[2016] JMSC Civ.160

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2013 HCV 01867

BETWEEN	**HORACE KENNEDY**	**CLAIMANT**
AND	**CHARMAINE KENNEDY**	**DEFENDANT**

IN CHAMBERS

Ms. Carlene McFarlane and Ms. Deneve Barnett instructed by McNeil & McFarlane for the claimant.

Ms. Marion Rose Green, Ms. Andrea Lannaman & Ms. Colleen Franklyn instructed by Marion Rose Green & Co. for the defendant.

Heard: 4th, 5th May & 23rd September, 2016.

Matrimonial Property - Division of matrimonial property- Whether claims statute barred - Whether parties entitled to equal share of the beneficial interest- Undeveloped land bought as joint tenants - Building erected on land during parties' separation – Property (Rights of Spouses) Act sections 6, 7 and 13.

EVAN BROWN, J

Introduction

[1] By his Fixed Date Claim Form filed on the 13th March, 2013, the claimant seeks, along with a number of consequential orders, a declaration that he is entitled to a fifty percent (50%) interest in the premises registered at Volume 1101 Folio 123, situated at Clarksonville, Aboukir in the parish of St. Ann. The defendant contends that she is entitled to one hundred percent (100%) interest in the property.

Background

[2] The parties are husband and wife. They met in 1998. When they met, the claimant was a farmer and the defendant was a seamstress, operating her own business. About nine months into their relationship they commenced cohabiting. The claimant moved into rented premises already being occupied by the defendant. Their relationship progressed and on the 4th March, 2000 they were joined together in holy matrimony. The union grew the following January with the birth of their son.

[3] Sometime before the year 2005 the property at Aboukir was purchased as undeveloped land. The purchase was not financed with the help of a mortgage. The source of the funds for the purchase was the subject of much dispute. That is, while the claimant asserted that he contributed to the purchase price, the defendant countered that the purchase of the land was her sole venture.

[4] The parties' relationship deteriorated, resulting in the breakdown of the marriage and their separation on 4th June, 2005. The claimant returned to reside in rented premises in Aenon Town and the defendant, together with the child of the marriage, retreated to the shelter of her parents' home. That notwithstanding, the land was transferred into their joint names on the 26th February, 2006 as joint tenants.

[5] The parties remained estranged until 2009. It appears there was little or no contact between the parties during their estrangement. In, or about May of that year, the defendant suffered what she described as a nervous breakdown which had a negative impact on her memory. During this period of illness, the defendant's sister contacted the claimant, apparently to assist with her care and that of their son. The claimant assisted with her care although there was no resumption of cohabitation.

[6] The defendant's period of incapacitation lasted for approximately two months. Her memory started returning in about the first part of August 2009. Following her

recovery, construction of the building commenced on the land at Aboukir, in either late August or early September 2009. The building comprised sections for a grocery shop, dressmaking and living quarters to the rear. The building was completed in about the third week of July 2010. As with the purchase of the land, the source of the funds for the construction of the building was the focus of dispute between the parties.

[7] In August, 2010 (not on the 7th August, 2012) the claimant gave up his rented dwelling and began to reside in the building constructed on the land, with the defendant's agreement. The defendant, however, did not join him as she continued to reside with her parents. The relationship between the parties again deteriorated, culminating in the service of a notice to quit upon the claimant in October 2012. The notice to quit was dated 12th October, 2012 and required the claimant to give up possession on or before 13th April, 2013. The defendant required the premises for her own use and occupation, as was recited in the notice. Mr. Kennedy eventually gave up possession of the premises on the 30th May, 2014.

Claimant's Submissions

[8] The claimant's counsel submitted that the following two case are dispositive of the issue in the case at bar. In ***Bevon March-Brown v Xavier St. Michael Brown*** HCV0886/2002 dated 9th September, 2008 (unreported) the court declared that each party was beneficially entitled to a 50% share in the matrimonial property. The claimant wife claimed a 100% interest in the property and the defendant contended for a 50% share. The property was registered in the joint names of the parties. The mortgage was also in their joint names. The court accepted that both parties contributed to the deposit, although in unequal amounts. The defendant also contributed to the mortgage payments, although in unequal sums. The court found "that at the time of the purchase, the parties intended that they should share equally and that the property should be a continuing provision for them during their joint lives".

[9] In coming to that decision, McDonald J relied on ***Cecilia Mitchell Davy v Riley Adolphus Davy*** SCCA No.11/2004 where Harrison P said:

> *"Where land is transferred into the names of husband and wife jointly, prima facie they are jointly entitled. However, such entitlement is not determinate of the beneficial ownership of each. If each contributes to its acquisition, the legal estate is in both jointly and the equitable interest is held by them in the proportion in which each contributed".*

McDonald J also drew support from Rowe P's dictum in ***Patricia Jones v Lauriston Edmund Jones*** SCCA No. 19/88 dated March 8, 1990. At page 6 the learned President said:

> *"The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares. See Cobb v Cobb [1955] 2 All E.R. 696".*

Defendant's submissions

[10] Counsel for the defendant, in their written submissions filed on the 13th July, 2016, argued that the claim is statute barred by virtue of the operation of section 13 (2) of the ***Property (Rights of Spouses) Act*** (***PROSA***). That submission rests on two premises. One, the section required the claimant to file his claim within twelve months after the termination of cohabitation between the parties. Second, having failed to file his Fixed Date Claim Form (FDCF) within the required time, the claimant compounded that failure by failing to apply for permission to file the FDCF outside of the stipulated period of twelve months.

[11] In respect of the date of termination of cohabitation, it was submitted that the parties agreed that they separated in 2005. While the defendant maintained that they never resumed their relationship, the claimant asserted in his affidavit that they reconciled in 2009. It was submitted that if the court accepts 2005 as the year cohabitation ended then the claim should have been filed in 2006. In the alternative, if the court accepts that there was reconciliation in 2009, by the claimant's submission reckoned the marriage to have again broken down two

years later, the submission ran. The FDCF should have been filed in 2012. That being the case, the claimant needed to apply for permission, proffering "good, sufficient and valid reasons for his undue delay", the submission concluded.

Issues

[12] The issues for my determination are as follows:

i. Whether the claim was brought out of time or, as it was put by counsel for the defendant, whether the claimant's claim is statute barred by way of the operation of section 13 (2) of ***PROSA***?
ii. Whether the property falls within the definition of the family home pursuant to section 2 of ***PROSA*** and if it does, would section 7 of ***PROSA*** apply?
iii. If the answer to issue # ii is in the negative, does the property fall to be considered under section 14 (1) (b) of ***PROSA***?
iv. If the answer to issue # iii is in the affirmative, what is the respective share of the parties in the property?

Findings and analysis

[13] The first and predicate issue for resolution is whether the FDCF was brought in breach of section 13 of **PROSA**. For ease of reference, the provision is set out below in full. It reads:

"*13. – (1) A spouse shall be entitled to apply to the Court for a division*

of property -

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
(b) on the grant of a decree of nullity of marriage; or
(c) where a husband and a wife have separated and there is no reasonable likelihood of reconciliation; or
(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation,

annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant."

[14] It is clear from section 13 (2) that the claim must be brought within twelve months of any of the triggering events listed in subsection 1 in the first instance. If, for whatever reason, the FDCF is to be filed outside of this period it must be done upon application to the court. If the claim is filed outside the twelve month period, extension of time must be obtained from the court for the matter to proceed: ***Angela Bryant-Saddler v Samuel Oliver Saddler*** [2013] JMCA Civ 11(***Saddler v Saddler***). ***Saddler v Saddler*** is also authority for saying the application for the extension may be filed, considered and granted after the FDCF had been filed.

[15] It is an indisputable fact that no application was made to enlarge time in the instant case. I must therefore consider whether such an application was necessary, the trial having proceeded to the point where I am called upon to make a decision. The starting point is an examination of what was the triggering event which led to the filing of the FDCF. There is no evidence that the marriage between the parties was dissolved or annulled and neither party so contended. Further, the claimant did not allege that the defendant was endangering the property or seriously diminishing its value. His contention was that he was being wrongly excluded.

[16] That exclusion sprang from their separation, which takes me to the triggering event of separation. The spouse may apply for a division of matrimonial property where the parties have separated and there is no reasonable likelihood of reconciliation: section 13 (1) (c) of ***PROSA***. Since the FDCF is grounded in their separation without the reasonable likelihood of reconciliation, not only the fact of separation must be established but also the unlikelihood of reconciliation.

[17] I take first the fact of separation. "Separation in a marriage is not withdrawing from a physical place but a withdrawal from a state of affairs," per Sykes J in ***Paulette Gordon v Vincent Gordon et al*** 2007 HCV 04845 delivered 7th April, 2009 (***Gordon v Gordon***). Separation, then, connotes not only a cessation of

cohabitation but also a destruction of the consortium. Consortium means living together as husband and wife with all the incidents which flow from that relationship, for example the mutual obligation to engage in sexual intercourse (see ***Bromley's Family Law*** tenth edition page 108). Consortium, in short, is the sharing of not only a home but also domestic life. The spouses, therefore, have a duty to cohabit, or live together, even if their circumstances admit of doing so only occasionally. There is no loss of consortium as long as both spouses retain the intention of living together (see ***Bromley's Family Law*** op. cit.). I will now examine the evidence in light of this encapsulation of what separation means in law.

[18] That the parties separated in 2005 is agreed. There was both physical separation and a destruction of consortium. The question is, was there a resumption of the marriage in 2009, consequent upon the defendant's illness. In his affidavit of April 9, 2014 the claimant said when Mrs. Kennedy became well again they "resumed living together and the relationship resumed thereafter". That was recanted during cross-examination and became "we didn't physically live together after 2005". He admitted that it was untrue that they resumed living together but maintained that they resumed their relationship. So, Mr. Kennedy was saying that although their physical separation continued, new life had been breathed into the nostrils of their consortium. Does the evidence support this?

[19] For Mr. Kennedy to establish this resuscitated consortium, he must demonstrate the presence of one or more of the incidence of consortium. His evidence in this regard was the bald contention that they resumed their relationship. That was as true as the recanted "resumed living together". The evidence of the resumed relationship was made conspicuous by its absence. While it is not singular in its application, the resumption of conjugal relations is an unequivocal indicator that the broken marriage bonds have been repaired. Yet, there was absolutely no evidence that the parties spent even one night together after Mrs. Kennedy recovered from her illness. Neither was there any evidence that they went out together to a place of entertainment, or to dinner, took a walk in the cool of the

evening or did any other of those things that couples would share. On the contrary, her health having returned, Mrs. Kennedy set about undoing things Mr. Kennedy did during her incapacitation such as removing his name from her accounts or transferring the funds to individually held accounts.

[20] Aside from the evidence of what transpired, or did not, after Mrs. Kennedy was well again, the circumstances that precipitated Mr. Kennedy's re-entry into her life are nothing short of remarkable. Two points are to be noted here. Firstly, Mr. Kennedy's return was not at the instance of Mrs. Kennedy but her sister. The import of this is, in as much as a marriage is made upon the agreement between the parties, if there was to be a resumption of the marriage, following their estrangement, that too must have come about by their agreement, tacit or expressed. So, there was no meeting of their minds concerning their marriage in 2009.

[21] That takes me to the second point, conflated into the question of the reasonable likelihood of reconciliation. A corollary of the absence of consensus to end their separation is the lack of evidence that they were reconciled or were reasonably likely to be. The parties remained unreconciled from 2005 until the happenstance of Mrs. Kennedy's, but certainly not serendipitous, illness in 2009. The parties considered their differences irreconcilable in 2005 after being married for a mere four years. It is noteworthy, in passing, that they were estranged for as long a period as they cohabited.

[22] During the period 2005 - 2009, the parties communicated with each other by proxy. Not even the matter of obtaining Mr. Kennedy's consent for Mrs. Kennedy to collect the title to the property brought them face-to-face. On the evidence of Mr. Kennedy, that stalemate lasted from 2006, without any sign of abating up to the time of Mrs. Kennedy's illness. So, up until then there was no reasonable likelihood of reconciliation occurring between them. The question is, did Mrs. Kennedy's illness usher in a softening of positions?

[23] The evidence inclines me to the view that there was no reasonable likelihood of reconciliation between the parties after Mrs. Kennedy's memory was restored. I earlier referred to her action of setting asunder joint accounts effected while she was ill. In addition to that, was her refusal to resume cohabitation with Mr. Kennedy. She refused to live with him at his rented premises which had the conveniences of kitchen and bathroom. Further, when he moved into the completed building on the subject property in 2010 she also refused to dwell with him. Mr. Kennedy advanced as the reason for her reluctance the inconvenience of the temporary bathroom at the latter building. The presence of those facilities at the rented premises rendered this reason grossly implausible. I find this to be powerfully persuasive evidence that Mrs. Kennedy no longer entertained any intention of cohabiting with Mr. Kennedy.

[24] Against the background of such stubborn refusal to resume cohabitation, without a plausible explanation, it is very clear that Mrs. Kennedy entertained no hopes of reconciliation with Mr. Kennedy. I infer from Mrs. Kennedy's refusal that the prospect of reconciliation was raised and perhaps discussed. Therefore, one party, undoubtedly Mr. Kennedy, entertained hopes of a reconciliation. However, the fact that one party entertained such hopes, though hope springs eternal from the human breast, does not translate into a reasonable likelihood of reconciliation between the parties. In sum, all Mrs Kennedy's actions make it palpable that she was resigned to a life, separate and apart from Mr. Kennedy. And, in my opinion, that is the very antithesis of a reasonable likelihood of reconciliation.

[25] I have, therefore, come to the conclusion that the parties' separation in 2005 was unbroken by the "spousal *detente*" or interregnum during 2009 - 2012. That is, the period covered by Mrs. Kennedy's illness and the occupation of the building by Mr. Kennedy. There was neither a resumption of cohabitation nor consortium between them. I conclude further, that not only was there no reasonable likelihood of reconciliation between them between 2005 and 2009, the "spousal detente" brought no change to the pre-2009 period. The ultimate conclusion is that when the parties separated in 2005 there was no reasonable likelihood of

reconciliation between them. I am therefore constrained to agree with the submission made on behalf of the defendant that the FDCF should have been filed, as of right, from 2006.

[26] According to the skeleton submissions filed on behalf of the claimant on the 18th September, 2015, the parties were reconciled in 2009 and two years later the marriage again broke down. That is, on the claimant's appreciation of the facts the marriage broke down in 2011. Accepting the claimant's appreciation of the facts for the sake of argument, the FDCF ought properly to have been filed in 2012. There is, therefore, much force in the alternate submission made by counsel for the defendant that on the claimant's calculations the parties would have then completely separated in 2011 and the claimant should have filed his claim in 2012, not 2013.

[27] Although I do not accept the claimant's view of the facts, even on that account an application ought to have been made for an enlargement of time within which to file the claim, even *ex post facto*. As was said above, no application was made for time to be enlarged and so, no order was made extending the time to make the FDCF compliant with section 13 (2) of ***PROSA***. Therefore, on one view, the limitation defence must succeed. If, as was laid down in ***Saddler v Saddler***, *supra*, the limitation defence is a complete defence, although procedural, the claim would be time barred.

[28] However, the trial having proceeded to this point, the question becomes, how should the claim be justly disposed of? According to the learning in ***Saddler v Saddler***, the failure to apply for permission does not render the FDCF invalid. It is merely irregular and cannot proceed until the time for filing has been extended. The situation which faces the court, therefore, is one in which it has proceeded to hear evidence on an irregularly filed FDCF.

[29] The answer to the question appears to be to treat the FDCF as having been filed under section 11 of ***PROSA***. There is no evidence before me that the parties' marriage has been dissolved. Indeed, the claim was contested on the basis of

their separation. As a matter of fact, the separation of the parties is the substratum upon which the submission that the claim is statute barred rests. According to Phillips JA, "although a fixed date claim form may be time barred from proceeding under section 13 (1) (c) of ***PROSA***, it could yet validly proceed under section 11 where there is no limitation period as long as the marriage subsists". (See ***Saddler v Saddler***, *supra*, para [45]). In the absence of evidence that the parties' marriage had been dissolved, I hold that the marriage subsists and the parties are estranged. I will, therefore, go on to consider the FDCF as if it had been filed under section 11 of ***PROSA***.

[30] Before going on to the question of entitlement, a brief excursus. It may be, that section 11 was placed in ***PROSA*** to provide for resolution of questions concerning property between spouses who are enjoying conjugal harmony. This might well be idle speculation. The Court of Appeal in ***Saddler v Saddler*** did not consider the question. The acceptance of the proposition that a time barred claim under section 13 (1) (c) may be validly continued under section 11, first put forward in ***Brown v Brown*** [2010] JMCA Civ 12, appears to rests on the *de jure* subsistence of the marriage, irrespective of its *de facto* termination. The resolution of property disputes between spouses in conjugal harmony and those estranged may contemplate different approaches.

[31] Both section 11 and section 13 appear under Part 111 of ***PROSA*** which deals with property generally. However, section 11, though dealing with questions about property between the spouses, has been placed in a separate sub-part of ***PROSA*** without any reference to the sub-part headed "Division of Property". In the "Division of Property" part of ***PROSA*** there is a prescribed regime which the court must follow to settle property disputes. If the property is the family home, the court is enjoined to make orders in accordance with section 6 or 7. Where the subject of the dispute is property other than the family home, the court is to take into account the several factors listed in section 14 (2).

[32] The court is not, under section 11 (1), directed to have resort to the provisions of section 14, as it is when considering applications made under section 13. Whereas section 13 is concerned with the division of property, the burden of section 11 (1) is "any question ... between the spouses as to title to or possession of property". The power of the court is to "make such order with respect to the property ... including an order for the sale of the property" (see section 11 (2). The question therefore arises as to the legitimacy of resorting to the several factors listed in section 14 when considering an application under section 11.

[33] In ***Brown v Brown,*** supra, Sykes J decided that by necessary implication the equal share rule enacted in section 6 of ***PROSA*** in respect of the division of the family home, applies equally to an application made under section 11 as well as section 13. That decision appears to rests on the accepted position that section 4 of ***PROSA*** swept away the old rules and presumptions of the common law and equity in so far as property transactions between spouses are concerned. Although ***Brown v Brown*** concerned the family home, in my opinion the position is no different when the claim concerns matrimonial property other than the family home. So that, if the property is adjudged not to be the family home the factors under section 14 (1) (b) are to be taken into account.

[34] Turning now to second issue, whether the property was the family home of the parties, the short answer is no. Section 2 (1) of ***PROSA*** provides a closed definition of the family home. Section 2 (1) reads:

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

[35] Leaving aside the question of the ownership of the property for the moment, it is not in doubt that the building on the land can properly be classified as a dwelling-house. The ***Concise Oxford Dictionary***, tenth edition, defines a dwelling house

as "a house used as a residence and not for business purposes". On the other hand, ***Black's Law Dictionary***, eighth edition, gives a number of definitions for a dwelling house. Firstly, it is "the house or structure in which a person lives". Secondly, a dwelling house is a building or a part of a building, a tent, a mobile home, or another enclosed space that is used or intended for use as a human habitation".

[36] The evidence is that the building constructed on the land was used primarily as a place of business and, between 2010 and 2014, as the residence of Mr. Kennedy. A small section was partitioned after completion to facilitate Mr. Kennedy's occupation, for however long or short a time. I shall return to the question of the permanency of this arrangement below. For present purpose I return to the classification of the building. The compilers of the ***Concise Oxford Dictionary*** did not contemplate this dual use and I would hesitate to use this definition, especially in a Jamaican setting where buildings often serve the dual purpose of business and residence. The definition which commends itself to me is the second one offered by ***Black's Law Dictionary***. Under this definition, the fact that Mr. Kennedy resided in a section of the building made it a dwelling house for the purpose of the definition of the family home. It was a part of a building that was used for human habitation.

[37] Notwithstanding Mr. Kennedy's occupation of the building as a dwelling house, the definition of "family home" contemplates joint occupation by the spouses. The evidence is that Mrs. Kennedy never resided at the premises. Therefore, she did not at any time use the premises, habitually or from time to time as either her principal or only family residence. Critically, the definition of family home contemplates joint use as such, not use by one of the spouses hence, the reference to "used ... by the spouses". Consequently, I completely agree with the submission of the defence that the disputed property falls outside the definition of family home and as such does not fall to be considered under sections 6 and 7 of ***PROSA***.

[38] Having answered that question in the negative, I will now consider the question of the parties entitlement. Section 14 (1) (b) of ***PROSA*** directs the court to take into consideration the factors listed in section 14 (2) (a) to (e). Under section 14 (2) (a) the court must consider:

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

Section 14 (3) provides a closed meaning of "contribution" as used in section 14 (2) (a) to (i). In essence, "contribution" is not limited to money and, under section 14 (4), "a monetary contribution is of [no] greater value than a non-monetary contribution".

[39] In this case, the issue in dispute is the contribution made to the acquisition of the undeveloped land in the first place and secondly, towards its improvement consequent upon the erection of the building between 2009 and 2010. I will address the matter in that order.

[40] The cost of the land was $200,000.00, the claimant swore in his affidavit. That figure was jettisoned under cross-examination. He changed his tune to say that they paid $225,000.00 which was again revised in re-examination to $350,000.00. In order to finance the purchase of the land, he asserted, he and the defendant threw three hands in a partner for which the defendant was the banker. The money for the partner came from the income of the shop both operated. The income from the shop was augmented by income from his farming and the defendant's dressmaking, the claimant said when cross-examined. Those three hands were supplemented by two more hands, borrowed from the partner, and a loan of $100,000.00 from the defendant's sister, according to the claimant.

[41] Under cross-examination, the claimant said each hand in the partner was $50,000.00, to make a total of $150,000.00 from the partner. Accepting that figure, for the sake of argument, since they borrowed two more hands from the

partner the partner would have yielded altogether $250,000.00. If that is correct, there would not have been any need for the loan for the defendant's sister.

[42] It was the defendant's contention that her sister was wholly incapable of affording that kind of loan facility, being "merely a sales clerk". The land was bought for $200,000.00. The purchase of the land was financed by $75,000.00 from her Scotia bank savings account; $19,000.00 from a Scotia Mint Insurance, which she closed; a gift of $17,000.00 from her father following the sale of a cow; and the remainder from income earned from her seamstress business.

[43] She further countered that each hand in the partner was worth $25,000.00. It was her contention that no partner money was used to purchase the land. In his affidavit response to the defendant, the claimant maintained that each hand in the partner was $50,000.00. He reiterated that three hands were used, along with the loan from the defendant's sister, to buy the land. No further mention was made of the two borrowed hands.

[44] The claimant sought, however, to explain this in re-examination. The land was really for $350,000.00. The vendor asked for $100,000.00 "up front" but the receipt was issued for $225,000.00 only; $25,000.00 was paid to Ernest Smith, Attorney-at-Law, for the transaction. Implicit in this explanation is the borrowed two hands of $50,000.00 each, to make the grand total of $350,000.00. It is not without significance that none of this was suggested to the defendant.

[45] Neither party tendered receipts. The question of the cost of the land is, however, settled by the endorsement on the title. In the record of the transfer, the consideration is listed as $200,000.00; the sum the defendant said she paid for the land. The amortization of that cost falls to be resolved as a matter of credibility in the absence of receipts. I give the claimant a failing grade on the credibility test. His evidence concerning the cost of the land bore the distinct character of the chameleon. It is perhaps superfluous to say that evidence of that nature is unreliable. Further, he did not impress me as being disposed to telling the truth.

[46] On the other hand, the defendant impressed me as frank and forthright. Since the defendant was the banker for the partner she would have had peculiar knowledge of specifics such as the value of each hand. And, perhaps paradoxically, she was the one who appeared to have the better recollection of events. I therefore prefer her evidence on the point. I accept too the explanation she gave concerning the impecuniosity of her sister. That financial disability rendered her sister incapable of advancing a loan of $100,000.00, half the price of the land.

[47] The upshot of the foregoing is that I reject the claimant's evidence that the land was purchased from a common pool of funds. Having rejected that evidence, there remains no evidence that the claimant made any direct financial contribution to the purchase of the land. I accept that the funds for the purchase of the land came solely from the defendant.

[48] Although the claimant did not contribute to the purchase price, was there an agreement between the parties, expressed or implied that each should share equally in the beneficial interest in the land? The case for the claimant is that the land was acquired in furtherance of a decision they took "to purchase a piece of land for ourselves". The defendant denied that they had any discussion and, or, made any such decision. The purchase of the land, she said, was her initiative absent "any contribution, encouragement or effort on the part of my husband".

[49] In light of the dispute concerning the fact of an agreement, I must therefore look to see if there is evidence of any conduct indicative of a meeting of the minds concerning the purchase of the land. A good starting place seems to be the fact that the defendant considered the claimant to be a decent man, in her experience a rare commodity, and one with whom she wished to have a family. She was, to use colloquial language, in it for the long haul. Even if it is accepted that she never saw the claimant as a financial partner, she certainly saw him as a partner for life.

[50] It is therefore unsurprising that both parties went to Mr. Ernest Smith's office "initially" in relation to the purchase of the land. The receipts issued from that office, at least two of them, were issued in the joint names of the parties. When payment was made to the vendor, both attended the home of one Mr. Case who witnessed their signature along with that of the vendor.

[51] Against the background of that high level of involvement of the claimant in the transaction, it is unlikely that some discussion about its purchase did not surface, however the existence of the land came to the attention of the parties. I find that not only was there discussion about the purchase of the land but a decision was also taken to buy it.

[52] Undoubtedly, the matter of Mr. Kennedy's name being placed on the title came up also for discussion. Since he did not provide any of the purchase price, the question is, why was his name placed on the title? Mrs. Kennedy said she placed his name on the title as he was her husband; she did so for convenience and not to vests an interest in him. According to her, it was her son's name that she wished to have on the title. The claimant discouraged her from doing so and "pressured" and "harassed" her to put his name instead.

[53] While Mr. Kennedy agreed that Mrs. Kennedy wanted her son's name on the title, he said that was subsequent to her recovery, not at the time of purchase. Admitted too was his discouraging her from doing so. He, however, denied bringing any pressure to bear on her to place his name on the title. I do not accept that there was this pressure under which she wilted for the reasons which appear below.

[54] Although I have accepted that Mr. Kennedy did not contribute to the purchase price of the land, I incline to the view that the intention at the time of the purchase of the land was that he should share equally in the beneficial interest in the land. That view is predicated on three premises. First, the nature and quality of their relationship at around the time of the purchase suggests the kind of looking out together towards the future conducive to joint acquisition for mutual benefit.

[55] Second, I regard the out of court attempt of Mrs Kennedy to pay Mr. Kennedy a sum of money, identical to the purchase price, as an acknowledgement of his entitlement. I do not accept Mrs. Kennedy's reason for making the offer. She said it was to get his name off the title. All of this came in the wake of Mr. Kennedy withholding his cooperation in her efforts to get the title from the lawyer. It is not without significance that the offer came on the heels of a request from Mr. Kennedy to have the land valued and payment made for half square. Even though Mrs. Kennedy advanced her own reason for making the offer, she did not deny the valuation request from Mr. Kennedy. So, in so far as the undeveloped land goes, Mr. Kennedy is legally and beneficially entitled to one half.

The building or developed property

[56] It was common ground that construction of the building commenced after Mrs. Kennedy's short period of illness, during which Mr. Kennedy had re-entered Mrs. Kennedy's life. Mr. Kennedy said they decided to construct the building. The platform upon which this decision was taken was a resumption of their marriage and business. In cross-examination he said what he meant by "we resumed our marriage" was that "we made up".

[57] In his affidavit of April 9, 2014 he said when Mrs. Kennedy became well again they "resumed living together and the relationship resumed thereafter". That was recanted during cross-examination and became "we didn't physically live together after 2005". He admitted that it was untrue that they resumed living together but maintained that they resumed their relationship.

[58] I reject the Mr. Kennedy's contention of a resumption of relationship. In the absence of a resumption of their relationship, it is a fanciful proposition to accept that the decision to build was a joint one. I reject that any such decision was arrived at. I will now examine the question of Mr. Kennedy's involvement in the actual construction of the building. Mr. Kennedy said he "was actually involved in the actual construction working alongside the paid workers". He also alleged that he provided for them. Specifically, he transported all the water used in the

construction from the parish tank, cooked for the men and worked on the site from 7 AM to 4 or 5 PM each day.

[59] The short answer to Mr. Kennedy's alleged involvement in the construction of the building is a resounding no. On this score I prefer the defendant and her witnesses who I found to be honest, frank and forthright. It is a short step from there to say I found no evidence that Mr. Kennedy in any way contributed to the building erected on the land. Although he asserted he was at the site every day, that was refuted by Rickman Walters, the contractor. He went on to also debunk the claimant's contention that he carried all the water used on the site.

[60] I accept that the claimant's involvement was limited to carrying water to the site one day as a hired hand and, perhaps, three bags of cement. The defendant was, in common Jamaican parlance, head cook and bottle washer. She hired the workmen, paid them and bought materials for the construction. Mr. Kennedy's counsel submitted that it is not about who handled the money and paid the workmen. Juxtaposed, however, with the claimant's contention of being on the site from dawn until dusk, it makes it nothing short of ludicrous that he, the more educated of the two, being so ever present, had no role to play which involved money.

[61] The claimant's counsel advanced that the real issue is whether the source of the funds came from a common pool and poured cold water on the receipts tendered by the defendant. I take first the alleged common pool. The pertinent question is, from whence came this common pool of funds? Construction of the building commenced either in August or September of 2009, that is three or four months after the claimant re-entered the defendant's life after their four years physical separation. It is a reasonable inference to draw that for most of those four months the defendant earned no income on account of incapacitation. It is, therefore, irrefutable that the funds were amassed prior to her illness.

[62] I hold that the funds so amassed came from the defendant's own endeavours. I cannot accept the claimant's discredited contention of a successful farming

venture, a farm which he abandoned in any event. Even though the defendant admitted continuing it for a while after his departure, there is no acceptable evidence of dollar value. I accept, that as an enterprise, it was a failure. Further, after the passage of four years without any input from the claimant, I fail to see how it could be just to allow the claimant to reap any benefit from it. The same can be said for the shop which was being run by the parties. In that vein, I reject that the parties opened a second shop.

[63] It was Mr. Kennedy's counsel's submission that the funds used to pay the workmen and purchase materials came from their joint account. The evidence disclosed that this joint account came about by, in a word, subterfuge. The undisputed evidence is that the claimant took the defendant to the financial institutions during her illness and effected the placing of his name on the accounts. He, however, gave absolutely no evidence that he personally lodged any money to any of the accounts. Neither did he say that he gave the defendant any money to deposit in the accounts. In any event, I accept the defendant that when she discovered the claimant's name on the Jamaica National account, the relevant account, she withdrew the money and placed it in an account held under her name and her son's. And, of course, there was no joint business venture between them at this time. So, there was no common pool of funds which was used to construct the building.

[64] I therefore find that there was no expressed common intention to construct the building upon the land previously acquired as joint tenants. A further finding I make is that there was no conduct referable to a common intention, that much is evidenced by the conspicuous absence of any contribution from the claimant.

[65] I find the events after the completion of the building of some persuasive value. Each party gave a different reason for the claimant's presence in the building. However, on balance, I prefer the defendant's reason. The claimant said they agreed he would take up residence in the building as the shop would have been unprotected. He, therefore, was residing in the building to provide security for the

shop. The level of protection the claimant was able to provide was not explored but I understand it to mean establishing a preventative presence on the premises.

[66] Taking a common sense approach, the need for security at a shop which was open for business would not have arisen during the day time. If there was in fact such a need (I say if because I accept the defendant's evidence that there was no stock in the shop when the claimant moved in), the time it would have arisen would be after closing hours when no one was expected to be there to even raise an alarm. Therefore, simply staying in the shop at nights would have accomplished the quality of security the claimant could have provided. Consequently, this rather implausible reason, coupled with the claimant's general lack of credibility, constrains me to reject his stated reason for being in the premises.

[67] Turning now to the defendant. She said the claimant was allowed to temporarily occupy the building for the convenience of having somewhere to stay, without paying rent, pending his departure to England. Apparently in connection with his leaving, the claimant wished to make a gift of a bed and dresser to their son. Not having anywhere else to store those items, they were placed in the partitioned section of the sewing area. I find this to be quite plausible, coming as it did from a witness who was largely unshaken.

[68] The partitioning of the building to accommodate the claimant was clearly an afterthought. On the subject of the partition, I accept that it was the claimant who funded it. The absence of any sanitary or cooking facilities is demonstrative of the temporary nature of the Mr. Kennedy's occupation. In my thinking, even his reason for being there is suggestive of temporary occupation. Accepting as I have, that the parties remained effectively separated even during the interregnum of 2009, the claimant could only have taken up occupation of the building with the claimant's permission; permission which she later withdrew as evidenced by the service of the notice upon the claimant.

[69] What, then, is the consequence of the defendant's improvement of the property from her own resources and without the agreement of the claimant? The claimant's counsel submitted that it being jointly held property, "the improvement and accretion in value is to their joint benefit". For that statement of the law she relied on ***Muetzel v Muetzel***, (for which she provided neither copy nor citation). Each would therefore be entitled to a fifty percent share in the property, as improved, regardless of the absence of any contribution by the claimant.

[70] In ***Muetzel v Muetzel*** [1970] 1 All E.R. 443,445 (***Muetzel***) Lord Edmund Davies said:

> *"If one postulates the matrimonial home has been acquired by joint efforts ..., the fact that one spouse spends money on extension of that house does not mean that the other can claim no part in the increased value of the property resulting from the extension. On the contrary in the absence of any specific agreement the extension should be regarded as the accretions of the respective shares of the beneficial interests. In other words the divisions must stand whether applied to the house in its original or extended form."*

[71] ***Muetzel*** was approved and applied in ***Wessel George Patten v Florence Edwards*** SCCA No. 29/95 by the Court of Appeal (***Patten v Edwards***). Patterson J.A. (at page 6) declared the law as follows:

> *"The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective shares remain constant. But the money expended by one tenant in common to effect the improvement can be recovered in a suit for partition or on a distribution of the value of the property as was decided in Brickwood v Young."*

[72] A reference to the head note in ***Brickwood v Young*** [1905] 2 C.L.R. 387 (H.C.) will suffice for present purposes. The headnote reads:

> *"A tenant in common who at his own cost repairs or improve the property cannot recover from the other tenants in common a proportionate part of the cost. But if the tenancy in common is brought to an end by partition, sale by order of the Court, compulsory acquisition, or the like, the tenant who has expended money on the property is entitled to a lien for the amount by*

which he increased the value of the shares of the other tenants in common."

[73] Having found that the defendant intended the claimant to have an equal share in the legal and beneficial interests in the land, it appears her subsequent improvement of the undeveloped land leaves the claimant's fifty percent share undisturbed. The seeming inequity of the claimant receiving a "betterment" is cured by the imposition of a lien on the proceeds in the event of a sale or partition.

[74] I therefore make the following orders.

(1) Order in terms of paragraphs 2,3,4,5 and 6 of the Fixed Date Claim Form filed on the 25th March, 2013.

(2) The defendant is granted a lien over the proceeds of sale of one half the value of the cost of erecting the building upon the land in question.

(3) No order as to costs.

(4) Liberty to apply.