[2017] **JMSC Civ. 172**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2009HCV02054

IN THE MATTER OF THE PROPERTY (RIGHTS OF SPOUSES) ACT

BETWEEN	**GWENETTA CLARKE**	**CLAIMANT**
AND	**WILLIAM CLARKE**	**DEFENDANT**

IN CHAMBERS

Lord Anthony Gifford QC and Ms. Scheree A. Miller instructed by Alton E. Morgan & Co. for the Claimant

Mr. Gordon Steer and Mrs. Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the Defendant

Heard: September 27th – 29th, November 2nd and 4th 2016, February 6th 2017 and November 10th 2017.

Property Rights of Spouse Act – definition of "property" – chose in action – retirement benefits – pension

MCDONALD J

[1] There is a matter which must be addressed at the outset. Due to the confidential nature of the parties' financial information as well as certain obligations under a Settlement Agreement which concerns a third party, I have elected to issue this

judgment in two (2) forms. The first, for the parties involved, will contain the figures disclosed. The second, which will be made available generally, will be redacted.

Introduction

[2] By her Amended Fixed Date Claim Form filed on the 27th of July 2009, the claimant, Mrs. Clarke, is seeking twenty-three (23) reliefs and/or orders. These reliefs and/or orders pertain to, *inter alia*, three (3) properties in Florida USA, motor vehicles, paintings, artwork, collectibles, furniture and furnishings. However, counsel for the claimant indicated that the scope of the claim has been substantially reduced and the only reliefs and/or orders being sought are –

> ***1.*** *A Declaration that the Claimant is entitled to half interest in all the investments, savings, monetary instruments, pension entitlements and other perquisites or benefits attached to the Defendant's current or former employment and monies, whether held in the names of the parties, in the name of the Defendant only or on his behalf or benefit;*
>
> ***22.*** *Costs of the application be borne by the Defendant; and*
>
> ***23.*** *Such further and/or other relief as this Honourable Court deems just.*

[3] By way of background it should be noted that a number of judgments have been pronounced concerning one or both of the parties to this claim. These judgments include, (1) **Gwenetta Clarke v William Clarke** (unreported), Supreme Court, Jamaica, Claim No. 2009HCV02054, judgment delivered 22 July 2011; (2) **William Clarke v Gwenetta Clarke** [2012] JMCA App 2; (3) **William Clarke v Gwenetta Clarke** [2014] JMCA Civ 14; (4) **William Clarke v The Bank of Nova Scotia Jamaica Limited et al.** (unreported), Supreme Court, Jamaica, Claim No. 2009HCV05137, judgment delivered 23 February 2010; (5) **William E. Clarke v Bank of Nova Scotia Jamaica Limited** (unreported), Court of Appeal, SCCA No. 38 of 2009, judgment delivered 2 October 2009; and (6) **William Clarke v The Bank of Nova Scotia Jamaica Limited** [2012] JMCC Comm 2.

[4] Counsel for the claimant, Lord Gifford, has specifically referred to three (3) of these judgments but has submitted that his reliance is limited to the matters of law and not issues of fact. Counsel for the defendant, Mr. Steer, has submitted that if the court is minded to consider the judgments to which Mrs. Clarke is not a party, then the court ought to do so with some caution. I will consider the relevance in due course.

[5] Both Mr. and Mrs. Clarke have sworn to a number of affidavits in this matter which have been treated as their evidence in chief. Mrs. Clarke has relied on six (6) affidavits filed between the 20th of April 2009 and the 20th of November 2015 (i.e. Exhibits 1–6). She has also given *viva voce* evidence pursuant to an application by Lord Gifford for her evidence to be amplified to update the court in respect of her current financial situation.

[6] Mr. Clarke has relied on eight (8) affidavits filed between the 4th of November 2009 and the 29th of December 2015 (i.e. Exhibits 7–14). He also gave *viva voce* evidence in amplification with respect to the state of two (2) motor vehicles, a Bentley and a Porsche. Mr. Clarke indicated that both motor vehicles were sold. The Bentley was sold to repay the institution that held the Bill of Sale and there was a surplus of USD$8,000.00. The Porsche was also sold for a sum of USD$24,000.00, which Mr. Clarke states that he used for his own benefit.

[7] Both parties were also cross-examined extensively.

Undisputed Facts

[8] Mr. Clarke and Mrs. Clarke were married on the 21st of July 1973. Their union produced three (3) children, all of whom are now adults. A decree absolute dissolving the parties' marriage was granted on the 16th of November 2010. During their marriage, both Mr. and Mrs. Clarke were employed to the Bank of Nova Scotia ('BNS'). Mr. Clarke was employed from the 16th of April 1968 and he eventually became the President and Chief Executive Officer in June 1995, a position he held for the last thirteen (13) years of his employment. He officially retired from the BNS

on the 31st of October 2008, this being his last day of employment. On the other hand, Mrs. Clarke left the BNS, in or about 1987, to open a business which was eventually closed in 1994. Thereafter, she primarily looked after the household.

[9] During the course of the parties' approximately thirty-five (35) year marriage, a number of properties, motor vehicles, furniture and artwork were acquired, some of which they no longer possess. Included in the properties which the parties no longer possess are three (3) which are located in the United States of America, namely, (1) a condominium located in Miami, Florida; (2) a home in Plantation, Florida (referred to by the parties as the "Sweet Bay property"); and (3) undeveloped land in Morrison County, Florida. The relevance of these properties will become apparent subsequently.

[10] In or about 1996, a year after Mr. Clarke became President and CEO, the parties moved to a house on Hyperion Avenue which was owned and provided by the BNS. Mr. Clarke subsequently acquired this property from the BNS following his departure from office. Although the Hyperion Avenue residence could be described as the principal family residence, Mrs. Clarke is not claiming any entitlement to same. Lord Gifford helpfully submitted at the outset that since the Hyperion Avenue residence was not owned by either or both of the parties, it does not constitute the family home within the meaning of section 2 of the **Property (Rights of Spouses) Act** ('PROSA'). He further submitted that this is not a case which involves a family home at all and that this is a factor to be considered pursuant to section 14(2)(b) of **PROSA**.

[11] The issue of spousal maintenance has been resolved by way of a Consent Order filed on the 11th of December 2009 and counsel for the defendant, Mr. Steer and Mrs. Cooper-Batchelor, have indicated that the terms have been complied with. This court is now concerned with determining Mrs. Clarke's interest, if any, in the settlement sum which Mr. Clarke received following his departure from his employment with the BNS.

The Claim

[12] As previously mentioned, the scope of Mrs. Clarke's claim has been considerably narrowed. She contends that during the course of their marriage Mr. Clarke retired from his employment with the BNS and that he had accumulated substantial pension entitlements and other perquisites and benefits attendant thereto. Further, she contends that prior to the divorce proceedings he became embroiled in a legal dispute with the BNS over the amount of money and assets he was entitled to receive.

[13] In essence, Mrs. Clarke is claiming that the dispute between Mr. Clarke and the BNS is a chose in action and as such the settlement sum is marital property which is subject to distribution under the **Property (Rights of Spouses) Act**. More specifically, she is claiming a half interest in the said settlement sum and is seeking a declaration to that effect.

[14] Mrs. Clarke is also claiming that Mr. Clarke's pension and retirement benefits are matrimonial property, to the extent that they are rights and interests which he became entitled to during the marriage.

[15] More specifically, in her affidavit filed on the 20th of May 2011 (Exhibit-4), Mrs. Clarke gave the following evidence –

> *7. That prior to the divorce proceedings the Defendant and I had conversations regarding his retirement, wherein he explained that upon his retirement he became entitled to receive an extensive pension package. The Defendant explained to me that he had rejected an initial amount offered to him by the Bank as his retirement entitlement earned over the course of his employment, and that there was a dispute between himself and the Bank as to the amount of money he would receive.*
>
> *8. That in or about October 2008 an occasion arose where the Defendant disclosed to me that he had received a letter from the Bank relating to his retirement package. I read the letter noting that the Bank had offered the Defendant a retirement package amounting to Three Million Seven Hundred and [sic] Thousand ($3,700,000.00) in Canadian Dollars.*
>
> *9. That after reading the letter I told the Defendant that I thought that in the circumstances he should accept the offer and leave the Bank quietly. I reminded him that a legal battle would be very costly and could even take years. I further*

suggested that with his financial and business savvy Three Million Seven Hundred and [sic] Thousand ($3,700,000.00) in Canadian Dollars could be a sufficient basis to secure our family's future.

10. That in response to my suggestions the Defendant told me that he would not accept any offer less than Four Million Five Hundred Thousand ($4,500,000.00) in Canadian Dollars as his retirement package.

11. That my recollection of the amount offered, and the Defendant's rejection thereof is confirmed by the contents of the judgment of the Court of Appeal #38 of 2009 attached hereto and marked "C" for identity.

12. That in further reference to the said judgment I know that the Court of Appeal ordered the Defendant and the Bank to submit to arbitration their existing dispute as to the quantum of a fair and equitable retirement plan for the defendant.

The Claimant's Case

[16] Mrs. Clarke bases her entitlement on the nature of their relationship and agreements made over the years, i.e. during the course of the marriage. Mrs. Clarke claims that when she met Mr. Clarke they were both teachers. He became employed to the BNS before she did. She was an employee of the BNS for fifteen (15) years up until her resignation in 1988. She held a senior position as a Loan Officer when she resigned.

[17] Mrs. Clarke contends that she gave up her job at the insistence of Mr. Clarke who suggested that she open her own business. To this end, Mrs. Clarke opened a boutique in 1988 which ceased operation in 1994. She claims that this business was self-sufficient and was started with a loan from Century Bank. Mrs. Clarke claims that from the earnings of the business she was able to repay the loan and contribute to the household. She stated that Mr. Clarke was able to make withdrawals from the business account for his own use.

[18] When the business was closed Mrs. Clarke says she used the profits to open a Scotia Mint account and that Mr. Clarke was able to benefit from withdrawals and that he would ask her to make withdrawals. According to Mrs. Clarke the closure of the business took place after discussions between herself and Mr. Clarke and was with Mr. Clarke's full approval. In or about 1994 when Mr. Clarke had been promoted to Chief Executive Officer ('CEO') of the BNS, Mrs. Clarke states that

her duties had grown significantly. These duties included accompanying him to functions, entertaining his guests, ensuring that his domestic arrangements were satisfactorily taken care of and managing the home and the household staff.

[19] Mrs. Clarke claims that she and Mr. Clarke have always agreed that their assets and earnings belong to them jointly. That was the basis upon which she gave up her job and opportunities for advancement in the bank (BNS). Further, it was based on this understanding and course of conduct during the marriage that Mrs. Clarke remained in Jamaica between 1991 and 1994 when Mr. Clarke went to Canada for professional training. During this time Mrs. Clarke states that she singlehandedly raised the children, managed the household, operated the business and used the business earnings to contribute to their expenses. She recalls that this was hard work and emotionally taxing, but that she willingly fulfilled her duties knowing that this facilitated Mr. Clarke's upward movement at the BNS and that this was for the benefit of the entire family.

[20] Upon Mr. Clarke's return from Canada he was promoted to CEO. Mrs. Clarke recounts that Mr. Clarke spent considerable time away from home and that he has been described as a 'workaholic'. This she said increased the burden on her to maintain a stable home and safeguard the welfare of their children.

[21] Mrs. Clarke mentioned that to Mr. Clarke's credit, he publicly acknowledged her contribution to his success and in particular she made reference to a statement made in the public media where it was said, *"he gives credit and sincere gratitude to his wife, Gwen, who was committed to being a constant source of encouragement throughout his career advancement but more so in the last 13 years when he was President and CEO [sic] Scotiabank Jamaica Limited".*

[22] Over the years, Mrs. Clarke says that their relationship began to deteriorate. She speculates that Mr. Clarke's professional duties may have resulted in him becoming more autocratic in his relationship with her and undermining her authority and instructions with regard to the household staff. Mrs. Clarke states

that the situation was made worse after information came to her of Mr. Clarke's alleged indiscretions and her attempt to confront him. As a direct consequence, Mrs. Clarke says that Mr. Clarke became hostile and refused to engage with her.

[23] According to Mrs. Clarke, things deteriorated to the extent that on the 19th of November 2008, she thought it best to move from the matrimonial bedroom. Mrs. Clarke says that she still attempted to rebuild the relationship and after unsuccessful attempts to speak with Mr. Clarke, she wrote him a letter in December 2008. According to her, this letter went unanswered. It should be noted however that in cross-examination, Mrs. Clarke agreed that their marriage started to deteriorate from August 2008. She also conceded that Mr. Clarke separated himself from her in August 2008.

The Defence

[24] Mr. Clarke asserts that he had an oral contract of employment with the BNS and the said contract was one of indefinite duration. He contends that the contract could have been terminated by either party by way of written notice. Mr. Clarke states that he opted to go on early retirement and as such he was not entitled to any retirement benefits, save for his pension.

[25] Mr. Clarke contends that he could not sue the BNS for retirement benefits as they were not due to him. Further, he contends that anything offered to him was merely gratuitous and was made in an effort to save the BNS from unfavourable publicity.

[26] Regarding the claim which was brought against the BNS, Mr. Clarke states, at paragraphs 6 and 7 of his affidavit filed on the 14th of July 2011 (Exhibit 13), *"My lawsuit against the bank was instituted with the aim of having the dispute arbitrated, as I had no cause of action against the bank. Therefore in the circumstances, my lawsuit against the Bank cannot be deemed a chose in action..."*

The Defendant's Case

[27] Mr. Clarke is in essence denying that there was ever an agreement between himself and Mrs. Clarke as to the joint ownership of any asset that he acquired during the subsistence of the marriage.

[28] Mr. Clarke contends that he and Mrs. Clarke separated on the 12th of August 2008, not on the 19th of November 2008, and that she moved out of the matrimonial home in May 2009.

[29] With regards to the earlier years of the marriage, Mr. Clarke contends that it was Mrs. Clarke who expressed dissatisfaction with the salary and remuneration package which the BNS offered her. In or about 1987, she was the one who approached him about opening her own business and that it was on her own volition that she resigned from her position at BNS. It is Mr. Clarke's evidence that in 1988 a limited liability company was formed and they were the sole directors. Mr. Clarke states that the business loan from Century National Bank was procured by him, in his sole name. This loan was obtained as a result of the relationship that he had with the then Managing Director of Century National Bank.

[30] He disputes Mrs. Clarke's averments that the business was self-sufficient, he contends that the business was in a constant struggle to keep afloat. At no time during its existence did it ever return a profit. Mr. Clarke has exhibited a letter from an Attorney-at-Law who acted on behalf of Century National Bank which indicated that as at the 29th of May, 1991, Three Hundred and One Thousand Six Hundred and Ninety-Four Dollars and Nine Cents ($301,694.09) was outstanding. He claims that neither Mrs. Clarke nor the business was in a position to repay the loan and as such he settled all the arrears from his own earnings. He has exhibited a receipt from Century National Bank, dated the 2nd of July 1991, for Three Hundred and Fifteen Thousand Nine Hundred Dollars and Thirty-Nine Cents ($315,900.39).

[31] Mr. Clarke contends that the business was eventually closed in 1994 owing to the fact that despite liquidating the loan in 1991, the business was unable to generate

a profit and was experiencing extreme difficulties. He denies making withdrawals for his personal use as there was no need for him to do so. Apart from the business making a loss he states that he was earning good money, even when he was in Canada between 1992 and 1994, and as such there was no need for him to request that Mrs. Clarke make withdrawals for his benefit.

[32] With regard to the Scotia Mint account which Mrs. Clarke states that she opened after the closure of the business, Mr. Clarke states that he is unaware of the source of funds used to open same and further that the account was opened on the 19th of January 1999 and not in 1994. He further states that the Scotia Mint product was not in existence in 1994 and that the contributions to the said account were funded from his chequing account.

[33] Mr. Clarke confirms that he was promoted to CEO in 1995 and acknowledges that as a part of his duties he was required to attend several functions. He stated that Mrs. Clarke would accompany him on a few of these occasions. With regard to the events that were hosted by BNS at their Hyperion Avenue residence, Mr. Clarke contends that all the necessary arrangements were made by the Public Relations unit of BNS and that Mrs. Clarke was not required to actively participate in the organisation of same.

[34] Mr. Clarke disputes Mrs. Clarke's assertion that her duties as a wife became a full time occupation. He contends that from the time that they moved to the Hyperion Avenue residence, in 1997, there were two (2) household helpers and two (2) full time gardeners who were capable of performing their duties without the constant supervision of Mrs. Clarke.

[35] Mr. Clarke states that at no time did he have access to the Claimant's earnings and he disputes that there was any agreement or entitlement to share in each other's earnings or assets as Mrs. Clarke contends.

[36] Reference is made to two (2) facilities at the BNS on which the parties were joint account holders, however Mr. Clarke stated that this was done for mere

convenience. It may be noted that these accounts were closed in June 2009. A US bank account is also mentioned by Mr. Clarke which the parties shared, he states that Mrs. Clarke, being a US citizen was named as the primary account holder for convenience and also to facilitate the opening of the account which required a US Social Security Number which he did not have.

[37] Mr. Clarke emphasises that Mrs. Clarke voluntarily resigned from her job at the BNS, without any coercion from him and since 1994 she has never indicated any interest in seeking employment despite his encouragement for her to do so on numerous occasions. He contends that Mrs. Clarke declined to capitalise on any employment opportunity within the US and has exhibited a copy of a letter which both noted Mrs. Clarke's expression of interest in working with a certain agency and scheduled a time for an examination session.

[38] In or about 2004, Mr. Clarke recalls funding Mrs. Clarke's pursuit of qualifications to become a Nursing Assistant. He states that she successfully completed the course but never sought employment. This, according to Mr. Clarke, was a source of conflict between them as he encouraged her to seek employment to assist with servicing their outstanding liabilities in the United States of America, and Mrs. Clarke refused.

[39] Mr. Clarke acknowledged that he gave credit to Mrs. Clarke for her encouragement and support during his career. He added that this was contained in a publication that was prepared and issued by the BNS at the time of his retirement.

[40] In response to Mrs. Clarke's averment that his work habits created a burden on her to maintain a stable home, Mr. Clarke states that this is untrue. He contends that by 1997 all their children had migrated either to the US or England to pursue full time academic studies.

[41] Mr. Clarke maintains that throughout the marriage he treated Mrs. Clarke with the utmost respect, and that based on her own attitude, it would have been difficult for

him to be autocratic in his dealings with her, as she alleged. He also denies interfering in her relationship with the household staff.

[42] Mr. Clarke also denies ignoring Mrs. Clarke's attempts to rebuild the relationship. He recalls receiving a letter from her in December 2008 and that he met with Mrs. Clarke and two (2) of their children to see if things could be resolved. He contends that Mrs. Clarke was resolute in her position that unless he could offer evidence to disprove certain allegations, she did not want to be a part of the relationship.

[43] It should be noted that in cross-examination, Mr. Clarke stated that Mrs. Clarke gave him support that was consistent with the responsibilities of a spouse. When asked by Lord Gifford what he regarded the role of spouse to be, he responded as follows – *'The role of a spouse in my determination is to undertake the functions of ensuring that where there are children, their needs are taken care of, whether by way of shopping at the supermarket or green grocery. In conjunction with the household staff assigned, ensuring the orderly functioning of the residence.'*

The Settlement Sum

[44] For clarity and comprehension, it is necessary to have regard to the Court of Appeal decision, **William E. Clarke v Bank of Nova Scotia Jamaica Limited** (unreported), Court of Appeal, SCCA No. 38 of 2009, judgment delivered 2 October 2009, which was referred to in **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 and **William Clarke v Gwenetta Clarke** [2014] JMCA Civ 14.

[45] By way of background, I would conveniently adopt the summary of Morrison JA (as he then was) from the procedural appeal, **William Clarke v Gwenetta Clarke** [2014] JMCA Civ 14, at paragraph [6] –

> *[6] ...The background to this dispute – and, indeed, to Mr Clarke's retirement – is that it is common ground that Mr Clarke did not initiate the steps which ultimately led to his separation from the service of the bank. This is how Cooke JA described it in his judgment in **William Clarke v Bank of Nova Scotia Jamaica Ltd** (SCCA No 38/2009, judgment delivered 2 October 2009, at para. [57]):*

> *"[Mr Clarke] was summoned to a meeting in Toronto, Canada by Robert Pitfield, the Chairman of the Board of [the bank]. This meeting was on July 8, 2008. Also present at this meeting was the Deputy Chairman of the [bank's] Board. At this meeting [Mr. Clarke] was informed that a decision had been made. He would 'be separated' from [the bank] and would retire on August 31, 2008. This separation would be done on 'an amicable basis to be negotiated'...[Mr Clarke] 'was apprised of certain allegations and complaints made against him with regard to his personal and professional conduct that called seriously into question [his] fitness to continue as CEO of [the bank]'...At the meeting of July 8th in Canada, [Mr Clarke] was given a letter which proposed the terms on which he should retire. This was not accepted. Subsequent negotiations between the parties as to the terms of [Mr Clarke's] retirement package have proved fruitless and it would not be unfair to say that both parties, despite any outgoing show, understood that there would be no amicable resolution to this issue. Thus, after this meeting, [Mr Clarke's] separation from [the bank] was not an issue; it was a fait accompli. The sole question pertained to the terms of the retirement package. Of course...[the bank] was faced with the factor of dealing with [Mr Clarke's] retirement in such a manner that, as regards public consumption, there would be no fallout in any way to [the bank's] operation. This was a sensitive task."*

[46] This summary in essence reflects Mr. Clarke's evidence, in cross-examination, as it related to the meeting of the 8th of July 2008 (the 'July meeting'). He gave additional evidence that he was summoned to the July meeting to discuss the annual planning exercise of the BNS. He stated that he found that request rather strange because it had never happened before, so when he arrived at the said meeting and was presented with the letter that was preceded by some hearsay allegations, he was shocked. He recalls that there was a discussion for several minutes prior to the letter being handed to him but no sums of money were mentioned. He states however that sums of money were mentioned in the letter. Mr. Clarke confirmed that the said letter indicated that the bank wished to facilitate his amicable retirement. He stated that he could not recall the sum of money mentioned in the letter but he said that it contained a number of options. His evidence is that at the conclusion of the July meeting, the letter was withdrawn and he returned to work the following Monday. Mr. Clarke testified that he had planned on an early retirement but not at that time.

[47] It is useful to have regard to the following exchange which took place between Lord Gifford and Mr. Clarke in cross-examination –

Q: ...the situation in June 2008, you were then 59 years?

A: Yes

Q: You were President and CEO of BNS Jamaica?

A: Yes

Q: Your intention was to continue occupying that position until your retirement?

A: Yes

Q: Your retirement age, you expected to be 65?

A: Yes

Q: When was your date of birth?

A: December 3rd 1949

Q: You owned 2 properties in Florida?

A: Yes

Q: One was at Sweet Bay?

A: Yes

Q: That was planned to be retirement home?

A: No such plan

Q: Used as second home for you and family to visit?

A: Yes, I visited the US I have only a visitor status to the US

Q: You had a substantial mortgage on Sweet Bay?

A: Yes

Q: Totalling USD$2M?

A: Yes, sir

Q: And the first payment would have been (refers to page 40 of the bundle) on 1st of October 2005?

A: I can't recall the exact date (shown page 40 of the bundle) The document says the 1st of October 2015

Q: The last payment due on the 1st of September 2015?

A: Yes

Q: What were the monthly payments?

A: I cannot remember the payments

Q: In order to sustain that mortgage you needed to retain your employment. At BNS?

A: Yes, sir

…

Q: Your plan had been to continue working until retirement?

A: Yes

Q: In fact you left employment on the 31st of October?

A: Yes, I left on the 31st of October

Q: What caused you to retire so much earlier than you intended to retire?

A: Because the cordial relationship that I previously enjoyed with the Canadian executives had become strained.

...

Q:You spoke of the letter of the 8th of July being withdrawn, it mentioned various figures which represented compensation for early retirement?

A: I do not remember all the details that were outlined in the letter because following the discussions the letter was withdrawn.

Q: After the letter was withdrawn and after the meeting, was any sum of money offered to you by the bank?

A: The Board of Directors after I indicated my desire to retire, the Board of Directors decided that the matter of my retirement should be referred to arbitration.

[48] The exchange above sheds light on a number of relevant matters, but for present purposes it provides some background on the litigation which took place between Mr. Clarke and the BNS. This was summarised by Phillips JA in **William Clarke v Gwenetta Clarke** [2012] JMCA App 2 at paragraphs [11] to [17] –

*[11] The background facts in **Clarke v BNS Jamaica Limited** may appear at first blush to be complicated but they are not really so. On 8 July 2008, the bank having received reports of misconduct in respect of the applicant, summoned him to a meeting in Canada and indicated to him that a decision had been made for him to "be separated" from the bank, which would be effective 31 August 2008. **This separation was to be done on an amicable basis "to be negotiated".** The applicant was told about certain allegations and complaints made against him with*

regard to his personal and professional conduct that called seriously into question his fitness to continue as chief executive officer of the bank. ***The applicant denied the allegations and did not accept the compensation package offered to him.***

[12] However, it was the view of the court that after the meeting, his separation from the bank was not in issue. Indeed, Cooke JA said that it was a "fait accompli". The sole question to be determined related to the terms of the retirement package.

[13] There were subsequent meetings held, initially on 16 July 2008 when the applicant was present and addressed the Board putting forward his proposals of the terms and conditions of the retirement package that he would accept. On 18 July 2008, the Board met, in the absence of the applicant and, the terms and conditions of the package were discussed. In the opinion of Cooke JA, the discussions in the Board meetings focused on (a) the terms of the retirement package, (b) the protection of the reputation of the applicant in the communication of information, and (c) safeguarding the image of the bank as a stalwart financial institution. He set out the news release issued by the bank in its entirety in his judgment. It read thus:

> "William "Bill" Clarke to Retire"
>
> **Kingston Jamaica, July 18, 2008** - The Board of the Bank of Nova Scotia Jamaica Limited wishes to advise that President and CEO William "Bill" Clarke has decided to retire on October 31, 2008. The Board refutes any allegations that Mr. Clarke has separated from the Bank.
>
> The Board wishes to express its admiration for the exemplary leadership which Mr. Clarke has provided to the Bank over the past fourteen years, and its appreciation for his forty years of service to the Bank.
>
> Scotiabank has been part of the Caribbean and Central America since 1889. It is now the leading bank in the region, with operations in 26 countries, including affiliates. The bank has some 12,081 employees in the region, serving more than two million customers, with 437 branches and about 919 automated banking machines."

[14] The applicant's successor was appointed as president and chief executive officer on 1 August 2008. Correspondence followed thereafter from the applicant's attorneys, and in particular an e-mail dated 12 July 2008 circulated to the Board with a proposal for the parties to submit to arbitration. The Board met on 21 October 2008, and a resolution was passed in the following terms:

> "The Board resolved that:
>
> a. The retirement package be restated with the value of the supplemental pension foreign exchange protection and car along with a total value of CDN $3.7M or
>
> b. The parties proceed to Arbitration
>
> c. The Arbitration panel be constituted by a panel of three arbitrators selected in the following manner:
>
> - Each party to select an arbitrator of his/its own choice.

- The two arbitrators shall select a Chairman
- In the event that the two elected arbitrators are unable to agree upon the selection of the Chairman, the Chairman shall be selected under the London Court of Arbitration [sic] (LCIA) Rules.
- The Chairman will decide the location of the Arbitration and the rules to govern the Arbitration.
- The Agreement to be governed by Jamaican Law.

d. The question to be referred to the Arbitration Panel for determination is:

> What is [sic] fair and equitable retirement plan for Mr. Clarke having regard to all circumstances."

[15] On 22 October 2008 Mr Robert Armstrong wrote, on behalf of the bank, to Mr R.N.A. Henriques, QC, attorney for the applicant, allegedly setting out the terms of the resolution of the Board, but which all members of the court held had been inaccurately stated, amended unlawfully without the concurrence of the Board and the court having found the letter to be entirely ineffectual, consequently disregarded it. On 29 October 2008, Mr Henriques, wrote a subsequent letter to Mr Armstrong stating inter alia:

> "With respect to the offer to refer the matter to arbitration the acceptance of which we now confirm, we enclose a draft agreement which we are instructed conform [sic] with the decision of the Board."

[16] The court found that the offer to settle the dispute by arbitration was made in the resolution which was communicated to the applicant and accepted by the above letter of 29 October 2008 from Mr Henriques. ***The court also found that the applicant and the bank were bound by the agreement to submit to arbitration the dispute between them as to what was "a fair and equitable retirement plan for [the applicant], having regard to all the circumstances."***

[17] In ***Clarke v BNS Jamaica Limited****, the fundamental issue was whether there was a binding agreement to arbitrate. Smith JA stated that, "Both parties are at one that the primary issue in this appeal is whether the learned trial judge erred in holding that there was no arbitration agreement between the parties." Cooke JA said that the central issue of debate conducted by this court on the appeal, was whether or not there was an agreement to arbitrate. Harris JA set out the issue in this way in paragraph 88 of the judgment:*

> "The critical issue to be determined in this case is whether there is in place, for submission to arbitration, a binding agreement between the parties that the dispute between them 'as to what is a fair and equitable compensation for the appellant, in all the circumstances'."

[49] It should be noted that in **William E. Clarke v Bank of Nova Scotia Jamaica Limited**, from which the abovementioned quote from Harris JA was taken, the Court ordered, *inter alia*, *"Declaration granted that the appellant and respondent are bound by agreement to submit to Arbitration the existing dispute between them*

as to what is a fair and equitable retirement plan for the appellant, having regard to all the circumstances."

[50] Notwithstanding the order referred to immediately above, the matter never went to Arbitration. Instead, it was settled by way of agreement and the terms of settlement were finalised between Mr. Clarke and the BNS on the 7th of June 2011. Following the order of my brother Sykes J on the 22nd of July 2011, which was affirmed by the Court of Appeal (see: [2014] JMCA Civ 14) the minutes of settlement, statement of account, computation of taxable emoluments and disbursements of settlement have been duly disclosed by Mr. Clarke.

[51] Notwithstanding the settlement, Mr. Clarke contends that there was no dispute between himself and the BNS. In cross-examination he stated that he had no entitlement, save for his pension, and that the settlement sum that the Board (at the BNS) decided to offer could best be described as a golden handshake which was entirely discretionary.

Issues to be resolved

[52] Therefore, the issues for this court to resolve are as follows –

i. whether Mr. Clarke had a chose in action against the BNS, i.e. does the settlement sum represent a chose in possession;

ii. if so, whether the chose in action arose prior to the parties' separation which would make the settlement sum 'property' eligible for division pursuant to the **Property Rights of Spouses Act**; and

iii. if so, what portion of the settlement sum is eligible for division and in what share.

Counsel for the Claimant's Submissions

[53] In the course of the hearing, counsel for Mrs. Clarke, Lord Gifford, indicated that the main claim being pursued was related to the chose in action, namely the right

possessed by Mr. Clarke, at the time of his separation from Mrs. Clarke, to obtain a sum of money from the BNS arising from the circumstances which led to his early retirement.

[54] Lord Gifford submitted that the court has the power to vary the declaration sought so as to make clear what the entitlement of the Claimant is. It was further submitted that the appropriate declaration would be –

> *A declaration that the Claimant is entitled to a half share of the value of the chose in action possessed by the Defendant at the time of the parties' separation by reason of the Defendant's right to sue the Bank on a claim for breach of the Defendant's contract of employment with the bank on 8th July 2008.*

[55] It was also submitted that the court is entitled to make such further orders as are necessary to give effect to the Declaration which it has made, and to deal justly with the claim. In the instant case, it was submitted that the court should make an order for the payment by the Defendant of the amount which represents the share (as determined by the court) of the value (as determined by the court) of the benefit received by the Defendant under the settlement (excluding the Facebook claim portion), hereinafter referred to as the 'settlement sum'. Counsel submits that the appropriate order would be –

> *An Order for the payment by the Defendant to the Claimant of CAD$*[redacted]

[56] In support of the aforementioned submissions, Lord Gifford submitted that the action of the BNS on the 8th of July 2008 was a breach of the duty of trust and confidence, which is a feature of every employment contract. Reference was made to the dicta of Lord Steyn from **Malik v Bank of Credit and Commerce International SA; Mahmud Malik v Bank of Credit and Commerce International SA** [1998] AC 20,45 –

> *The employer's primary case is based on a formulation of the implied term that has been applied at first instance and in the Court of Appeal. It imposes reciprocal duties on the employer and employee. Given that this case is concerned with alleged obligations of an employer I will concentrate on its effect on the position of employers. For convenience I will set out the term again. It is expressed to impose an obligation that the employer shall not:*
>
> > *"without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee:" see* **Woods v. W. M. Car Services (Peterborough) Ltd.** *[1981] I.C.R. 666, 670 (Browne-Wilkinson J.), approved in* **Lewis v. Motorworld Garages Ltd.** *[1986] I.C.R. 157 and* **Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.** *[1991] 1 W.L.R. 589.*

[57] It was submitted that the conduct of the BNS was plainly such as to destroy or seriously damage the relationship of trust and confidence between itself and Mr. Clarke. Counsel advanced four arguments in support of this submission -

(1) Firstly, the BNS received allegations of misconduct on the part of Mr. Clarke but took no steps to inquire into the allegations or inform him, so as to allow him an opportunity to answer to them;

(2) Secondly, the BNS took a decision to separate Mr. Clarke from his employment prior to meeting with him. The letter was prepared before the meeting and handed to him after the initial discussion. It matters not whether the letter was withdrawn. The damage was done. The effect on Mr. Clarke must have been devastating. The basic principle of natural justice that a person has a right to be heard before a decision is made against him, had been violated.

(3) Thirdly, it was clear that Mr. Clarke felt that he had been wronged and justifiably so. Reference was made to Mr. Clarke's evidence in cross-examination that he was shocked at the meeting. In particular, his response to the question if he felt wronged, to which he said, *"Well I was surprised as to what was being discussed given that I was not apprised of any such allegations before, therefore I was surprised."* Mr. Clarke was also asked if Mr. Pitfield gave him a chance to comment or answer to the allegations, to which he responded, *"From my recollection I said to him that this was a*

matter, if he had gotten these hearsay allegations there is a process within the organisation to deal with such matters."

(4) Lastly, the duty of trust and confidence had been fundamentally breached. There was a direct link between Mr. Clarke's early retirement and the allegations made in those circumstances. Reference was made to a board meeting, on the 16th of July 2008, which Mr. Clarke stated that he requested to indicate to the board his desire to retire. The reason given by Mr. Clarke is revealing. He said that he opted to retire because *"the cordial relationship that I previously enjoyed with the Canadian executives had become strained."*

[58] Lord Gifford referred to the fact that he had repeatedly (i.e. five (5) times) put the question to Mr. Clarke whether an offer of CAD$3,700,000.00 was made, and that Mr. Clarke was unable to answer directly. According to counsel, the basis of this question is that Mrs. Clarke gave evidence that he had shown her a letter from the BNS referring to an offer of CAD$3,700,000.00 and that she advised him to accept it, to which he said that he would accept nothing less than CAD$4,500,000.00. It was submitted that Mr. Clarke was evasive in his answers and that Mrs. Clarke's evidence should be accepted as true.

[59] Counsel referred to Mr. Clarke's evidence that *"when the board had decided that the matter of my retirement should be referred to arbitration it [sic] (there) was correspondence between my Attorneys and the bank's Attorneys regarding what would be an amicable settlement amount."* and his agreement that the matter that was to be referred to arbitration was what would constitute a fair and equitable retirement package for him. In those circumstances, counsel submitted that it is nonsense for Mr. Clarke to maintain that there was no dispute between himself and the BNS, or that the matter referred to arbitration was purely gratuitous, or that he had no entitlement in the matter or that the BNS was merely offering a golden handshake which was entirely at their discretion. Counsel submitted that the evidence is that Mr. Clarke, himself, spoke about a dispute between himself and

the BNS and a settlement to which he may be entitled. In particular, reference is made to paragraphs 14 and 17 of Mr. Clarke's affidavit filed on the 13th of June 2011 (Exhibit 12), which states –

> *14. That in response to paragraph 12 and 13 of the Claimant's Further Affidavit, I will state that the dispute between my former employers and myself has been referred to Arbitration. The dispute not only involves the circumstances surrounding my retirement but certain actions of a Bank of Nova Scotia Jamaica Limited employee, which resulted in me being defamed on the Internet.*
>
> *17. That in relation to paragraph 18 of the Claimant's Further Affidavit, I deny that the Claimant has an equal right to any settlement to which I may be entitled by virtue of my early retirement or otherwise.*

[60] Counsel submitted that whatever the truth of Mr. Clarke's interpretation, the question for the court is not what he thought, but whether he had a right to claim compensation from the BNS as at the 12th of August 2008 when the parties separated. As previously mentioned, it was conceded that the 12th of August 2008 was the date of separation. Further, it was submitted that Mr. Clarke had such a right and that such right was 'property' within the meaning of section 2 of the PROSA. Counsel advanced that the right falls within two (2) of the definitions of property, namely –

1) It was a "chose in action". Reference was made to the definition in **Stroud's Judicial Dictionary**, at page 461: *"when a man hath cause, or may bring an action, for some duty due to him, and because they are things whereof a man is not possessed but for recovery of them is driven to his action, they are called "things in action".*

2) It was an "other right or interest" to which Mr. Clarke was "entitled".

It was submitted that the two (2) phrases in **PROSA** overlap, but they clearly cover the entitlement of Mr. Clarke to claim for compensation.

[61] In addressing the issue of whether Mr. Clarke had a right against the BNS, counsel placed reliance on the cases of **Western Excavating (ECC) Ltd v Sharp** [1978] 1 All ER 713 and **Sandhu v Jan de Ryk Transport** [2007] EWCA Civ 430.

[62] With regards to **Western Excavating**, counsel referred the Court to one of the rival tests for determining constructive dismissal, namely the "contract test"; which Lord Denning MR stated was the right test. Specific reference was made to the dicta at page 717, wherein his Lordship stated -

> *On the one hand, it is said that the words of Sch 1, para 5(2)*(c)*, to the 1974 Act express a legal concept which is already well settled in the books on contract under the rubric 'Discharge by breach'. If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*

[63] With regards to **Sandhu**, the issue was whether the appellant resigned from his employment or whether he was dismissed. The appellant, Mr. Sandhu, was invited to a meeting where he was faced with allegations of misconduct and he was made aware that his employers no longer had trust in him and wished to terminate his contract. The rest of the meeting was spent on sorting out a financially beneficial way for Mr. Sandhu to leave the company. Reference was made to paragraph 63 of the dicta of Lord Justice Wall –

> *There is, however, a point of principle which should be mentioned. On any view, in my judgment, and whatever the appellant may or may not have done, the respondent's conduct in this case is unacceptable for a number of reasons. It does not appear to have conducted any investigation into the appellant's alleged misconduct before summoning him to the 6 December meeting. It did not tell him in advance what the charges against him were. It did not suggest that he could or should take advice before attending the meeting, or that he could bring a representative or adviser with him. It kept no record of the 6 December meeting. It made up its mind to dismiss him before it had heard him. It does not appear to have any proper grievance, dismissal or appeal structures in place. It did not properly consider the appellant's correspondence after the event.*

[64] Lord Gifford submitted that in applying the principles from **Western Excavating** and **Sandhu**, it is plain from the evidence that the BNS's conduct was equally unacceptable and amounted to constructive dismissal. The BNS acted on the basis

of allegations of misconduct which were not investigated and were not made known to Mr. Clarke in advance. Further, the BNS decided to terminate Mr. Clarke before the meeting started. It was submitted that Mr. Clarke acted promptly to challenge the decision by requesting a meeting of the Board within eight (8) days. He did not waive his rights. The cause of his 'agreed' termination was the lack of trust and confidence. It was submitted that the words 'fait accompli' are apt to describe the position after the meeting on the 8th of July 2008 as proved by the evidence given before this Court.

[65] Lord Gifford submitted that both the breach and the damages which Mr. Clarke could claim were significant. In respect of the latter, it was advanced that since Mr. Clarke did not have a written contract, then no period of notice was specified. In these circumstances, the contract could only be terminated by giving reasonable notice, which in the case of a CEO could be as much as two (2) years. Reliance was placed on the Eastern Caribbean case, **Deca Penn v Scotiabank (British Virgin Islands) Limited** (unreported), High Court, British Virgin Islands, Claim No. 2009/0277, judgment delivered 28th February 2013, wherein it was noted that successful claims for notice of twelve (12) months or more were brought by claimants who were in the *'highest ranking tieres [sic] of the management structures of their organizations (and) Their positions would have involved significant autonomy; organizational responsibility and accountability.'*

[66] It was further submitted that in **Malik v Bank of Credit and Commerce International SA** it was held that where the employer has breached the duty of trust and confidence in a way which reflects on the reputation of the employee, so that he cannot obtain fresh employment, further damages can be claimed and the old rule in **Addis v Gramophone Co** [1909] UKHL 1 that damages for wrongful dismissal are limited to pay for the contractual period of notice does not apply. Damages can also be claimed for the manner of the dismissal.

[67] The court was referred to the case of **Marlene Hamilton v United General Insurance Company Ltd** [2013] JMCC Comm 18 which followed **Malik v Bank**

of Credit and Commerce International SA. Lord Gifford submitted that after a careful review of the authorities, Sinclair-Haynes J (as she then was), in a wrongful dismissal case awarded the dismissed employee the equivalent of three (3) years' earnings, up to the date of her likely retirement. It was held at paragraph [85] –

> *In the absence of statutory impediment, it is unthinkable, in the light of modern developments such as: (a) the erasure of the words 'master servant' from the legal vocabulary of employment law and (b) recognition of the employee's contribution to the work force, that there should be reticence about implying a term which compensates an employee who has suffered financially as a result of the manner in which he was dismissed and which results in pecuniary loss.*

[68] It was submitted that in the instant case, the value of the actual settlement indicates that the parties knew that the amount of compensation to which Mr. Clarke was entitled, would be very substantial.

[69] In resolving the instant matter, counsel submitted that the Court should take the following approach –

(a) examine the evidence to see if there was a chose in action as at the date of the separation (12th August 2008);

(b) calculate the value of the chose in action, having made such deductions, if any, as required by section 17(2) of **PROSA**; and

(c) divide the property pursuant to section 14(1)(b) of **PROSA** having regard to the factors in subsection (2).

Counsel for the Defendant's Submissions

[70] Counsel for Mr. Clarke, Mr. Steer and Mrs. Cooper-Batchelor, have submitted that the sum given to Mr. Clarke by the BNS is ineligible for distribution. Several arguments have been advanced in this regard, the first being that pursuant to the **PROSA**, this court is only empowered to consider property that existed prior to the separation and that the settlement sum did not exist prior to the parties' separation. Reference was made to section 2 of the Act which defines 'property' and also section 12(2). Counsel submitted that the court should find that the parties

separated in August 2008, since Mrs. Clarke in cross-examination accepted that Mr. Clarke separated himself from her at that time.

[71] Further, reliance is being placed on the date of Mr. Clarke's retirement, i.e. on the 31st of October 2008 and the fact that the settlement was received in 2011. With regards to the former date, counsel referred to section 2(1) of the **Employment (Termination and Redundancy Payments) Act** which provides that the 'relevant date' in relation to the dismissal of employees means –

> *(a) where his contract of employment is terminated by notice given by his employer, the date on which that notice expires;*
>
> *(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;*
>
> *(c) where he is employed under a contract for a fixed term and that term expires, the date on which that term expires;*
>
> *(d) ...*

According to counsel, pursuant to this definition, the operative date when a right would arise is the date of 'dismissal', which is the last day of employment which would have been the 31st of October 2008.

[72] The second argument advanced by counsel is that Mr. Clarke had no cause of action capable of giving rise to a chose in action against the BNS, as such at the time of separation (August 2008) there was neither a settlement sum nor an entitlement to same. Mr. Clarke has maintained his position that no cause of action existed at any time between himself and the BNS. He stated that sometime after he separated from Mrs. Clarke the BNS agreed to go to arbitration to resolve what would constitute a just and equitable retirement package and the BNS tried to renege on this agreement to arbitrate the matter. As such, the ensuing litigation concerned this dispute (i.e. to go to arbitration) and there was no other dispute save and except for what has been referred to as the 'Facebook claim'. It is undisputed that the 'Facebook claim' arose after the separation and as such Mrs. Clarke is not claiming an interest in same.

[73] Counsel for Mr. Clarke submitted that there is no evidence that Mr. Clarke was unfairly or constructively dismissed and accordingly there is no evidence upon which this court can make a finding that a cause of action arose against the BNS thereby giving rise to a chose in action. Mention was made of the fact that Mr. Clarke never took any matter before the Industrial Dispute Tribunal, which is set up for the settlement of disputes concerning employment. The court notes however that it is doubtful whether Mr. Clarke could have availed himself this opportunity, given the fact that Mr. Clarke's dispute with the BNS took place in 2008, prior to the amendment to the **Labour Relations and Industrial Disputes Act** ('LRIDA') in 2010. This point will be revisited subsequently.

[74] Counsel for Mr. Clarke submitted that he has consistently stated in his affidavits that he had no cause of action against the bank. In cross-examination he went on to add that he voluntarily retired. Counsel further submitted that there is no evidence to contradict this assertion and at no time was there any allegation by Mrs. Clarke that he was forced to leave his employment. At paragraph 40 of Counsel's closing submissions it states – *'She stated that the dispute between the BNS and Mr. Clarke was regarding the quantum of a fair and equitable retirement plan. This, she says, is the chose in action. She has also put forward that the entitlement arose on the defendant's retirement. Therefore if the entitlement arose on the defendant's retirement in October 2008 after the parties separated in August 2008 then it would fall outside the period of consideration by this court.'*

[75] Finally, in support of counsel's submission that there is no evidence before the court to support a finding that a chose in action existed, reference was made to the definition of wrongful dismissal from **Halsbury's Laws of England** Volume 16, 4th edn., at paragraph 451 as well as the principles enunciated at paragraph 27 of the judgment of Wall LJ in **Charles Sandu v Jan De Rijk Transport Ltd.** [2007] EWCA Civ 430. For clarity it is to be noted that Lord Gifford submitted that action of the bank on the 8th of July 2008 was a breach of duty and confidence which is a feature of every employment contract.

The Law

[76] This claim has been made pursuant to the **Property (Rights of Spouses) Act** ('PROSA') which came into force on the 1st of April 2006. I would adopt the following summary by Lord Wilson at paragraph 5 of his judgment in **Eutetra Bromfield v Vincent Bromfield** [2015] UKPC 19 -

> *The **Property (Rights of Spouses) Act** ... confers on the court following divorce limited redistributive powers in relation to the family home and wider such powers in relation to other property: sections 13-15. It requires the court, in any redistribution of other property, to take into account not only the financial contributions, direct or indirect, which would have been relevant to the creation of an equitable interest in property but other contributions and indeed all other circumstances which the justice of the case requires to be taken into account: section 14(2) and (3)...*

[77] It is useful to have regard to how the **PROSA** defines property.

> *2. – (1) In this Act –*
>
> *"property" means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt **or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled**;* (emphasis added)

[78] This definition of property is wide and includes a 'chose in action'. I would conveniently adopt paragraphs [34] – [36] of the procedural appeal (referred to in paragraph [45] herein) –

> ***Choses in action***
>
> *[34] For a definition of "chose in action", we were referred by Lord Gifford to Stroud's Judicial Dictionary of Words and Phrases (4th edn, Vol 1, page 460):*
>
> > *"(1) 'chose' in action is the antithesis of 'chose in possession'…*
> >
> > *(2) 'Things in action' is when a man hath cause, or may bring in action, for some duty due to him;…and because they are things whereof a man is not possessed but for recovery of them is driven to his action, they are called 'things in action'."*
>
> *[35] Lord Gifford also referred us to the decision of the Court of Appeal of England and Wales in **Jennifer Simpson v Norfolk & Norwich University Hospital NHS Trust** [2011] EWCA 1149, in which the first issue for consideration was whether a claim for damages for personal injury arriving out of the alleged negligence of a hospital was capable of assignment. The answer to this question turned on whether a claim of this nature could properly be regarded as a "legal thing in*

action", within the meaning of section 136(1) of the Law of Property Act 1925 (which is to the same effect as section 49(f) of the Judicature (Supreme Court) Act). Moore-Bick LJ (with whom Kay LJ and Dame Janet Smith DBE agreed) held that it could:

> *"Whether a right to recover compensation for personal injury caused by negligence can properly be regarded as a form of property might at one time have been open to argument, but in my view the expression 'legal thing in action' is wide enough to encompass such a claim and support for that conclusion can be found in the decision in Ord v Upton [2000] Ch. 352, to which I shall return in a moment. It is difficult to see why a claim for damage to property caused by negligence should not be regarded as a chose in action and capable of assignment and if that is so, I can see no reason in principle why a claim for damages for personal injury should not be regarded in the same way. Indeed, the reasons given in the authorities for not permitting the assignment of a bare cause of action, namely, that to do so would undermine the law on maintenance and champerty, tends to support the conclusion that a claim of that kind is to be regarded as a chose in action and inherently capable of assignment."*

[36] In not dissimilar vein, the learned editors of Crossley Vaines' Personal Property (5th edn, page 263) make the point that the expression "chose in action", "when used in its widest sense, covers a multitude of things of which no really accurate classification seems possible". ***It accordingly appears that, in the modern law, the term 'chose in action' is apt to carry the widest possible connotation and in Halsbury's Laws of England (4th edn Reissue, Vol 4, para. 1) it is said that "[t]he meaning of the expression 'chose in action' or 'thing in action' has varied from time to time, but it is now used to describe all personal rights of property which can only be claimed or enforced by action****, and not by taking physical possession". In a list of things which have been held to be choses in action, Halsbury's includes (at para. 8) "miscellaneous rights, such as a right of action arising under a contract, including a claim for unliquidated damages for breach of contract, or a right of action arising out of tort..."* (emphasis added)

[79] The **PROSA** prescribes, at section 13, the time in which an application may be made to the court for the division of property, i.e. within twelve (12) months of separation. I am satisfied that this application has been duly made and as such section 14 is relevant –

> *14. – (1) Where under section 13 a spouse applies to the Court for a division of property, the Court may –*
>
> > *(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*
> >
> > *(b) subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),*
>
> *or, where the circumstances so warrant, take action under both paragraphs (a) and (b).*

(2) The factors referred to in subsection (1) are –

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

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

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

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

(3) In subsection (2)(a), "contribution" means –

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available,

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof;

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse.

(4) For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.

[80] Section 17(2) states –

> *(2) The value of property that may be divided between the spouses shall be ascertained by deducting from the value of property owned by each spouse –*
>
> > *(a) any secured or unsecured debts (other than personal debts or debts secured wholly by property) owed by one spouse; and*
> >
> > *(b) the unsecured personal debts owed by one spouse to the extent that such debts exceed the value of any property of that spouse.*

[81] It is also relevant to have regard to sections 17(3) and (4) –

> *(3) Where any secured or unsecured personal debt of one spouse is paid out of property owned by both spouses the Court may, on a division of that property, order that –*
>
> > *(a) the share of the other spouse in that property be increased proportionately; or*
> >
> > *(b) the first mentioned spouse pay compensation to the other spouse.*
>
> *(4) In subsections (2) and (3) "personal debt" means a debt incurred by either spouse other than a debt incurred –*
>
> > *(a) by both spouses jointly; or*
> >
> > *(b)in the course of a joint venture carried on by both spouses whether or not with any other person; or*
> >
> > *(c) for the purpose of effecting improvements to the family home or acquiring, repairing or effecting improvements to the family chattels; or*
> >
> > *(d) for the benefit of both spouses or any relevant child in the course of managing the affairs of the household or for caring for the relevant child, as the case may be.*

Analysis

Whether Mr. Clarke had a chose in action against the BNS, i.e. does the settlement sum represent a chose in possession

[82] Both sides agree that a chose in action requires the existence of a cause of action. Lord Gifford submitted that the cause of action was breach of contract by the BNS by the conduct of its officers on the 8th of July 2008. The BNS made allegations, which according to Mr. Clarke were untrue, against him and expressed that they wished to facilitate his amicable retirement. This according to Lord Gifford

amounted to a flagrant breach of the duty not to destroy or seriously damage the relationship of trust and confidence between the employer and employee. It was submitted that it is this breach which led to Mr. Clarke's early retirement. Further, the court has been asked not only to infer the 'cause and effect' from the facts, but also Mr. Clarke's own admission that he retired earlier than he planned because *'the cordial relationship which I had previously enjoyed with the Canadian executives had become strained.'*

[83] There appears to be merit in Lord Gifford's submission. I also would consider Mr. Clarke's evidence that a letter was given to him at the outset of the meeting, which outlined his options to retire from the BNS, together with some proposed compensation packages. This letter was obviously memorialising the decision that had been taken prior to the meeting. As such Mr. Clarke, by his own admission, did not have the benefit of the 'process' which he recalls BNS had. His evidence is as follows –

> *Q: Before this letter was handed to you at all, there was mention of the allegation, who spoke of the allegation?*
>
> *A: Robert Pitfield*
>
> *Q: Was that the first thing he said leaving aside introductions and pleasantries?*
>
> *A: I can't recall which came first or second, the discussion started with Mr. Matalon talking/speaking about things totally unrelated.*
>
> *Q: The first thing relating to your employment was the hearsay allegation?*
>
> *A: I don't remember what was the sequence of the discussion.*
>
> *Q: The only thing related to your employment which was mentioned in those discussions before the letter handed over to you was the allegation?*
>
> *A: Pitfield mentioned the hearsay allegations.*
>
> *Q: Did he give you a chance to comment/answer on the allegations?*
>
> *A: From my recollection I said to him that this was a matter, if he had gotten these hearsay allegation* ***there is a process within the organisation to deal with such matters.***
>
> *Q: What did he say then?*

A: I don't remember what his response was.

Q: And then he handed you the letter?

A: Yes

Q: Which clearly had been typed before the meeting

A: Yes

[84] It should be noted that Mr. Clarke concedes that he was entitled to his pension but he contends that because he opted to go on early retirement, he was not entitled to any retirement benefits. As such he was of the view that he could not sue the BNS for retirement benefits as they were not due to him. Further, he contends that anything offered to him was merely gratuitous and was made in an effort to save the BNS from unfavourable publicity. With regards the claim which was brought against the BNS, Mr. Clarke states, at paragraphs 6 and 7 of his affidavit filed on the 14th of July 2011 (Exhibit 13), '*My lawsuit against the bank was instituted with the aim of having the dispute arbitrated, as I had no cause of action against the bank. Therefore in the circumstances, my lawsuit against the Bank cannot be deemed a chose in action against the bank.'*

[85] By Mr. Clarke's own admission, there was a dispute between Mr. Clarke and his former employer, the BNS. In fact one of the orders granted by Smith JA in respect of the 'lawsuit' to which Mr. Clarke referred, was a Declaration that Mr. Clarke and the BNS are *'bound by agreement to submit to Arbitration the existing dispute between them as to what is a fair and equitable retirement plan for the appellant (Mr. Clarke) having regard to all the circumstances.'* In the circumstances I have no difficulty in finding that Mr. Clarke did in fact have rights against the BNS, and that these rights amounted to a chose in action, which I accept arises when there is a credible right to bring an action. I do not accept Mr. Clarke's assertion contained at paragraph 4 of his affidavit filed on the 14th of July 2011 (Exhibit 13) that, *"I opted to go on early retirement. I was not entitled to retirement benefits save and except my pension, which I duly received."* I would agree with the reasoning of Morrison JA (as he then was) that this *'naturally begs the further*

question: what then was the "dispute" with the bank which he was so bent on having arbitrated? It again seems...to be strongly arguable that the only answer to this question is that the parties remained in dispute over the issue of what compensation should be paid to Mr Clarke in consequence of his involuntary separation from the bank.'

[86] I therefore find that Mr. Clarke had a chose in action, i.e. having regard to the definition set out in paragraph [78] herein and in particular modern classification of the term from the editors of **Crossley Vaines' Personal Property** (5th edn, page 263) which is that –

> *...**the term 'chose in action' is apt to carry the widest possible connotation** and in Halsbury's Laws of England (4th edn Reissue, Vol 4, para. 1) it is said that "[t]he meaning of the expression 'chose in action' or 'thing in action' has varied from time to time, but **it is now used to describe all personal rights of property which can only be claimed or enforced by action, and not by taking physical possession". In a list of things which have been held to be choses in action, Halsbury's includes (at para. 8) "miscellaneous rights, such as a right of action arising under a contract, including a claim for unliquidated damages for breach of contract, or a right of action arising out of tort..."*** (emphasis added)

[87] Based on the evidence before me, it seems that Mr. Clarke might even have had a number of personal rights which could only be claimed or enforced by action. Firstly, there is his pension entitlement which he admitted that he had and duly received. In his affidavit filed on the 4th of November 2009, he stated at paragraph 4, *'I am in receipt of a pension from the Bank of Five Hundred and Sixty-One Thousand Two Hundred and Ninety Dollars ($561,292.00) per month net of statutory deductions...'*

[88] Secondly, having regard to Mr. Clarke's evidence that, *'There was an oral contract of employment between the Bank of Nova Scotia Jamaica Limited and myself. It was a contract of indefinite duration. This contract could have been terminated either by me or the Bank by written notice on either side.'* Also, that he was called into the meeting on the 8th of July 2008 (the 'July meeting'), without being told of the true purpose of the meeting and that certain allegations were levied against him and thereafter a pre-typed letter was given to his setting out various options

for Mr. Clarke to vacate his post. I bear in mind that Mr. Clarke gave evidence that he was taken by surprise by the true purpose of the July meeting and the allegations. He also stated that the BNS had its own process for dealing with such matters, which inferentially was not followed. Further, he gave evidence that the letter was subsequently withdrawn and that he returned to work the following week. However, on the 16th of July 2008, i.e. eight (8) days later, he claims that he called a board meeting to announce his resignation. In these proceedings Mr. Clarke admitted that he did this because the cordial relationship that he previously enjoyed (i.e. before the July meeting) had become strained. He also indicated that he retired earlier than he planned to and that this resulted in the loss of property when the loan facilities could not be serviced. It is clear that the July meeting resulted in Mr. Clarke's separation and in those circumstances, Mr. Clarke may have had an arguable case in respect of how his separation was effected/handled by the BNS.

[89] For the purpose of this judgment I do not find it either necessary or advisable to express a final determination in relation to what the appropriate cause of action might have been. It seems that such a determination would require further particulars. However I would say that based on the evidence before this court it seems that, *prima facie*, it could be argued that (1) Mr. Clarke might have brought an action for breach of the duty of trust and confidence, which Lord Gifford has submitted is a feature of every contract of employment, or (2) for wrongful dismissal if the terms of his oral contract, which according to him required written notice, were breached or even (3) for constructive dismissal if the July meeting forced his resignation and it could be said to have been involuntary. Notwithstanding that the court has referred to three (3) potential causes of action, I would agree with Mr. Steer's submission that one must be mindful of asking the court to make an adverse finding against someone that is not a party to the claim, in this case the BNS. If the court were to make such a finding it might very well offend the principle of natural justice that no one shall be condemned unheard – i.e. *audi alteram partem.*

[90] Noticeably absent from the list of potential causes of action is unjustifiable dismissal. As previously mentioned at paragraph [73] herein, it is doubtful whether Mr. Clarke could have pursued a claim for unjustifiable dismissal before the Industrial Disputes Tribunal, pursuant to the **Labour Relations and Industrial Disputes Act** and its Regulations and Code, since the relevant amendments to the said Act came into effect on the 23rd of March 2010. Accordingly, I would reject Mr. Steer's submission that there was no cause of action giving rise to a chose in action because, *'at no time did the defendant (Mr. Clarke) take the matter before the Industrial Dispute Tribunal alleging that he was unfairly dismissed.'*

[91] I am fortified in the view that I have taken that the correct/specific cause of action need not be identified by the court in this case since the court, having the benefit of hearing from both sides, would have had the requisite jurisdiction to grant Mr. Clarke the remedy which he appeared to be entitled had he properly brought a claim against the BNS, irrespective of how the claim was grounded. Section 48 (g) of the **Judicature (Supreme Court) Act** provides –

> *48. (g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just,* ***all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them*** *respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided.* (emphasis added)

(See also: Rule 8.7(1) of the Civil Procedure Rules and the dicta of Phillips JA at paragraph [53] of **Medical And Immuniodiagnostic Laboratory Limited v Dorett O'Meally Johnson** [2010] JMCA Civ 42.)

[92] While I do find that there are some similarities between the facts as alleged by Mr. Clarke and the **Sandhu** case, I am not prepared to make a finding that the conduct of the BNS was unacceptable and/or that it gave rise to constructive dismissal. It is not certain whether any investigations were conducted into Mr. Clarke's alleged misconduct before summoning him to the July meeting. Such a finding could only be made after hearing from the BNS, which is not a party to the instant claim.

Based on Mr. Clarke's evidence the true purpose of the meeting was not revealed to him prior nor were the charges against him. There was nothing to suggest that he would be allowed to seek advice or bring a representative. By all indications it seems that the decision that Mr. Clarke should be separated from BNS was taken before he even had an opportunity to be heard. It is also questionable whether he was even allowed a fair hearing. Unlike the **Sandhu** case, the BNS seemed to have had a grievance, dismissal or appeal structure in place; but sought not to follow it. Further, if Mr. Clarke's evidence is to be accepted that the letter was withdrawn, this would tend to suggest that there was some recognition of wrongdoing/failure on the part of the BNS.

[93] In the circumstances I am prepared to find that the conduct of the BNS, as alleged by Mr. Clarke, would appear to give rise to at least one cause of action. Whether or not he would have been successful is entirely another matter, which this court is in no position to express a view on. At the very least, based on Mr. Clarke's evidence, it can be said that, *prima facie,* the actions of the BNS did not conform to its own internal process and Mr. Clarke was placed in a position where he left his employment with the BNS before he intended to.

[94] It should be recalled that Mr. Clarke gave evidence that he intended to continue in his employment until his retirement at age 65, which would be in December of 2014. The sum of USD$2M was borrowed to purchase one of the Florida properties (the Sweetbay property in Plantation, Florida). The last payment was due in September 2015. It is evident that to service that debt, Mr. Clarke would have needed to remain in his position at the BNS. He gave evidence that he tried to save the said property by obtaining a loan facility from the National Commercial Bank (NCB) and that this resulted in the loss of a lump sum pension entitlement.

[95] Thirdly, I accept that if Mr. Clarke did not take the steps which led to his separation from his employment and he was dismissed, then he would have been entitled to a reasonable period of notice and that what is reasonable would be determined by reference to the post which he held. I note that in cases where Claimants were in

'the highest ranking tiers of the management structure in their organizations' and where their positions *'clearly involve significant autonomy; organizational responsibility and accountability'* (per Ellis J in **Deca Penn v Scotiabank (British Virgin Islands) Ltd**.) the notice period was in the range of twelve (12) months. Prima facie, it seems that Mr. Clarke would have had little difficultly in supporting a claim that he would have been entitled to at least twelve (12) months' notice. But again, it should be noted that it is Mr. Clarke's contention that he took the steps to effect his retirement.

[96] Fourthly, Mr. Clarke by his own admission had a cause of action against the BNS in relation to certain actions taken by one of its employees which were defamatory (the 'Facebook claim'). As previously mentioned, although the settlement sum includes compensation for the Facebook claim, Mrs. Clarke is not claiming an interest in this portion as she acknowledges that this entitlement would have arisen after their separation.

Whether the chose in action arose prior to the parties' separation which would make the settlement sum property eligible for division pursuant to the Property Rights of Spouses Act

[97] It is clear that Mrs. Clarke's application can only relate to property which existed as at the date of separation, i.e. the 12th of August 2008. I have found that as at the date of separation, Mr. Clarke had a chose in action and/or rights in relation to (1) his pension, which he admits; and (2) compensation for the manner in which his separation was handled by the BNS, which he does not admit but on balance, is what the parties referred to as a 'fair and equitable retirement plan' and what was the subject of the dispute i.e. the very thing that the parties agreed to Arbitrate and later settled.

[98] Prima facie, both Mr. Clarke's pension and compensation/retirement plan are eligible for division pursuant to the **PROSA**. I do not agree with Mr. Steer's submission that in resolving the question of what date Mr. Clarke would have had

a right to claim/cause of action regard should be had to the **Employment (Termination and Redundancy Payments) Act** and in particular the definition of "the relevant date" as provided in section 2(1). While there is no dispute that Mr. Clarke's last day of employment would have been the 31st of October 2008, it must be borne in mind that it is Mr. Clarke's evidence that he requested a meeting of the Board to indicate his desire to retire and on the 16th of July 2008 the meeting was convened at which time he submitted a document to the Board and said it was for the Board to determine what were the next steps.

[99] To my mind none of the definitions of "the relevant date" as provided in section 2(1) would apply. Mr. Clarke was neither employed under a contract for a fixed term nor employed in seasonal employment as such it is obvious that subsections (c) and (d) are inapplicable. In fairness to Mr. Steer, he did not mention subsection (d), only subsections (a) – (c) were cited in his submissions. With regards to subsections (a) and (b), which provide as follows –

> *"the relevant date" in relation to the dismissal of employees means –*
>
> *(a) where his contract of employment is terminated by notice given by his employer, the date on which that notice expires;*
>
> *(b) where his contract of employment is terminated without notice, whether by the employer or the employee, the date on which the termination takes effect;*

it seems that neither are applicable. Subsection (a) refers to a situation in which the employer terminates the employment contract by notice. Mr. Clarke's evidence is that he terminated the employment contract on the 16th of July 2008. He emphatically stated that the letter given to him during the July meeting was withdrawn. The Act does not provide for a situation in which the employee terminates the employment contract by notice, in the same way that it provides in subsection (b) which applies to termination without notice 'whether by the employer of the employee'. As noted in the dicta of Phillips JA, quoted at paragraph [48] herein, the news release issued by the BNS stated –

"William 'Bill" [sic] Clarke to Retire"

> *"**Kingston Jamaica, July 18, 2008** – The Board of the Bank of Nova Scotia Jamaica Limited wished to advise that President and CEO William 'Bill" [sic] Clarke has decided to retire on October 31, 2008. The Board refutes any allegations that Mr. Clarke has separated from the Bank..."*

This clearly supports the contention that Mr. Clarke terminated the employment contract with notice.

[100] The fact that Mr. Clarke's last day of employment was the 31st of October 2008 and the settlement was finalised in 2011 is of no moment. I am of the view that the chose in action with respect to Mr. Clarke's pension and compensation/retirement plan existed as at July 2008, which is a month prior to the parties' separation. The question for this court is therefore, what portion of the settlement sum is eligible for division and in what share.

What portion of the settlement sum is eligible for division and in what share?

Counsel for the Claimant's submissions

[101] Lord Gifford has submitted that the value of the chose in action can be calculated by reference to the benefits which Mr. Clarke received from the settlement with the BNS, which was agreed on the 7th of June 2011. He further submitted that if the matter had gone to arbitration, the value would have been the value of the arbitration award. Since it was settled by agreement, the court ought to look at the value of the settlement as agreed. The chose in action became a chose in possession when the agreement was reached. It was helpfully observed that the matter is complicated by the following factors –

(1) The settlement also included compensation for the Facebook claim;

(2) Part of the settlement consisted of non-pecuniary assets, namely the house at Hyperion Avenue, the BMW and Audi motor cars, and some works of art;

(3) Tax had to be withheld on the part of the settlement which related to Mr. Clarke's employment;

(4) Legal and other professional fees had to be taken into account;

(5) Some amounts were calculated in Canadian currency and others in Jamaican currency. (For convenience the exchange rate used by PricewaterhouseCoopers ('PwC') of CAD$1.00 to JMD$85.847 was used in the submissions by Counsel for Mrs. Clarke).

[102] Lord Gifford submitted that in order to find the value of the property which is capable of division under **PROSA**, the starting point must be the value which PwC, an expert firm acting as an agent for both Mr. Clarke and the BNS, estimated for the purpose of tax. The court was referred to clause 8 of the Settlement Agreement (titled 'Minutes of Settlement' contained in the Bundle of Confidential Documents in Exhibit 15 at pages 1-2), which states, *'This agreement is subject to all necessary tax withholdings. The parties will jointly retain PricewaterhouseCoopers to determine all necessary tax withholdings.'*

[103] Reference was made to the document titled 'Computation of Taxable Emoluments Arising from Settlement' (Exhibit 15 at pages 4-5) in which the total value of the deemed emolument was stated as JMD$[redacted] (which converts to CAD$[redacted]). It was submitted that the following figures ought to be deducted (1) value of the Facebook claim (JMD$[redacted] or CAD$ [redacted]), (2) the portion withheld for tax (JMD$[redacted] or CAD$[redacted]), (3) arbitration and professional fees (PwC and Legal) (JMD$[redacted] or CAD$ [redacted]). It was submitted that the value of the settlement amounts to JMD$[redacted] or CAD$[redacted] and that this figure represents the basis for calculating the value of the property to be divided between the spouses, subject to any deductions under section 17(2) of the **PROSA**.

[104] It was submitted that the settlement figure represents the value of the settlement at the date it was agreed, i.e. the 7th of June 2011, rather than the value 'at the date the Order is made' as provided by section 12(1) of the **PROSA**. It was

recognized that section 12(1) also provides the court with the power to 'otherwise direct' in appropriate cases. It was submitted that this is an appropriate case for the court to direct otherwise, since it would be an artificial exercise to calculate the value of the settlement as at the 2017 date when the Order is made. It was further submitted that where the relevant property is a chose in action, then assessing the value of the chose when it became a chose in possession, by reference to agreed financial details, is the fairest way to apply the Act in a way which does justice to both parties.

[105] Lord Gifford took issue with the document titled 'Disbursement of Settlement Between William Clarke and the Bank of Nova Scotia Jamaica Ltd' (Exhibit 15 at page 6) which was prepared by Mr. Clarke. He submitted that there were some errors in the figures contained in that document. The first error is said to be the figure which represents the value of the settlement, i.e. CAD$[redacted]. This figure, according to Lord Gifford, reflects the sum of the payments referred to in clause 3 and 5 of the Minutes of Settlement which represent the payments for the arbitration and litigation matters and associated costs (CAD $[redacted] and CAD$[redacted], respectively). This figure does not reflect the true value of the settlement which included the opportunity to purchase the Hyperion residence, with all its contents, (at the total book value of CAD$[redacted]) at a price which Lord Gifford submits is far less than their true worth. Reference was made to the market value which PwC used which was JMD$[redacted] or CAD$[redacted] and not the price it was purchased for which was computed as JMD$[redacted] or CAD$[redacted].

[106] The court was then referred to the Notes attached to Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 5) wherein Mr. Eric Crawford of PwC, stated as follows –

> *1. Property and Chattels were sold for C$[redacted] allocated House: $[redacted]. Chattels $[redacted]. Market value taken as J$[redacted] (the assed [sic] value of the house) and in the absence of further details the value of the chattels taken as the selling price.*

2. Market value was per B.N.S.

[107] Lord Gifford submitted that it follows from this that the real benefit gained by Mr. Clarke from what he calls the 'house element' of the settlement was the difference between the market value and the price it was purchased for, which amounts to JMD$[redacted] which is the figure stated as the deemed emoluments in the Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 4). It was submitted that the difference is not surprising and that the court can take judicial notice that a house in a neighbourhood off Jacks Hill Road with one and a half (1.5) acres of land would hardly be valued at less than JMD$[redacted], which is what Mr. Clarke ended up paying for it.

[108] A similar submission was made in respect of the BMW and Audi motor vehicles. In the Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 4) the value of the motor vehicles was stated as JMD$[redacted] with Mr. Clarke purchasing them for CAD$[redacted] or JMD$[redacted] as such the deemed emolument was stated as $[redacted].

[109] In light of these submissions, it was contended that the value of the settlement ought to be CAD$[redacted] or JMD$[redacted] which is the figure that PwC arrived at in the Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 4), prior to the deduction of the Facebook Claim. It was submitted that it is only logical and just that the value of the property to be divided should be consistent with the amount that was calculated for tax purposes on behalf of Mr. Clarke.

[110] The second issue that Lord Gifford took with regards to the Disbursement of Settlement Between William Clarke and the Bank of Nova Scotia Jamaica Ltd (Exhibit 15 at page 6) is the value of the Facebook claim, which is stated to be CAN$[redacted] and not CAN$[redacted] or JMD$[redacted] which is the figure used for the calculation of tax. According to Lord Gifford this error can easily be explained by reference to Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 5) where Mr. Crawford has stated the 'Derived

Value of Claims' in Canadian currency in the left column and the 'Value of Settlement' in Jamaican currency in the right column. It is submitted that it is the figures in the right column which are relevant as it is these figures which are used in the Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 4) under the heading of 'Deemed Emolument'.

[111] Lastly, the figures contained in the Disbursement of Settlement Between William Clarke and the Bank of Nova Scotia Jamaica Ltd (Exhibit 15 at page 6) for taxes withheld and various fees have been agreed. Lord Gifford submitted that it is only right that the fees paid to obtain the settlement should be subtracted from the global figure. Having regard to the two (2) errors which have been set out above, Lord Gifford submits that the value of the settlement is CAD$[redacted].

[112] Having regard to section 17(2) of the **PROSA**, Lord Gifford has submitted that there are no relevant deductions to be made from the value of settlement. Reference was made to the figures contained in the Disbursement of Settlement Between William Clarke and the Bank of Nova Scotia Jamaica Ltd (Exhibit 15 at page 6) which represent the settlement of debts which total CAD$[redacted].

[113] A six step approach was advanced by the Lord Gifford in support of his submission that section 17(2) is inapplicable in the instant case.

1. Consider the value of the property owned by Mr. Clarke;
2. Consider the value of the property owned by Mrs. Clarke;
3. Consider the debts, other than personal debts, owed by Mr. Clarke;
4. Consider the secured debts owed by Mr. Clarke;
5. Consider the unsecured debts owed by Mr. Clarke; and
6. Consider whether the unsecured personal debts exceed the value of Mr. Clarke's property.

Counsel for the Defendant's submissions

[114] Mr. Steer contends that the net settlement amount is a negative figure, CAD$-[redacted] Reliance is clearly being placed on the computation in the Disbursement of Settlement which states the 'net residue of settlement' as CAD$-[redacted] It was submitted that the documents disclosed by Mr. Clarke clearly show that there is nothing left to divide.

[115] One of the main issues, according to Mr. Steer, has to do with the Facebook claim. It was submitted that the Chartered Accountant, Mr. Eric Crawford, clearly set out how the amount/value was derived. Curiously, without reference to any particular document, Mr. Steer submitted as follows –

> *The document states;*
>
> *Present Exchange Rate (JMD/CAD) 85.8472*
>
> *Computation of Value of Facebook Claim*

	J$	*Exchange Rate J$/CDN$*	
Abrahams Award 31/07/2000	[redacted]	*28.08*	[redacted]
Strachan Award 16.05 1995	[redacted]	*23.87*	[redacted]
Average of both Awards			[redacted]

[116] With regards to the above figures, it was submitted as follows, *'This is separate and apart from the way the Chartered Accountants manipulated the figures for the purpose of ascertaining the amount that ought to be paid for taxes. It is on this latter figure that the claimant relies. This is faulty and incorrect.'*

[117] It should be noted however that the figures provided by Mr. Steer in the untitled document (Exhibit 16) does not match with the Computation of Taxable Emoluments Arising from Settlement (Exhibit 15 at page 5), what is stated at Note 4 by Mr. Crawford is as follows –

		Derived Value of Claims	*Value of Setlement [sic]*
4 Computed as follows:			
Value of Claim per BNS (average of amount claimed and amount offered)	*88.06%*	[redacted]	[redacted]
Value of Facebook Claim (average Strachan and Abrahams)	*11.94%*	[redacted]	[redacted]
		[redacted]	[redacted]

[118] Mr. Steer submitted that the accountants hired by the parties converted sums to Jamaican currency for the sole purpose of calculating the taxable income. However, it was submitted that no reliance should be placed on same as it would *'take the court down a rabbit hole which distracts from the simple basic truth of the figures.'*

[119] According to Mr. Steer, the agreement between the BNS and Mr. Clarke is clear. It would be difficult for the court to say that he got a bargain when he purchased the Hyperion Avenue residence from the BNS. There is no valuation of the property from the Bank. Further, it was submitted that this line is a distraction, since Mr. Clarke received certain sums and he also got the opportunity to purchase property with these sums. It was submitted that it would be erroneous to calculate the value

without a proper valuation and add it to the award. Mr. Steer also pointed out that PricewaterhouseCoopers are not valuators.

[120] With regards to the debts under section 17 of the **PROSA**, I think it useful to set out Mr. Steer's submissions –

> *57. Should the court take into account debts discharged by the defendant as set out in his statement of disbursement?*
>
> *58. The claimant has agreed that certain sums can be subtracted from the settlement amount. She has agreed, through counsel, that the professional fees which were directly responsible for the achievement of the settlement are a legitimate deduction.*
>
> *59. Separate and apart from this however the court ought to consider money spent by the defendant in his attempt to save the "family home" at Sweet Bay in Plantation Florida, USA. The court ought to also consider money spent to save land in Morrison County, Florida USA.*
>
> *60. The defendant in cross examination stated that the amounts set out in his calculations for settlement of various debts were debts incurred to assist with the construction of the house in the United States of America (Sweet Bay), servicing of mortgages and other family commitments.*
>
> *61. The evidence before the court is that the monthly obligation in Florida to include mortgage and keeping the property at Sweet Bay maintained and in a position to properly accommodate the family, was approximately USD22, 000.00 per month. This was money paid by the defendant. The claimant has said on more than 1 occasion in her affidavit and in cross examination, that she expected the defendant to save her properties. Where did this money come from?*
>
> *62. The defendant has provided the court with proof of efforts made by him to send money on a regular basis to a joint account in Florida. His evidence is that this money was borrowed from a financial institution as well as from close friends. Once he received the settlement he was obligated to repay the sums owed. The actual documentation was handed to the court. The claimant seeks to have the benefit without the burden. The properties in Florida were jointly owned. The debts incurred to keep them afloat and maintain the parties' lifestyle were joint debts.*
>
> *63. The defendant's evidence is that he received a lump sum as a part of his pension. This was an entitlement that matured after the parties separated. His uncontested evidence is that this sum was used as security for a loan that was granted from the National Commercial Bank in Cayman. This loan assisted with the payment of the monthly mortgage dues for the properties in Florida. This is how the said lump sum was lost. The lending institution used it to liquidate the loan.*
>
> *64. The court ought to take into consideration the fact that the claimant received the sum of USD200,000.00 for her maintenance. In addition the claimant received over USD40,000.00 as a refund from the deposit on the Epic West Condominium. In 2009 after separation the claimant also had a Scotiamint account that was*

valued at in excess of J$4,000,000.00. She also had an investment worth in excess of USD15,000.00 at Citigroup Global Markets.

65. There being no chose in action existing at the time of separation this court would have no basis for making an order based on the settlement sum nd [sic] in any event, the documents disclosed by the defendant to the court clearly show that there is nothing left to divide.

[121] Having regard to section 12 of the **PROSA**, which states –

12. – (1) Subject to sections 10 and 17(2), the value of property to which an application under this Act relates shall be its value at the date the Order is made, unless the Court otherwise decides.

(2) A spouse's share in property shall, subject to section 9, be determined as at the date on which the spouses ceased to live together as man and wife or to cohabit or if they have not so ceased, at the date of the application to the Court.

there are two (2) findings which the court has to make. The first being the value of the property and secondly, Mrs. Clarke's share in the said property.

The value of the property

[122] Section 12(1) of the **PROSA** provides that the value of the property should relate to the date on which the order is made. While the court has a discretion to order otherwise, there is a clear recognition by the legislators that the value of property may change between the time the application is brought and the court makes a pronouncement. It must be borne in mind that the object of the **PROSA** is clearly to achieve fairness between the parties upon the breakdown of their marriage as such the court will have regard to what the value of the property is in 2017 and whether there is any justification for using the value as it was in 2011.

[123] In the instant case, Mr. Clarke contends that in addition to the settlement sum being ineligible for distribution, it has been exhausted by the debts which he settled. Mr. Clarke has given evidence in relation to how the settlement sum was applied. The details were set out in the document prepared by Mr. Clarke, titled Disbursement of Settlement between William Clarke and the Bank of Nova Scotia ('Disbursement of Settlement').

[124] The parties are not *ad idem* with regards to what Lord Gifford refers to as the 'global figure'. Mr. Clarke states that the value of the settlement is CAD$[redacted] whereas Mrs. Clarke claims that it is CAD$[redacted]. I take it to mean that both parties consider these figures to represent the gross value of the settlement. The figure advanced by Mrs. Clarke is higher by CAD$[redacted], because her view is that the value of the non-pecuniary assets (the Hyperion Avenue residence and motor vehicles) ought to be quantified by reference to what PwC calls the 'deemed emolument' and Mr. Clarke's 'real benefit' should be added to the global figure. I have set out Lord Gifford's submissions on this point at paragraphs [107] - [109] herein. In support of this position, Lord Gifford is asking this court to take judicial notice of a property value, namely that the Hyperion Avenue Residence given the locality and size of the property, would have been valued far more than what Mr. Clarke paid for it. As enticing as this submission is, I would tend to agree with Mr. Steer's submission as set out at paragraph [119] herein. I would accept that the gross settlement amount is CAD$[redacted] and the net settlement amount (after taxes) is CAD$[redacted]. I think best to state that Mr. Clarke received CAD$[redacted] plus the non-pecuniary assets, namely the house at Hyperion Avenue, the BMW and Audi motor cars, and some works of art.

[125] Having determined the net settlement amount, the court must determine the portion that is eligible for division. It is common ground that the value of the Facebook claim, taxes withheld, arbitration fees, and professional fees to achieve the settlement (PwC and Legal) are to be deducted from the settlement sum. The parties however do not agree on the total to be deducted. Mr. Clarke puts this figure at CAD$[redacted], whereas Mrs. Clarke puts it at CAD$[redacted]. This discrepancy is attributed to the how the parties have valued the Facebook Claim. Mr. Clarke is relying on the derived value of claim which amounts to CAD$[redacted] whereas Mrs. Clarke is relying on the value of settlement which amount to CAD$[redacted] (JMD$[redacted]).

[126] It seems to me that the correct figure is Mrs. Clarke's figure which is also the figure used by PwC as the deemed emolument, save for the fact that it was stated in JMD$[redacted] which converts to CAD$[redacted]. I am fortified in the view that I have taken by reference to Mr. Crawford's note that the value of the Facebook claim is the 'average Strachan and Abrahams'. If indeed the value was the average of the damages awarded in the ***Gleaner Company Ltd and Dudley Stokes v Eric Anthony Abraham*** *(unreported) Court of Appeal, Jamaica, SCCA No 70/1996, judgment delivered 31 July 2000* and ***Leymon Strachan v The Gleaner Company and Dudley Stokes*** *(unreported) Court of Appeal, Jamaica, SCCA No 133/99 delivered 6 April 2001* wherein the claimants were awarded JMD$35,000,000.00 and JMD$25,500,000.00, respectively, then it would seem that JMD$[redacted] would be closer to the average than CAD$[redacted], which converts to JMD$[redacted].

[127] Accordingly, the net settlement sum of CAD$[redacted] would be reduced by CAD$[redacted], which represents the Facebook claim. Therefore, I find that the value of the property would amount to CAD$[redacted] (plus the non-pecuniary assets), prior to any debts which may be deducted pursuant to section 17(2) of the **PROSA**.

[128] It was agreed that this sum would be reduced by the professional fees to achieve the settlement. The taxes withheld, the arbitration fees and PwC fees have already been deducted. What remains are the legal fees which Mr. Clarke claims amounted to CAD$[redacted]. As such, the value of the property would be CAD$[redacted].

Section 17(2) debts

[129] The parties do not agree on what may be deducted from the value of the property. Lord Gifford submitted that section 17(2) does not apply, as such the entire settlement sum is eligible for division. Whereas Mr. Steer submitted that the said

section applies to the extent that when the deductions have been made there is nothing left to be divided.

[130] Lord Gifford submitted that all the debts were personal debts, reference was made to section 17(4) of the **PROSA** which defines personal debts.

[131] There are eight (8) line items under the heading 'Settlement of Debts' which according to Mr. Clarke total CAD$[redacted].

[132] In support of the figures contained in the said document, Mr. Clarke has also provided copies of five (5) Scotiabank Receipts (numbers 31054448 – 31054452) evincing various payments made on the 24th of August 2011 which total USD$[redacted]. He has also provided copies of two (2) statements evincing payment by cheques (numbers 0219431 and 0219432) made on the 24th of August 2011 which total JMD$[redacted].

[133] The documentary evidence in respect of the NCB loan facility, which Mr. Clarke claims was liquidated by a lump sum of his pension, was exhibited as 'WC-6' to the affidavit of William Clarke which was sworn to and filed on the 4th of November 2009. It is noted that Mr. Clarke stated in the Disbursement of Settlement that the sum of USD$[redacted] was settled in favour of the NCB. It should be noted that in cross-examination Mrs. Clarke stated that she was not in a position to dispute debts incurred by Mr. Clarke.

[134] In the circumstances, I would accept that Mr. Clarke settled the aforementioned debts from the settlement sum. Sections 17(2) – (4) are very important in the context of this dispute. They state –

> *(2) The value of property that may be divided between the spouses shall be ascertained by deducting from the value of property owned by each spouse –*
>
> > *(a) any secured or unsecured debts (other than personal debts or debts secured wholly by property) owed by one spouse; and*
> >
> > *(b) the unsecured personal debts owed by one spouse to the extent that such debts exceed the value of any property of that spouse.*

(3) Where any secured or unsecured personal debt of one spouse is paid out of property owned by both spouses the Court may, on a division of that property, order that –

(a) the share of the other spouse in that property be increased proportionately; or

(b) the first mentioned spouse pay compensation to the other spouse.

(4) In subsections (2) and (3) "personal debt" means a debt incurred by either spouse other than a debt incurred –

(a) by both spouses jointly; or

(b)in the course of a joint venture carried on by both spouses whether or not with any other person; or

(c) for the purpose of effecting improvements to the family home or acquiring, repairing or effecting improvements to the family chattels; or

(d) for the benefit of both spouses or any relevant child in the course of managing the affairs of the household or for caring for the relevant child, as the case may be.

[135] In my view the debts are deductible pursuant to section 17(2)(b). This is a case in which the unsecured personal debts owed by one spouse (Mr. Clarke) exceed the value of property owned by him. The CAD$[redacted] would therefore be reduced by CAD$[redacted] as such the value of the property (save for the non-pecuniary assets) is CAD$ -[redacted].

[136] That is however not the end of the matter, there are still (1) the pension and (2) the non-pecuniary assets. With respect to the latter, Mr. Clarke gave evidence that he is no longer in possession of the motor vehicles. It should be noted that no evidence was given in relation whether the motor vehicles were sold and if so, what was done with the proceeds. With regards to the Hyperion Avenue residence, Mr. Clarke gave evidence that he still owns and resides there.

[137] Having found that a chose in action arose prior to the parties' separation and that the pension and a portion of the settlement from the BNS represents a chose in possession, which has for the most part been exhausted or otherwise disposed of, the court can only seek to divide the value of the remaining property (i.e. the pension and the Hyperion Avenue residence) in accordance with the **PROSA**. I will

deal with the non-pecuniary assets first. It is to be noted that Mr. Clarke gave evidence in cross-examination that he is no longer in possession of the two (2) motor vehicles which formed part of the settlement with the BNS.

[138] It is a well established principle that the court ought not to make orders in vain. It seems to me that this principle is contemplated by section 12(1) of the Act, which states that in determining the value of the property each spouse may be entitled to, the court should have regard to any agreements the parties may have made, as well as any debts either one or both of the parties have incurred. It is also clear that in the normal course of events the value should be determined as at the date of the order. While the court has a jurisdiction to otherwise decide, this to my mind must be exceptional and justified by the circumstances of the case. I am not satisfied that there are exceptional circumstances to justify the departure from the normal approach. In my view the value of Hyperion Avenue residence ought to be determined as at the date the order is made in accordance with section 12(3) which states that –

> *(3) In determining the value of property the spouses shall agree as to the valuator who shall value the property, or if there is no agreement, the Court shall appoint a valuator who shall determine the value of the property for the purposes of this subsection.*

[139] Unlike with the value of the property which is determined as at the date of the order, a spouse's share in the said property is determined as at the date of separation (see: section 12(2) of the **PROSA**). I am mindful that Mrs. Clarke is not claiming an interest in the Hyperion Avenue residence, which she acknowledged was not the family home. However, I consider the Hyperion residence to form a part of the settlement which in my view is property eligible for division.

[140] Having regard to the **PROSA**, there is no equal share rule with respect to property other than the family home. I note Lord Gifford's submission in relation to the yardstick of equality of division and the case of **Dorothy Boswell v Kenneth Boswell and Teino Boswell** (*unreported), Supreme Court, Jamaica, Claim No. 2006 HCV02453, judgment delivered 31 July 2008.* Wherein N. E. McIntosh J (as

she then was) held, at page 16, in respect of property which was not the family home –

> *As stated earlier, the first house was no longer the family home when the parties separated and as such is subject to division. On the evidence in this case, there is no reason to depart from what is now widely settled as the formula of equality division adopted by the courts in several jurisdictions including the Jamaican courts. The authorities clearly indicate that the courts should only depart from the yardstick of equality of division to the extent that there is good reason for doing so and there is no good reason here (See for example, Martin v Martin [1988] 1 NZLR 722; White v White [2000] 3 WLR 1571; Lambert v Lambert (2003) 2 WLR 631). The Claimant is accordingly declared to be entitled to a 50% share in this house.*

[141] As an aside, I would note that given the Court of Appeal's criticisms of **Boswell** in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, some caution must be had in relying on and applying same. Regard must be had to sections 14(1)(b) and (2) which states –

> *14. – (1) Where under section 13 a spouse applies to the Court for a division of property the Court may –*
>
> *(a) ...*
>
> *(b) subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),*
>
> *...*
>
> *(2) The factors referred to in subsection (1) are –*
>
> *(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouse or either of them;*
>
> *(b) that there is no family home;*
>
> *(c) the duration of the marriage ...;*
>
> *(d) that there is an agreement with respect to the ownership and division of property;*
>
> *(e) such other fact or circumstance which in the opinion of the Court, the justice of the case required to be taken into account.*

[142] Before considering Mrs. Clarke's contributions, it may be stated as a fact that there is no family home and that the marriage lasted a considerable duration of time, spanning over three (3) decades (see: sections 14(2)(b) and(c)).

[143] By all appearances the thirty-five (35) year union between the parties was a true partnership. This is evident in how Mr. and Mrs. Clarke managed their affairs. Firstly, when Mrs. Clarke left the BNS to establish the business, both parties were named as directors upon incorporation. The parties do not agree on much in relation to the business, it is somewhat difficult to make a finding in relation to whose idea it was for Mrs. Clarke to leave the BNS and establish the business, nor whether the business was profitable. With regards the latter, there was no documentary evidence to support Mrs. Clarke's contention that she used monies from the business to contribute to the household, nor is there any evidence to support Mr. Clarke's contention that the business never returned a profit. What I accept is that Mr. Clarke supported Mrs. Clarke in this endeavour, and this is demonstrated by Mr. Clarke's actions namely by acquiring a personal loan for the business and settling same.

[144] For the most part, their accounts were held in their joint names. While Mr. Clarke states that this was done for mere convenience, because Mrs. Clarke had a US social security number which was required. This is somewhat betrayed by his evidence in cross-examination wherein he stated that he encouraged Mrs. Clarke to seek employment to assist with discharging their financial obligations in the US. It seems to me that Mr. Clarke considered both the assets and the liabilities to be joint, which is how they were registered for the most part.

[145] Mr. Clarke acknowledged that there was a publication about him in which he said, '*he gives credit and sincere gratitude to his wife, Gwen, who was committed to being a constant source of encouragement throughout his career advancement but more so in the last 13 years when he was President and CEO [sic] Scotiabank Jamaica Limited.'* Notwithstanding Mr. Clarke's attempt to distance himself by stating that the publication was prepared and issued by the BNS, in cross examination he agreed that he said those words sincerely and truthfully.

[146] It is clear that both parties made contributions, financial or otherwise, to the acquisition of their numerous properties, most of which have *'ceased to be the*

property of the spouse or either of them' as section 14(2)(a) puts it. I am mindful that the definition of 'contribution' as provided for in section 14(3) is quite expansive and in light of the particular facts of the instant case, regard must be had to subsections (d) and (e) which provide –

> *(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which -*
>
> > *(i) enables the other spouse to acquire qualifications; or*
> >
> > *(ii) aids the other spouse in the carrying on of that spouse's occupation or business;*
>
> *(e) the management of the household and the performance of household duties;*

[147] Subsection (4) puts it beyond doubt that there is no presumption that a monetary contribution is of greater value than a non-monetary contribution.

[148] Mr. Clarke has sought to relegate Mrs. Clarke's contribution. He stated, *'...the Claimant did not make any tangible contribution to my advancement. My career advancement were as a result of my own hard work and determination and not as a result of any act of the Claimant.'* When asked in cross examination if he wished to qualify or modify that statement, Mr. Clarke responded in the negative.

[149] It seems to me that Mr. Clarke has further sought to downplay Mrs. Clarke's contribution by emphasising the help which she received. Firstly, in or about 1992, when he went for a two (2) year management training programme in Canada, Mrs. Clarke managed their business as well as looked after their children and the household. In response he stated that he was being paid during this time (which is not in dispute), that he would return to Jamaica once every quarter and that Mrs. Clarke would bring the children for visits during the holiday months. He accepted that while he was in Canada, Mrs. Clarke was responsible for the care of the children. I accept Mrs. Clarke's evidence that this time would have been more challenging than usual for her and that she facilitated Mr. Clarke obtaining his training because it was for the benefit of the family.

[150] With respect to the maintenance of the home at Hyperion Avenue, i.e. the organisation and cleaning, he stated that two (2) helpers and two (2) gardeners were a part of the household. Inferentially, it seems that he was suggesting Mrs. Clarke would have had help and that her duties were merely *'consistent with the responsibilities of a spouse'*. He did not agree that she was the domestic manager of the house but repeated that she gave support that was consistent with the responsibilities of a spouse. When asked what he regarded the role of a spouse to be, he said *'The role of a spouse in my determination is to undertake the functions of ensuring that where there are children, their needs are taken care of, whether by way of shopping at the supermarket or green grocery. In conjunction with the household staff assigned, ensuring the orderly functioning of the residence.'*

[151] Further, he said that Mrs. Clarke was not required to actively participate in the organisation of the BNS events that were held at the Hyperion residence, as the Public Relations unit made all the necessary arrangements. By contrast, Mrs. Clarke gave evidence that she was instrumental in the preparation of functions, she even did so remotely when she travelled abroad. She also recalls preparing the menus for the functions and entertaining guests. Further, she cultivated ground provisions and almost 200 orchids in two (2) orchid houses. With regards the latter, she would do so to decorate the property and the house for the numerous functions that were kept at the Hyperion Avenue residence. Around Christmas she recalls purchasing gifts for the staff and baking traditional puddings for Mr. Clarke's friends and the staff. The last Christmas that Mrs. Clarke spent at Hyperion, she recalled baking forty (40) puddings. With regards to the management of the staff, some of her duties included distributing their wages and transporting them to their bus stops if necessary.

[152] It seems to me that based on Mr. Clarke's own evidence, the position cannot be maintained that Mrs. Clarke did not make a substantial contribution in the form of child care, assistance and support which enabled Mr. Clarke to both acquire qualifications and to carry on his occupation, as well as her management of the household (see: sections 14(3)(b), (d) and (e)).

[153] In any event, Mr. Clarke himself acknowledged Mrs. Clarke's contribution when he credited her commitment to being a source of encouragement throughout his career and particularly in the last thirteen (13) years while he was the President and CEO of the BNS. There is no doubt that Mr. Clarke's rise throughout the BNS was attributable to hard work and dedication on his part, however it is clear that Mrs. Clarke played a significant role. I find that she directly and indirectly contributed to the acquisition and improvement of property, most of which the parties no longer own.

[154] Based on the foregoing and also having regard to section 17(3) of the **PROSA**, which empowers the court to, *inter alia,* order a spouse to compensate the other spouse where their secured or unsecured personal debt is paid out of property owned by both of them, I would order that Mrs. Clarke be awarded the monetary equivalent of a 50% interest in the Hyperion Avenue residence, which should be valued in accordance with section 12(3) of the **PROSA**.

The Pension

[155] With regards to Mr. Clarke's pension, which is in my view is property by virtue of being a 'right or interest which Mr. Clarke is entitled' and is therefore eligible for division; I would not make any orders in respect of same. Pursuant to section 14(2)(e), the court may consider such other facts or circumstances which the justice of the case requires to be taken into account. To that end, I have considered that Mrs. Clarke has received maintenance in the sum of USD$200,000.00 as well as a refund from the deposit on the condominium located in Miami, Florida. I have also considered that Mr. Clarke retired earlier than he projected which caused him to incur unplanned debts and ultimately for the parties to lose ownership of the majority of their properties, most significantly the Sweet Bay property which they constructed and customised for their use.

[156] Further, I have had regard to the object of the modern law and in particular the principle of "the clean break". While this principle is typically considered in the

context of maintenance, in my view the reasoning can be extended to the instant case. As Lord Scarman put it in **Minton v Minton** [1979] AC 593, 603 –

> *"There are two principles which inform the modern legislation. One is the public interest that the spouses, to the extent that that their means permit, should provide for themselves and their children. But the other - of equal importance – is the principle of "the clean break".* ***The law now encourages spouses to avoid bitterness after family break-down and to settle their money and property problems. An object of the modern law is to encourage each to put the past behind them and to begin a new life which is not overshadowed by the relationship which has broken down."*** (emphasis added).

[157] The Australian case of **Dorothy Joan Perrett v William Charles Perrett** *[1989] Fam CA 56*, was referred to the court by Mr. Steer. The reasoning of the court was adopted in Mr. Steer's submissions. In that case the Full Court of the Family Court held at paragraph 28 -

> *'...it is, in our view, impossible to characterise the husband's entitlement to a continuing pension as a chose in action referable to some notional capitalised figure. We think it wrong to treat a lump sum so arrived as property however broadly defined.'*

While I do not necessarily agree that the pension cannot be treated as property, pursuant to the **PROSA,** which it should be noted is not identical to the Australian **Family Law Act** which the **Perrett** case was decided pursuant to, I am of the view that any ongoing order in relation to Mr. Clarke's pension would lead to an undesirable consequence and would not facilitate a 'clean break'.

Disposal

[158] It is hereby ordered –

1. A Declaration that the Claimant is entitled to the monetary equivalent of a 50% interest in the property located at Hyperion Avenue, which formed part of the Defendant's settlement;

2. The said property should be valued by a reputable valuator to be agreed between the parties within thirty (30) days of this Order or

if there is no agreement the Registrar of the Supreme Court is hereby empowered to appoint a valuator;

3. The cost of the valuation shall be borne equally by the parties;

4. The Defendant is to pay the Claimant the monetary value of 50% interest in the said property within one hundred and eighty (180) days of his receipt of the valuation;

5. No order as to costs; and

6. Liberty to apply.