equitable to the remaining tenant-in-common to charge him or her with an occupation rent which he or she never expected to pay.' (at p. 1050).*

[58] This court entirely accepts the above – quoted statement from Millett J. as setting out not only the correct law, but also the legal principles which are most pertinent for the purpose of resolving the particular issue of the claim by Ms. Wilson for 'occupation rent.' Applying the same to the matter at hand, firstly, this court concludes, as a matter of fact, that by having changed the locks of the, 'family home,' after Ms. Wilson had, prior thereto, left that townhouse as a matter of her personal choice and voluntarily and having done so without any prior notice to Ms. Wilson and without, at any time, having offered to her, a set of the new keys that would then have had to have been used by her if she wished to access that town home, Mr. Malcolm thereby, at that stage, effectively ousted Ms. Wilson from the, 'family home' which they then owned and even now own, as tenants-in-common.

[59] This court has concluded, as a matter of fact, that Ms. Wilson left the, 'family home' voluntarily, since, even though this court has, for legal reasons earlier adumbrated, concluded that Ms. Wilson has successfully proven her allegation that, at the material time, Mr. Malcolm had been engaged in an extra-

marital affair, nonetheless, this court does not accept that such a situation, in and of itself, bearing in mind that there exists no evidence of either the extent to which the said extra-martial affair had reached in terms of potential permanence or otherwise, or even as to the length of time that such extra-marital affair had lasted for, should be taken as having, 'forced' Ms. Wilson to leave the 'family home.' Marriages will usually have their so-called, 'ups and downs' and oftentimes, one or perhaps even both parties to a marriage will often engage in actions or inactions which will be detrimental to the marriage, albeit that sometimes that party or those parties, will not and do not always recognize that this will be so. As such, for any marriage to work well, a great deal of, 'give and take' will usually be required throughout. Certainly therefore, if, as part and parcel of an extra-marital affair, a husband or wife engaged in such, were to try to bring the extra-marital affair partner into the, 'family home,' to live there permanently, whilst the non-offending spouse is still living in that home, then in such circumstances, that spouse may very well be adjudged by a court as having been 'forced,' out of that home, if he or she were then to leave that home. Everything will, of course, depend on the particular circumstances of each particular case. In the case at hand though, insufficient evidence was led at trial by Ms. Wilson as to what were all of the pertinent circumstances concerning the alleged and proven extra-marital affair that was engaged in by Mr. Nicholson at the material time. The only evidence that was really led by Ms. Wilson as regards same, is that such extra-marital affair was engaged in while the parties resided together in the, 'family home' and that the parties had quarrelled about same in the presence of the children of the marriage. Such evidence on this point, cannot and does not lead this court to the conclusion that Ms. Wilson was 'forced' out of the 'family home.' This court though, for reasons earlier provided, has concluded that Ms. Wilson was nonetheless ousted from the 'family home,' as at the point in time when the locks of that townhouse were changed and she was thereby deprived of access thereto.

[60] The fact that this court has concluded, as a matter of fact, that Ms. Wilson was ousted from the 'family home,' does not, in and of itself, entitle her to obtain,

‘occupation rent’ by order of this court. This court must still have regard to what is the primary consideration, that being whether equity or fairness to Ms. Wilson, justifies, in the particular circumstances of this particular case, this court awarding in her favour and as against Mr. Malcolm, ‘occupation rent.’ This court does not hold the view that the equity of this case is in Ms. Wilson’s favour in that respect.

[61] The equity is not in her favour for at least two very important reasons. The first of these is that it is the uncontradicted evidence of Mr. Malcolm, that Ms. Wilson had, at no time after having left the family home with the children of the marriage, ever even so much as expressed to Mr. Malcolm, any desire to return to that home along with the children and resume living with him there. Instead it was Mr. Malcolm who, according to the evidence of Ms. Wilson, visited the home of her sister, which is the home in which she was living after she had permanently left the, ‘family home,’ in order to visit the children of the marriage. It was also Ms. Wilson’s evidence that she had, from time to time, taken the children of the marriage to visit with Mr. Malcolm at the, ‘family home,’ but was on those occasions, unable to gain access to same solely as a matter of her own volition. As such, Ms. Wilson could undoubtedly have asked Mr. Malcolm to resume living with him there if she had wished to do so. It is very clear to this court that she did not ask for same, because she did not desire same. It certainly seems to this court therefore, that Ms. Wilson’s claim for, ‘occupation rent’ is nothing more than, for her, a potentially useful afterthought, through which she believed that she could gain some commercial advantage. A court of equity which this court functions as in this particular respect, will not lend any support to such afterthought.

[62] Furthermore, the equity of Ms. Wilson’s case as regards her having been ousted from the, ‘family home’ and thereby claiming for ‘occupation rent’ at this time, certainly does not favour her being awarded such relief by order of this court. This is because, whilst away from that townhouse, as earlier mentioned in these reasons for judgment, it was Mr. Malcolm who solely paid the mortgage

payments, taxes and for the upkeep of said town home. Prior to having left that townhouse, Ms. Wilson was, according to her own evidence, equally sharing the mortgage payment which was to be paid in each month, for that town home. As things will stand as a consequence of the order of this court, Ms. Wilson will be entitled to recover 50% of the value of the net proceeds of sale of the town home, if sold via public auction, of if her share is sold to Mr. Malcolm, she will still be entitled to obtain from him, the net value of her 50% share of the town home, as consideration for the transfer to him, of her 50% share of that town home. In the circumstances, Ms. Wilson should not benefit any further, financially, from that home. This court, for those reasons, will deny Ms. Wilson's application for, 'occupation rent.'

[63] There is one other small point to be made thought before this court next moves on to making the required orders and it is that this court noticed with puzzlement, that Ms. Wilson had claimed for 'occupation rent' for a period of six years prior to her claim having been filed. This court just wishes to make it clear that a claim for 'occupation rent' is not the equivalent of a claim for rent founded upon the law of contract between landlord and tenant. It is a claim based solely on equity. As such, there is no limitation period application to same, albeit this court does know and would ask that litigants and legal practitioners alike, carefully note the equitable maxim, 'delay defeats equity.'

Orders

[64] This court now, for all of the reasons as detailed above, makes the following orders:

(i) The Claim No. 2011 HCV 02007, between the parties – Junior Malcolm as claimant and Vilma Mae Wilson Malcolm, as defendant, is dismissed with costs of that claim being awarded to the defendant therein and such costs are to be taxed if not sooner agreed.

(ii) The premises registered at volume 1309 folio 578 of the Register Book of Titles and with residential address at 58 Portview Mews,

Kingston 20, in the parish of St, Andrew, is owned in equal shares of 50% alike, by Mr. Malcolm and Ms. Wilson.

(iii) Mr. Malcolm shall have the first option to purchase Ms. Wilson's 50% interest in the premises referred to in Order No. (ii) hereof and if he is to exercise that option, he shall notify Ms. Wilson's attorney of same, within three months of the date of this order and shall execute an agreement for sale as regards same, by not later than six months subsequent to the date of this order.

(iv) It is ordered that in the event that Mr. Malcolm chooses to exercise the option to purchase Ms. Wilson's 50% share of the premises referred to in order (ii) hereof, Ms. Wilson shall, in such event, be required to execute an agreement for sale pertaining to same, by or before the conclusion of the time period specified in Order No. (iii) permitted to Mr. Malcolm to execute said agreement for sale and additionally, shall be required to be paid by Mr. Malcolm no more than the value of her 50% share of said premises, less 50% of the costs associated with the transfer of same to him. Mr. Malcolm shall bear the remaining 50% of such costs.

(v) The said premises shall be valued by a certified valuator, at the discretion of the parties, but if the parties cannot or do not agree as to who shall conduct the said valuation, within two weeks of this order, then in such event, Mr. Malcolm shall then be entitled, in exercise of his sole discretion, to engage the services of a certified valuator for that purpose. All costs associated with the valuation of the said premises, shall be borne equally by the parties.

(vi) In the event that Mr. Malcolm shall either fail to exercise his option to purchase as per this order, or alternatively, does not execute the requisite agreement for sale, within a period of six months subsequent to the date of this order, then the said premises shall be made available for sale on the open market and shall be sold at a price which is no lower that the market value of that premises as assessed by the certified valuator.

(vii) If the said premises is sold on the open market, then all costs associated with the transfer of same to the purchaser thereof, shall be borne equally by the parties and the parties shall each be entitled to derive from such sale, 50% of the net proceeds of sale.

(viii) In the event that either party is unwilling or unable to execute the requisite land transfer documentation as may, in any event, be required to be executed, following upon this order, then the Supreme Court Registrar shall be authorized to execute any such documentation on such party's behalf.

(ix) Pursuant to the provisions of section 9 of PROSA, if there is carried out pursuant to this order, a transfer of Ms. Wilson's interest in the said premises to Mr. Malcolm, such transfer shall be exempt from transfer tax.

(x) The parties are each restrained from in any way parting with their respective interest in the said premises, other than in accordance with the terms of this order and additionally, are restrained from carrying out any work in relation to said premises other than such as will likely increase the value thereof and are restrained from utilizing the said premises as security for any loan, or any form or equivalent of a loan, whatsoever, at any time subsequent to the date of this order.

(xi) The law firm of McNeil and McFarlane, with office situated at No. 47F Old Hope Road, Kingston 5, shall have carriage of sale, in the event that Mr. Malcolm chooses to exercise his option to purchase Ms. Wilson's 50% interest in the said premises, in accordance with the terms of this order.

(xii) In the alternative, if the said premises is to be sold on the open market, then the law firm of Donovan St. L. Williams and Company with office situation at Suite 7, Wyndham Hotel, 77 Knutsford Boulevard, Kingston 5, shall have carriage of sale.

(xiii) Ms. Wilson's claim for, 'occupation rent' is denied.

(xiv) There shall be, within 14 days of the date of this order, provided by Mr. Malcolm to Ms. Wilson, a written inventory of all items of personal property in the said premises as at the date of this order.

(xv) If the parties can agree on how the items of personal property in the said premises at present, are to be divided as between themselves, then such items shall be so divided between them, in accordance with such agreement and any item so divided shall be owned solely by the party who has, by virtue of that division, receive possession or kept possession (as the case may be), of any such item.

(xvi) In the alternative, if for whatever reason, the parties cannot so agree and do not divide such items of personal property between themselves, pursuant to any such agreement, within 30 days of the date of this order, then the parties shall agree on and hire a certified appraiser to value all such items of personal property and shall thereafter, within the next 30 days after receipt by the parties, of an appraisal report concerning same, offer said personal property items for sale, at prices no lower than the minimum value

for each such item, as specified by said loss assessor. Receipts shall be issued for the sale of each such item and each such receipt shall be made available, whether by means of copy or otherwise, to the parties. Following on the sale of each such item, Mr. Malcolm – who shall be entitled to conduct each such sale, shall account in writing for the price at which each such item has been sold and shall do so, reasonably promptly after any such item has been sold in accordance with the terms of this order. In addition, Mr. Malcolm shall reasonably promptly, pay to Ms. Wilson, 50% of the net proceeds of sale, of all such items.

(xvii) Mr. Malcolm is restrained from giving, pledging, transferring, using as loan security, moving, or disposing of any item of personal property which is, as of the date of this order, located in the said premises, other than to the limited extent as expressly permitted by this order.

(xviii) Any of the said items of personal property which may not have been sold, notwithstanding the reasonable efforts of Mr. Malcolm to do so, shall remain in the possession of Mr. Malcolm, save and except that Mr. Malcolm may, at any time and for whatever reason, give any such unsold item to Ms. Wilson, whereupon Ms. Wilson shall then be considered as being the exclusive owner of same.

(xviv) Any such unsold item of personal property may, at any time beyond one year hereafter, if this court so orders, be treated as being no longer subject to division by sale and shall then be treated as being exclusively owned by Mr. Malcolm.

(xx) Ms. Wilson shall be entitled to 70% of the costs of Claim No. 2011HCV 00731.

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Hon. K. Anderson, J.