

[2] On September 23, 2009 the court ordered that the case was to proceed as though commenced by claim form with the result that the trial of this matter was heard in open court.

[3] On January 28, 2010 Mr. Chambers filed an ancillary claim seeking a declaration that he having paid 'directly and indirectly' all the purchase price for the property is entitled to 100% beneficial interest in it and that Mrs. Wiggan-Chambers as joint owner holds her interest on trust for him.

[4] He has also claimed in the alternative that commensurate with his contribution to the purchase price and the costs he bore to renovate the property that he is entitled to an equitable share of the beneficial interest in the said property of 'approximately' 82%.

[5] He is also claiming 'damages' in the amount of \$2.5 million representing several debts owed to him by the claimant.

[6] To satisfy the requirements of section 13(2) of PROSA which provides that actions of this kind are to be brought within twelve months of the dissolution of a marriage, the court on the application of the parties enlarged the time for the filing of their claims which had been done outside of the statutory limitation period.

Background

[7] The parties were married on November 27, 1997. They had no children. The marriage unfortunately ended in divorce on December 13, 2007.

[8] The property in question was acquired in June 2005. It consists of a main house and two self contained flats which are rented. It was acquired through the joint efforts of the parties. The agreed purchase price was \$9 million. Mr. Chambers contributed \$6 million in cash while the rest of the funds were obtained from loans from the Jamaica National Building Society (JNBS) for \$2 million and \$1 million from the National Housing Trust (NHT). It is contended by Mrs. Wiggan-Chambers that this was her contribution to its acquisition and it is undisputed that she pays the mortgages by way of salary deductions.

Mrs. Wiggan-Chambers' evidence

[9] Mrs. Wiggan-Chambers stated that during the early years of the marriage, the parties resided at premises owned by the defendant at Ebony Vale in St. Catherine. This property was owned by the Defendant prior to the parties' marriage. She said that Mr. Chambers was in the habit of putting her out of the house. In January 2002 he locked her out of the house and this forced her to reside in rented premises for about a year. However, during this period they shared a visiting relationship and she would spend most of her week-ends at Ebony Vale with him. They eventually reconciled and she resumed living with him in 2003. She stated that aside from a period of a year (2002 to 2003), they cohabited as man and wife for about seven years until their separation in 2005.

[10] It is Mrs. Wiggan-Chambers' case that during the time she was excluded from the matrimonial home at Ebony Vale. She started to search for an apartment to purchase. She planned to do so with her sister. When the parties reconciled she said that Mr. Chambers voiced his disapproval about this arrangement and accused her of trying to destroy their marriage. She, however, continued her search mindful that he had previously thrown her out of his house.

[11] She stated that she located the property at West Kirkland Heights. It was advertised in the Sunday Gleaner. She negotiated with the agent and had the price reduced from \$14 million to \$9 million. She spoke with her sister about purchasing the premises. Mr. Chambers did not participate in this discussion.

[12] She took Mr. Chambers to see the property. He was upset that she was planning to purchase it with her sister. After a lengthy discussion, she relented and decided to purchase the property with him as she wanted to save their marriage and most importantly she felt that if they jointly acquired a matrimonial home, Mr. Chambers could not exclude her from it.

[13] She said that as a result of the agreement they had she contributed \$3 million to the purchase price by way of mortgages from JNBS and NHT and she paid the monthly mortgage payment of \$49,563.14. This was done by way of salary deductions and there

is documentary evidence to support this aspect of the evidence. She also purchased the food for the home and paid the helper. She contributed to the renovation of the property by purchasing paint.

[14] She stated that they agreed that the rent from the two flats would be used to pay the utility bills and take care of the general maintenance of the property. Mr. Chambers failed to honour this agreement and wanted her to pay a portion of the utility bills which she refused to do. He also stopped doing the gardening and she had to pay gardeners to maintain the grounds. Except for three months when the tenants paid the rent directly to her she has not benefited from any of the rental income.

[15] She denied that Mr. Chambers lent her \$2.5 million. She stated that she was never diagnosed with cancer. She gave evidence that in 2005 she had an irregular pap smear and had to do a minor surgical procedure. The cost of this procedure was under \$32,000 and she was the one who paid for it using her health insurance and her own funds. She has provided documentary proof of this.

[16] She agreed that when Mr. Chambers was made redundant from his job at Cable and Wireless he gave her some money as a gift and she used it to clear the balance owed on her car loan. However, he never loaned her any money to repair her motor vehicle or to liquidate the balance that was owed on her car loan. They also went to Mexico together but denied that the money that was used to purchase her ticket was also a loan.

[17] Mrs. Wiggan-Chambers' evidence is that at the time the property was acquired it was specifically purchased as their matrimonial home and was utilised as such after they moved in sometime in July 2005. She stated that they occupied the same bedroom until Mr. Chambers moved out in September 2005. However, he still had access to this bedroom and would return to it from time to time. She also said that she would comply with his 'demands' whenever he returned.

[18] In essence, her case is that the marriage was not one of short duration, she made a financial contribution to the acquisition and maintenance of the property which

was acquired by the parties and used by them as the family home and she is entitled to 50% interest in the property in accordance with the provisions of section 6 of PROSA.

Mr. Chambers' evidence

[19] Mr. Chambers' evidence on the other hand is that the parties lived together for about seven months and one week for the almost ten (10) years of marriage. The seven months they cohabited was prior to the purchase of the property. When they took up residence at the West Kirkland property they only lived as man and wife for one week. He stated that after one week Mrs. Wiggan-Chambers left the matrimonial bedroom after making certain assertions. His said that during this time they engaged in marital relations only once.

[20] He stated that Mrs. Wiggan-Chambers left their Ebony Vale home in February 1998, shortly after they were married, returned a few months later and began a pattern of moving in and out of their matrimonial home until her permanent departure in December 2001.

[21] In the middle of 2003, while they were separated, she informed him that she was diagnosed with cancer and requested financial assistance from him to undergo surgery. He said that between mid 2003 and September 2004 he loaned the claimant a total of \$2.5 million for medical treatment, repairs to her car, liquidation of her car loan and a trip to Mexico to facilitate her recovery after surgery. He also contended that Mrs. Wiggan-Chambers destroyed the records he had of the loans he made to her. This evidence was given to explain the absence of documentary proof of these loans.

[22] He said that they developed a casual non-sexual relationship after her surgery. Mrs. Wiggan-Chambers, he stated, began exhibiting an interest in reconciliation as she told him she had made a mistake to have left, placed him on her health card and promised to refurbish his furniture. He was also encouraged by his relatives and neighbours, including Mr. Tivy Coley who gave evidence on his behalf, to reconcile with her.

[23] Mr. Chambers said that he was the person who discovered that the property was up for sale when he assisted a disabled motorist in the area that it is located. It is undisputed that he financed its acquisition by contributing \$6 million in cash. The funds were obtained from the sale of two properties he owned as well as a portion of the payment he received from Cable and Wireless when he was made redundant.

[24] Mr. Chambers' evidence is that he needed a further \$3 million to complete the purchase of the property. He obtained a mortgage from JNBS for \$2 million and Mrs. Wiggan-Chambers contributed \$1 million from her NHT benefits. He stated that it was agreed between them that she would pay off the debt she owed to him in three years by making the monthly mortgage payments. She was also to renovate the kitchen and install floorboards to replace the worn out tiles in the house. He would control the revenue that was generated from the rental of the two flats.

[25] When he gave evidence, Mr. Chambers stated that Mrs. Wiggan-Chambers' name was erroneously placed on the certificate of title for the premises as a joint tenant and he that he had instructed his attorney at the time to correct this. In other words her name was placed on the title as a matter of convenience. It is perhaps useful to indicate that the evidence on this point was never pleaded by him.

[26] Mrs. Wiggan-Chambers moved into the premises, he stated, without his knowledge or agreement. He gave evidence that about a week after she had moved in the arrangements they had, as well as, their relationship broke down. She refused to assist him with the payment of the utility bills, did no chores in the house, reneged on her promise to renovate the kitchen and refurbish his furniture. She removed his name from her health card and reluctantly began to make the mortgage payments only after her brother intervened. He denied that she made any contribution towards the renovation and maintenance of the property.

[27] In summary, Mr. Chambers' case is that the marriage was one of short duration, the premises was never the family home, Mrs. Wiggan-Chambers' contribution to its acquisition was to pay off a loan of \$2.5 million that she owed to him and the court

should be guided by the provisions of section 14 (1) (b) of PROSA when deciding the issues.

Witness called on behalf of Mr. Chambers – Mr. Tivey Coley

[28] Mr. Coley gave evidence that Mrs. Wiggan-Chambers moved into Mr. Chambers' residence at Ebony Vale sometime around October 1997 and they got married shortly afterwards. He also spoke of the disputes the parties had and that he would intervene at times. He stated that Mrs. Wiggan-Chambers would be absent from the home for long periods.

[29] Sometime in 2003, when Mrs. Wiggan-Chambers was not living at the house, he overheard Mr. Chambers cursing his wife and telling her to move from the gate. He later learnt from Mr. Chambers that he had been informed by her that she had been diagnosed with cancer and was seeking his financial assistance. He encouraged him to help her.

[30] Mr. Coley stated that he tried to get the parties to live peaceably together and advised them that if they could not do so they were to 'separate'. He said he observed that they continued to live separate lives and Mr. Chambers remained 'single' until he left Ebony Vale two years later.

[31] He said that he never had any conversation with Mrs. Wiggan-Chambers and what he learnt about her alleged medical condition was based on what Mr. Chambers told him. He also said that he was not aware that the parties had purchased a house together and that this was the property that Mr. Chambers moved into after his relocation from Ebony Vale.

[32] Based on the source of most of the information that Mr. Coley gave evidence about, I have found that his evidence does not provide much assistance to the court and as a result very little weight is given to it.

Issues

[33] Is the property the family home within the context of PROSA and should it be divided equally between the parties?

[34] Did Mrs. Wiggan-Chambers owe Mr. Chambers \$2.5 million at the time the property was acquired and was it agreed between the parties that she would liquidate this loan by securing the mortgages and paying the monthly mortgage installments?

[35] If the property is not the family home is Mr. Chambers entitled to the whole or at least 82% beneficial interest in the premises?

The Law

[36] The substantive and ancillary claims are made pursuant to section 13 of PROSA. Section 13 (1) (a) is the relevant provision in the circumstances of this case as it allows spouses to apply to the court for a division of property “*on the grant of a decree of dissolution of marriage or termination of cohabitation*”.

[37] Section 2 (1) of PROSA defines the family home as “*the dwelling house that is wholly owned by either or both spouses and used habitually or from time to time by the spouses as the only or principal family residence...*”

[38] Section 6 of PROSA makes provision for the entitlement to the family home in the following way that “*subject to sub-section 6(2) and sections 7 and 10 each spouse shall be entitled to one-half share of the family home.*” This is commonly referred to as the equal share rule.

[39] Section 6 is subject to section 7 which provides for the variation of the equal share rule where the court is of the opinion that its application would be unreasonable and unjust. Some factors that are stated in the legislation that the court is to consider under section 7 (1) are that the house was inherited by one spouse, that the house was already owned by one spouse at the time of the marriage or commencement of cohabitation or that the marriage is one of short duration. An interested party (which includes a spouse) may apply for a variation of the rule under the section.

[40] Section 14 (1) (a) provides that where an application is made under section 13 for the division of property, the Court may make an order for the division of the family home in accordance with sections 6 or 7, as the case may require.

[41] Section 14 (1) (b) which is made subject to section 17 (2) then provides that in respect to an application under section 13 for the division of property, the Court may divide property, other than the family home, as it thinks fit taking into consideration the factors that are specified in subsection (2).

[42] These factors identified in subsection 2 are:

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property...;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other facts or circumstance, which in the opinion of the Court, the justice of the case requires to be taken into account.

[43] Section 14 (3) defines contribution and this incorporates both financial and non-financial contribution including the payment of money to maintain or increase the value of the property or any part thereof and the management of the household.

Submissions

[44] Mrs. Usim has urged the court to accept Mrs. Wiggan-Chambers as a witness of truth. She has submitted that the evidence given by Mr. Chambers is riddled with inconsistencies and is unreliable. She has asked the court to find that the evidence presented by Mrs. Wiggan-Chambers supports her position that the premises was in

fact the family home and that Mr. Chambers has not presented any evidence to convince the court otherwise.

[45] She has also submitted that based on the defence and ancillary claim filed by Mr. Chambers he is seeking to rely on section 7 of PROSA and is asking the court to vary the equal share presumption as he has pleaded that the marriage was one of short duration and in those circumstances it would be unjust and unreasonable for the court to apply the equal share rule. She submitted that he bears the burden of proof to do so and has failed to discharge this burden. She relied on **Guthrie v. Guthrie** 2009 HCV 3430.

[46] She also put forward that the court was only to vary the equal share rule in exceptional circumstances and this was not applicable to the case at bar. She relied on **Saddler v. Saddler** and **Hoilette v. Hoilette** [2013] JMCA Civ 11 .

[47] Mr. Mellish on behalf of Mr. Chambers submitted that the premises has never been the family home and has urged the court, in deciding the issues, to apply section 14 (1) (b) of PROSA. He is asking the court to find that no spousal relationship existed between the parties and this was crucial in determining whether two persons can be said to be living as a family. He has urged to court to accept that for a residence to qualify as a family home there must be cohabitation. He has put forward that when the parties resided in the premises they did not live together as man and wife. He has relied on **Bowes v. Keith Alexander Taylor** 2006 HCV 05107.

Analysis and disposal

[48] The issue of credibility is vital to this case. The evidence given by the parties are poles apart on the crucial issues in the matter. Some of these are the duration of cohabitation, the state of the marriage before and after the purchase of the premises, the nature of Mrs. Wiggan-Chambers' contribution to the acquisition of the property and whether the property was acquired and used by the parties as the family home.

[49] Having had the opportunity to observe the parties and to assess their demeanour, I found Mrs. Wiggan-Chambers to be a more credible witness than Mr.

Chambers. I was impressed with the manner she gave evidence and found that she was not shaken by the able cross-examination of learned counsel Mr. Mellish.

[50] I found Mr. Chambers' evidence on the other hand to be inconsistent, unreliable and on some matters quite incredible. I felt he embellished the evidence that he gave. I have chosen to highlight certain areas of his evidence to justify the view that I have taken of his credibility. An example of the incredulous nature of the evidence Mr. Chambers gave, which comes readily to mind, is the reason he stated for putting his wife out of the Ebony Vale residence in 2002. Given the unsavoury quality of this aspect of his testimony, the details will not be repeated here. Suffice it to say, I viewed it as a total fabrication.

[51] In paragraph 3 of his defence filed on January 28, 2010 Mr Chambers stated that Mrs. Wiggan-Chambers contributed one third of the purchase price (\$3 million) by way of two mortgages with JNBS and the NHT. Yet when he gave evidence he stated that he had obtained the mortgage of \$2 million from JNBS while Mrs. Wiggan-Chambers secured \$1 million from the NHT.

[52] It is undisputed that at the time the property was purchased he was unemployed. It is hard for the court to accept that he would be in a position to access a loan of this amount from JNBS. How would he be able to repay it? I therefore find that he was not speaking the truth and it was Mrs. Wiggan-Chambers who applied for and obtained these two loans. By doing so, she contributed \$3 million towards the purchase of the property. I am also convinced that Mr. Chambers' name appears as a joint borrower on the statements of account for the loans because the property was used as the collateral for the mortgages and he is one of its registered owners.

[53] Mr. Chambers' case is that from mid 2003 to 2004 he made several loans to Mrs. Wiggan-Chambers amounting to \$2.5 million. One of these loans he said was in June 2003 in the sum of \$500,000.00 for her to undergo surgery for cancer. Dr. Vary Jones Leslie's report indicates that on the 7th June 2005 Mrs. Wiggan-Chambers had minor day care surgery (a biopsy) because of an abnormal pap smear and she was not found to have cancer. The cost of this procedure was \$31,650.00. More than half of the cost

(\$17,600.00) was covered by her insurance while a payment of \$8,000.00 was made. There was a balance of \$6,060.00 owed to the hospital.

[54] Mr. Chambers himself gave evidence that he drove Mrs. Wiggan-Chambers to the hospital on the day she had the surgery for cancer and waited for her until it was completed. She was released from the hospital on the same day he took her there.

[55] This evidence has caused me to seriously doubt the sincerity of Mr. Chambers' claim that he made several loans to Mrs. Wiggan-Chambers amounting to \$2.5 million. I am therefore prepared to accept Mrs. Wiggan-Chambers' evidence that this did not happen and she was not indebted to Mr. Chambers at the time the property was being purchased. I accept that after Mr. Chambers was made redundant he gave her some money as a gift, which is nothing extraordinary between a husband and wife, which she used to clear the balance that was outstanding on her car loan. I also reject Mr. Chambers' evidence that he made loans to her to repair her motor vehicle and to pay for a trip to Mexico during her purported recovery period.

[56] I find as a fact therefore that the mortgages that were obtained from JNBS and the NHT were not as a result of an agreement between the parties that this would be the method by which Mrs. Wiggan-Chambers would liquidate the debt of \$2.5 million she owed to Mr. Chambers. Rather, the court finds that this was her financial contribution to the acquisition of the property.

[57] I also accept as a fact that the parties had reconciled and were living as man and wife before the property was purchased. I also find that at the time of its acquisition, it was the intention of the parties that it was to be their family home and it was used by them for this purpose. I say so because firstly, in paragraph 4 of his defence Mr. Chambers avers that in late December he decided to give the marriage another try. The claimant he said insisted that she did not want to live in Spanish Town and that he decided to "purchase the premises with the claimant and agree to unite and live there together." Mrs. Wiggan-Chambers' evidence on this point is not at variance with that of Mr. Chambers because it is her case that she also agreed to purchase the premises with him because she saw this as a way to "save their marriage".

[58] I find therefore that the property in question is the family home as defined by PROSA and consequently, the issues in this matter are to be determined by the provisions of section 6 of PROSA and not section 14 (1) (b) of the legislation.

[59] However, I wish to address the issue raised by Mr. Mellish which concerns the cohabitation of the parties as a family unit. I accept the evidence given by Mrs. Wiggan-Chambers that when the parties moved into the premises they occupied the same bedroom. The separation she said occurred in September 2005 when Mr. Chambers removed from their bedroom. She continued to occupy it. However, she said that he would come to the bedroom from time to time and whatever he demanded of her she would do it. I accept this evidence and draw the reasonable inference that the parties had a sexual relationship. I reject Mr. Chambers' evidence that the parties only cohabited as man and wife for a week and then Mrs. Wiggan-Chambers separated from him after making certain unpleasant assertions.

[60] Mrs. Wiggan-Chambers paid the mortgages. I accept that the parties had an understanding or agreement about how the household would be managed. Mrs. Wiggan-Chambers would be responsible for purchasing food and paying the helper, while Mr. Chambers would pay the utility bills and maintain the property from the rent that he collected for the flats. This is evidence, in my view, that shows the sharing of a daily life between the parties, as well as, how the financial matters in respect to the management of the household were addressed.

[61] While Mr. Chambers gave evidence of other arrangements they had (the renovation of the kitchen, the laying of new floorboards to replace the worn out tiles and the sharing of the utility bills) he said quite tellingly that arrangements of this nature were standard between 'a husband and wife'. I find that this evidence indicates quite clearly that the parties were in fact cohabiting as man and wife at the West Kirkland property before they separated.

[62] While it is accepted that the parties separated shortly after they resided in the property, I agree with Mrs. Usim's submission that PROSA does not stipulate a

minimum time period that the parties should have acquired or lived at the family home before reliance can be placed on its provisions.

[63] Having found that the property is in fact the family home, Mrs. Wiggan-Chambers would, by virtue of the provisions of section 6 of PROSA, without more, be entitled to her 50% share in the family home as claimed.

[64] While the main thrust of Mr. Chambers' case has been that the property is not the family home and consequently section 6 of PROSA is not applicable to these proceedings, I have gleaned from a perusal of his defence and ancillary claim that the court is being asked to invoke the provisions of section 7 of PROSA and vary the statutory equal share presumption. However, even if this is not so, I have gone on to contemplate whether, in the circumstances of this case, this is a relevant consideration.

[65] The court recognises that the law allows for the displacement of the equal share rule in circumstances where it would be unjust and unreasonable to apply it. The party who makes this assertion is required to prove it.

[66] The evidence which I have accepted is that Mrs. Wiggan-Chambers contributed one third of the purchase price for the property by way of two mortgages. For eight years prior to date of trial she alone paid the mortgage installments. The evidence reveals that up to June 2013 she has so far made \$4,530,272.00 in mortgage payments and the balance owing on these loans is \$2,591,415.60. She also met some of the household expenses by buying food, paying the helper and gardeners. She contributed to the renovation of the property.

[67] The parties were married in November 1997 and divorced in December 2007. I have accepted that the parties cohabited as a married couple for seven years before the separation that led to their divorce. I am unable to agree that the marriage was of short duration which is one of the factors stipulated in section 7 of PROSA which may displace the application of the equal share presumption.

[68] I have concluded that given the circumstances of this case, the justice of the case merits the application of the equal share rule.

[69] Before concluding I wish to say that one of the reliefs that Mrs. Wiggan-Chambers sought in her claim was that fifty percent (50%) of the sums paid by her to satisfy the mortgages were to be deducted from Mr. Chambers' share of the net proceeds of the sale and be paid over to her. However, no arguments were advanced before me on this issue and I therefore treat it as having been abandoned.

[70] Mrs. Wiggan-Chambers' evidence which I accepted is that the parties agreed that the rent from the flats would be used by Mr. Chambers to pay the utility bills and maintain the property. The undisputed evidence is that she refused, when requested to do so, to make any contributions towards the payment of these bills in light of their agreement.

[71] It is also Mrs. Wiggan-Chamber's evidence that since 2008, given Mr. Chambers' conduct, she no longer pays gardeners to maintain the grounds. She has also not carried out any repairs to the property since then.

[72] Mr. Chambers was unemployed up to the date of trial. There has been no evidence that there is any disruption or termination of the utility services at the property. There is also no evidence that the grounds have become overgrown or that the property in general has fallen into disrepair. Without evidence to the contrary, it is reasonable to infer that these expenses are undertaken by Mr. Chambers from the rent collected for the two flats.

[73] The court therefore finds that in light of the agreement between the parties the relief sought for an account of the use of the rent by Mr. Chambers is unjustified.

Orders

[74] There will therefore be judgment for the claimant Mrs. Wiggan-Chambers on the claim and ancillary claim as follows:

1. It is declared that the claimant and the defendant are each entitled to 50% of the legal and beneficial interest in the property known as 4 Kirkland Crescent, West Kirkland Heights, Kingston 19 in the parish of St. Andrew registered at Volume 1034 Folio 115 of the Register Book of Titles.

2. That the property be valued by a valuator to be agreed between the parties within sixty (60) days of the date of this order. The cost of the valuation is to be borne equally by both parties. If the parties cannot agree to a valuator, the Registrar of the Supreme Court is empowered to appoint one.
3. Either party is given the option to purchase the property within thirty (30) days of receipt by both parties of the valuation report in respect to the property.
4. Should both parties fail to exercise the option to purchase the property, then the property shall be placed on the open market for sale by private treaty and failing that by public auction.
5. Both parties are to bear the cost of the sale equally and the net proceeds of the sale are thereafter to be divided equally between them.
6. The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the sale of the property should any of the parties be unable or unwilling to do so within fourteen (14) days of being notified in writing.
7. The claimant's attorneys-at-law shall have carriage of sale.
8. Costs to the claimant on the claim and ancillary claim to be taxed, if not agreed.
9. Both parties shall have liberty to apply.