



[2023] JMSC CIV. 29

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN THE CIVIL DIVISION**

CLAIM NO. SU2021CV01622

IN THE MATTER of All That parcel of land part of REIDS PEN now called **SANDOWN PARK, GREATER PORTMORE** in the parish of **SAINT CATHERINE** being Lot numbered **ONE HUNDRED AND NINETY** on the plan of **REIDS PEN** now called **SANDOWN PARK, GREATER PORTMORE** aforesaid deposited in the Office of Titles on the 29th day of March, 1996 of the shape and dimensions and butting as appears by the said plan and being part of the land registered at Volume 1293 Folio 257 of the Register Book of Titles.

AND

**IN THE MATTER OF A CLAIM UNDER THE PARTITION
ACT**

BETWEEN	POLYSEENIA ARLENE LEWIS	CLAIMANT
AND	MARLON FITZROY CAMPBELL	DEFENDANT

IN CHAMBERS

Ms Michelle Thomas instructed by Michelle Thomas & Associates, for the Claimant

Mrs. Ingrid Bryan instructed by Donald A. Bryan & Associates, for the Defendant

Heard: January 19 and March 10, 2023

Civil Procedure – Severance of joint tenancy – Whether claim for division of property under Property (Rights of Spouses) Act barred by statutory limitation period prescribed by section 13(2) of the Act – Whether property to be partitioned and sold and proceeds of sale apportioned under provisions of Partition Act – Sections 2(2), 3, 4 and 5 of Partition Act

Wolfe-Reece, J.

INTRODUCTION

- [1]** The focal point of this claim is whether it is just and equitable to sever joint tenancy so that the parties' legal and beneficial interests are held as tenants in common in unequal shares with ninety percent (90%) to the Claimant and ten percent (10%) to the Defendant based on the parties' unequal financial contributions to the subject property.
- [2]** The subject property is located at Lot 190, Sandown Park, Greater Portmore in the parish of Saint Catherine. The Claimant and Defendant are the registered proprietors of the property as both their names are endorsed on the Certificate of Title as joint tenants. The parties purchased the property in 2004 for Two Million Five Hundred Thousand Dollars (JMD\$2,500,000.00) by securing a mortgage from the Jamaica National Building Society. The amount for the mortgage was Two Million One Hundred and Four Thousand Eight Hundred and Seventy-Five Dollars (JMD\$2,104,875.00) with interest.
- [3]** It is not in dispute that when the parties purchased the property they were in a romantic relationship, or that the intention of the parties was that the property was to be used as an investment property and that at the time of acquisition of the property it was agreed between them that any rental income generated from the premises would go towards servicing the mortgage.

- [4] The monthly mortgage payment was Thirty Thousand Dollars (JMD\$30,000.00), which the bank in 2011 reduced to Twenty-Seven Thousand Nine Hundred and Forty-Eight Dollars and Forty-Nine Cents (JMD\$27,948.49).
- [5] Their romantic relationship began in 2000, and evidence reveals that the parties were married in 2005. The parties separated shortly after and were divorced in 2006 or 2007. There is no evidence of the exact date their divorce was granted and so it cannot specifically be said when the parties were divorced. However, the parties never lived at the subject premises or was it ever used as their family home.

THE CLAIM

- [6] The Fixed Date Claim Form and affidavit in support were filed on March 31, 2021 was filed pursuant to the Partitian Act. The Claimant sought the following substantive orders, inter alia:-
- i. An Order that the joint-tenancy be severed and the parties be endorsed on the Duplicate Certificate of Title registered as Tenants in Common holding in an unequal shares for all that parcel of land part of REIDS PEN now called SANDOWN PARK, GREATER PORTMORE in the parish of SAINT CATHERINE being Lot numbered ONE HUNDRED AND NINETY on the plan of REIDS PEN now called SANDOWN PARK, GREATER PORTMORE aforesaid deposited in the Office of Titles on the 29th day of March, 1996 of the shape and dimensions and butting as appears by the said plan and being part of the land registered in the Certificate of Title registered at Volume 1293 Folio 257 of the Register Book of Title
 - ii. Or in the alternative, an Order that the said premises be partitioned under the provisions of the Partition Act creating separate legal interest therein as tenants-in-common holding in an unequal share

- iii. Or in the alternative, an Order that the said premises be divided under the provisions of the Property (Rights of Spouses) Act
- iv. There shall be a sale of all that parcel of land part of REIDS PEN now called SANDOWN PARK, GREATER PORTMORE in the parish of SAINT CATHERINE being Lot numbered ONE HUNDRED AND NINETY on the plan of REIDS PEN now called SANDOWN PARK, GREATER PORTMORE, aforesaid deposited in the Office of Titles on the 29th day of March, 1996 of the shape and dimensions and butting as appears by the said plan and being part of the land registered in the Certificate of Title registered at Volume 1293 Folio 257 of the Register Book of Titles which is jointly owned by the parties and the net proceeds of sale be divided 90% for me and 10% for the Defendant
- v. An Order that the market value of the said premises be appraised by Benchmark Properties, real estate appraiser and valuator, each party bearing equally the cost of such valuation.
- vi. An Order that each party shall have the right to purchase the undivided share of the other party at the market value appraised by the said Benchmark Properties. If the Claimant and/or Defendant is unable to purchase the other interest in the said property within Thirty (30) days of this Order, then the property be sold on the open market and the net proceeds thereof be divided between the parties by way of 90% for me and 10% for the Defendant or in such shares as found by this Honourable Court.

THE DEFENDANT'S RESPONSE

[7] The Defendant filed his Response to the claim on November 19, 2021. Mr. Campbell rejected the Claimant's claim for variation of the parties' interest to reflect unequal shares of ninety percent (90%) and ten percent (10%). The Defendant did not oppose the severance of the joint tenancy, however he contended that they should hold their interest in equal shares of fifty percent (50%) for each party.

ISSUES

[8] The following issues arise for determination by the Court:-

- i. Whether the claim for division of beneficial interests under section 14(1)(b) of the Property (Rights of Spouses) Act(PROSA) should fail for falling outside the statutory limitation period prescribed by section 13(2) of the Act
- ii. Whether there should be a partition and sale of the property and the proceeds of sale distributed in unequal shares of ninety percent (90%) to the Claimant and ten percent (10%) to the Defendant under the Partition Act

[9] I have reviewed the submissions and authorities from Counsel and summarized them as follows:

Claim for division under the Property (Rights of Spouses) Act

CLAIMANTS SUBMISSIONS

[10] Counsel submitted that the applicable section under the PROSA is section 14(1)(b), which deals specifically with the division of property other than the family home because, even though the parties were married and the property is registered in both parties' names, the property does not fall within the statutory definition of the family home. The property did not serve as the parties' place of

residence, whether during the marriage or at any other time but instead the parties had agreed to use the property as an investment property.

- [11] Counsel submitted that since the subject property was not considered the family home, but other property, then the Court should take into account financial contributions of the parties in the division of the property, which is allowed under section 14(1) and (2) of the PROSA. Counsel relied on ***Simon McCormock v Cecile McCormock [2017] JMSC Civ 62***, where the Court considered section 14 of the PROSA. The Court found favour with the Defendants case and held that the Defendant was entitled to one hundred percent (100%) share in the property after consideration that the Claimant provided no evidence of his contribution to the property.
- [12] Counsel pointed to the Claimant's evidence where she stated that she has been the one solely taking on the responsibilities of paying the mortgage, property taxes, maintenance and renovation costs for the property. She submitted that at best the Defendant's contribution to both the acquisition and upkeep of the property has been minimal or insignificant. The Claimant expressed that the Defendant's only contribution to the property was assisting in obtaining the mortgage and paying for the property valuation and survey when the parties were purchasing the property in 2004. Since then, the Defendant has neglected all his responsibilities regarding the property.
- [13] Counsel submitted that the Defendant has not supported or made out his case with any form of documentary proof that he has contributed financially to the maintenance of the property apart from the receipts he provided for his payment of the valuation and survey.
- [14] It was further submitted that the Defendant disregarded his responsibilities in respect of the property, and she highlighted the evidence of the Claimant who spoke about times when the income generated from renting the premises during the period 2008 to 2018 was not enough to cover the total amount of the mortgage

or there was no tenant at all that she was left with the financial burden of paying the mortgage amount in whole or partially out of pocket. She stated that when the Claimant was having difficulties paying the mortgage, and the account fell into arrears and the bank notified the parties of the default on the mortgage, the Defendant did not assist with payment of the arrears.

- [15] In addition to making very little to financial contribution, Miss Thomas submitted that that the Court should find that the Defendant's actions show he has abandoned his interest in the property and neglected all of his responsibilities as a property owner. She submitted that the evidence supports he demonstrated no interest in keeping himself update with the property or the management of the property. The Defendant has shown neglect for his responsibilities as a property owner in many ways. It specifically it was pointed out to the Claimants evidence that in 2005 when the parties separated, they mutually agreed to make Mr. Errol Mason the agent for the property with responsibility for managing the affairs of the property because the Defendant failed to pay the mortgage on time or at all.

DEFENDANTS SUBMISSIONS

- [16] Counsel submitted that the Claimant's application for division under the PROSA must fail because it falls outside the ambit of PROSA and is barred by section 13 of the Act.
- [17] Counsel relied on ***Raymond Lincoln Oliver Johnson v Angela Eunice Johnson*** [2015] JMSC Civ 112, where Shelly-Williams J. (Ag.) (as she then was), held that the claim was barred because it failed to meet the twelve-month period for filing the claim set out in Section 13. The claim was filed nine years after the parties were divorced and the Claimant made no application for extension of time providing an explanation for the long delay.
- [18] Counsel submitted that a similar approach should be taken in the instant case since Ms. Lewis filed the claim fifteen years after the parties were divorced. On that basis, the claim is also barred by section 13 of the PROSA.

Claim for partition under the Partition Act

CLAIMANTS SUBMISSIONS

[19] Counsel, Ms Thomas submitted that based on sections 2(2), 4 and 5 of the Partition Act, the Claimant is entitled to partition and the sale of the property unless there is a compelling reason to the contrary.

[20] Counsel relied on much the same evidence regarding contribution of the parties to the property. She submitted that the Court should consider the unequal financial contribution of the parties in the maintenance and upkeep of the property. Miss Thomas further urged that the evidence that the Claimant paid a significantly greater portion of the mortgage and the expenses in relation to the property than the Defendant the proceeds from the sale of the property should therefore not reflect an equal partition, as to do so would result in injustice.

[21] Counsel also contended that any proceeds from a sale of the property should therefore reflect an unequal apportionment, with the greater share to the Claimant on the basis that she has contributed significantly more to the maintenance of the property. She suggested that based on the Defendant's lack of financial contribution and involvement in the property, the Court should find that his share should be reduced to ten percent (10%) and the Claimant's share increased to ninety percent (90%).

[22] The Claimant relied on the authorities of *Porter v Lopes*,¹ in which Jessel MR examined section 4 of the UK Partition Act, which is identical to section 4 of our Partition Act, as well as *Cynthia Stephens v Clemenston Stephens* [2012] JMSC Civ 134, where Williams, J (as she then was) in interpreting section 4 of the Partition Act, stated that:-

¹ 1877 7 CH D 358; 1874 – 80 All ER Rep Ext 1819; [1877] 7 Chan 356

“The section is regarded as making it imperative on the Court, to order a sale unless it sees good reason to the contrary. The party interested... is entitled to such a sale as of right unless there is some good reason to the contrary shown, the onus then is on the party opposing to show what the Court will consider good reason.”

DEFENDANTS SUBMISSIONS

- [23]** Counsel submitted that sections 2 and 3 of the Partition Act gives the Court power to order a partition or sale of the subject property and distribute the proceeds accordingly.
- [24]** Mrs Bryan pointed out that the Defendant does not oppose the partition and sale but contends that the Defendant strongly opposes the variation of beneficial interests to ninety (90%) and ten (10%) percent to the Claimant and Defendant respectively. The Defendant maintains that the Claimant is only entitled to fifty percent (50%) interest and share of the proceeds from a sale of the property.
- [25]** Counsel submitted that the fifty percent (50%) interest to each party should remain because there has not been any significant development to the premises since the parties bought it in 2004. Further, that the Claimants exhibited receipts for payments to Mr. Mason for installation of new gate and windows exhibited by the Claimant do not sufficiently prove that these were in relation to the subject property.
- [26]** Mrs. Bryan submitted the Defendant disputes the Claimant’s assertion that he has disregarded his obligations as property owner by showing no interest in the happenings of the property and making no financial contribution to the mortgage, maintenance and upkeep of the property.
- [27]** The Defendant contends that he asked the Claimant to join him in making the purchase for the property because he was not able to secure the mortgage on his own. The Defendant also contends that he made the first payment towards the mortgage and subsequently secured the first rental of the property, which covered the mortgage until 2008. The Defendant also maintained that during the initial

years between 2004 and 2008, he was very active in the rental of the premises. During that time, the mortgage payments were up to date. It was after that time that the agent Mr. Mason took full control of the premises.

[28] Counsel submitted that after Mr. Mason was put in charge of managing the property, Mr. Mason and the Claimant began keeping pertinent information about the management of the premises from the Defendant. The Defendant contends that the Claimant refused to share information about the arrears for the mortgage and foreclosure notices. Further, the receipts exhibited by the Claimant do not provide pertinent information, such as dates, names of tenants and rental amount paid.

[29] Counsel also relied on *Raymond Lincoln Oliver Johnson v Angela Eunice Johnson* (supra) for the factors the Court must consider upon an application for division or partition of property. Counsel argued that the facts of this case do not fall within any of the factors listed for consideration by the Court that would warrant a variation of interest in the property.

LAW AND ANALYSIS

Issue #1: Whether the claim for division of beneficial interests under section 14(1) (b) of the PROSA should fail for falling outside the limitation period prescribed by section 13(2) of the Act

[30] The Property (Rights of Spouses) Act (PROSA) provides the legislative framework for dealing with property related issues between spouses upon divorce, separation annulment or termination of cohabitation. There are instances where a claim may be statute barred by virtue of Section 13 of PROSA and the parties may seek an extension of time from the Court to pursue a Claim under PROSA. They may also seek to pursue non –matrimonial legislation, common law and equity in applying to the Court to pursue their property rights.

[31] Section 14 of PROSA provides that where a spouse applies for division of property other than the family home, the Court may take into account financial contribution of the parties whether directly or indirectly in the acquisition, conservation or improvement of the property. It is clear that financial contributions is a factor the Court can consider under the PROSA in varying the parties' shares.

[32] However, the application for division of property should be made within twelve months of a divorce, separation, annulment or termination of cohabitation. This statutory limitation period is prescribed by section 13(2) of the Act, which provides that:-

"An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, or separation or such longer period as the Court may allow after hearing the applicant."

[33] The law is clear that where the application is made outside the limitation period, the Claimant must seek leave or permission from the Court for an extension of time.

[34] Counsel for the Claimant did not address the issue of the timing of the application in her submissions. There was also no request for leave or application for extension of time made, nor was there any affidavit evidence by the Claimant addressing the issue of the long delay of about fifteen years between the period of separation and the filing of the application for division of property.

[35] Counsel for the Defendant took the position that the claim for division of the property under the PROSA should therefore fail for the Claimant's failure to meet the prerequisite of the time limitation under the Act.

[36] Guidance in approaching this issue can be gleaned from one of the authorities cited, ***Raymond Lincoln Oliver Johnson v Anglela Eunice Johnson*** (Supra) in which Shelly-Williams J. at paragraph 11 cited Harris JA in the judgment of ***Delkie Allen v Trevor Mesquita*** [2011] JMCA Civ 36.

"I go further to delve into a useful approach to the issue of extension of time adopted by of Harris JA. at paragraph 14 of her judgment, in which she stated:-

"Where the factors governing an extension of time are not provided for by statute or the rules of court, a court of first instance or appellate court may, in exercising its inherent jurisdiction, give considerations to the conditions which generally support an extension of time to do an act or comply with any rule of law. It follows that, in determining whether an extension of time should be granted, a court ought to follow the general procedure underpinning an entitlement to such grant. Thus in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court reasons to be evaluated by the court to justify his right to do so. Such reasons should explain the delay in filing the claim. The grant of leave is a precursor to the grant or refusal of an extension of time."

- [37] Although the PROSA does not expressly state what factors the Court must take into consideration in determining whether to extend the time to file the claim, what is clear is that it is unquestionable that the Claimant must provide some explanation or reasons to the Court. This is required for the Court to evaluate those reasons and assess whether there are sufficient grounds for extending time and allowing the applicant to bring the claim.
- [38] The Claimant has neither made an application to extend the time to pursue a claim under PROSA nor provided any explanation for the delay. Therefore, there could not have been a basis for the Court to exercise its discretion to extend time to bring the claim, especially at this stage of the trial. I am of the view that to ask the Court to apply the provisions of PROSA to determine this claim in these circumstances would mean a flagrant disregard for the legislative framework.
- [39] I accept the evidence of the Defendant that the parties were married and later separated in 2006. Even if there is lack of documentary proof of the marriage, the Court still accepts the evidence of the parties that they were in a relationship between 2000 and 2005. Whether the parties were married in 2005 and later divorced is not an issue before the Court. However, the Court accepts the evidence that the parties ended their relationship in 2006 or 2007. Whether it was by separation during the marriage or termination of their cohabitation, the time for

applying for division of property started to run in 2006 or 2007. I conclude that the alternative order sought by the Claimant under PROSA cannot be sustained as it is out of time by some fifteen (15) years. I find that the claim for division of property under PROSA is statute barred by operation of section 13(2) of the Act.

Issue #2: Whether there should be a partition and sale of the property and the proceeds of sale distributed in unequal shares of ninety percent (90%) to the Claimant and ten percent (10%) to the Defendant under the Partition Act

[40] The Court has an inherent jurisdiction under section 48 of the Judicature (Supreme Court) Act to determine questions of property rights in accordance with the rules of common law and equity. In addition, sections 2(2) and 4 of the Partition Act grant the Court the power to order partition and sale of property, and for the distribution of the proceeds of sale.

[41] Section 2(2) of the Partition Act states that:-

“For the purposes of this Act, an action for partition shall include an action for sale and distribution of the proceeds; and in action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.”

[42] Section 4 of the Partition Act provides that where a co-owner of property requests the Court to order a sale of the property and distribute the proceeds, the Court is obliged to direct a sale and give all necessary and consequential directions, unless it is satisfied that there is good reason to the contrary.

[43] In *Porter v Lopes*, (supra) Jessel MR examined section 4 of the UK’s Partition Act, which is identical to our section 4, Partition Act. Jessel MR stated as follows:-

“Now, therefore there is an absolute right in the owner of a moiety to require a sale subject to this; unless it see good reason to the contrary, the Court shall direct a sale... Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see some other good reason from the peculiar nature of the property, but it must be a good reason against the sale.”

[44] In ***Cynthia Stephens v Clemenston Stephens***, P.A. Williams J. (as she then was) at paragraph 6 examined section 4 of the Partition Act. She stated that:-

“This section is regarded as making it imperative on the Court, to order a sale unless it sees good reason to the contrary. The party interested in sale is entitled to such sale as of right unless there is some good reason to the contrary shown the onus then is on the party opposing to show what the Court will consider good reason.”

[45] Section 5 of the Act outlines the relevant procedure to be adopted when a party requests the Court to direct a sale and distribute the proceeds instead of a division of property.

[46] It is clear that once a joint tenant requests a partition and sale and distribution of the proceeds, the Court is obliged to grant the Orders sought unless there is compelling reason to the contrary. Although the Court must not do so blindly, as the Court must be satisfied that the evidence relied on to support the claim for severance of interests is clear, logical and convincing. The issue the Court must contend with is that the Partition Act does not state what factors the Court must consider in determining a variation of beneficial interests between the parties. The Court is therefore pressed to resort to common law and equitable principles as aids to make this determination.

Severance of joint tenancy

[47] It is not in dispute whether the joint tenancy between the parties ought to be severed, as on the Defendant's case, he admitted that he has no issue with severance or partition and a sale of the property. His contention is with the variation of beneficial interests to ninety percent (90%) and ten percent (10%). Since partition under the Partition Act is also a matter of severance, the common law principles relating to joint tenancy are also applicable.

[48] In this regard, a useful authority is the Jamaican Court of Appeal case of ***Carol Lawrence et al v Andrea Mahfood*** [2010] JMCA Civ 38, in which Morrison J.A.

(as he then was). cited the case of **Williams v Hensman**,² who discussed the principles governing the severance of joint tenancy. At paragraph 26 Morrison J.A. stated that the three methods of severing a joint tenancy are :-

- i. An act, usually referred to as “alienation of share” by any one of the joint tenants, which has the effect of creating a severance of his share. An example is where the joint tenant disposes of his half share in the property to a third party prior to his death*
- ii. Mutual agreement between the joint tenants*
- iii. Course of dealings between the joint tenants sufficient to treat the parties’ interests as constituting a tenancy in common³*

[49] Based on the decision of the House of Lords in **Stack v Dowden** [2007] UKHL 17, once there is joint legal ownership, this creates a presumption that both the legal and beneficial interests are divided equally. It is a burden that rests on the party who asserts that there should be beneficial ownership in some unequal proportion to show reason to the contrary to rebut the presumption of equal legal and beneficial interests created by joint legal ownership. In doing so, one of the factors the Court considers is the common intention of the parties at the time of the acquisition of the property and whether this common intention changed by conduct of the parties throughout the course of their relationship. Financial contributions may be relevant in ascertaining the parties’ true intentions. However, each case is different and is to be decided on its own facts.

[50] According to Morrison JA in **Carol Lawrence et al v Andrea Mahfood**, (supra) there must also be an element of mutuality in order for there to be a finding of severance of joint tenancy.

² (1861) 70 ER 862

- [51]** When assessing the evidence, the Court should therefore consider the following:-
- i. Was the common intention of the parties upon acquisition of the property to hold their beneficial interests equally
 - ii. Does the parties' course of dealings demonstrate a change in common intention towards severance of joint beneficial interests

Unequal financial contributions between the parties

[52] The fact of a greater financial contribution made by the Claimant does not automatically grant her a right or entitlement to severance and variation of the shares in the property. The entire circumstances of the case and the evidence must be assessed in much broader terms. However, it is a compelling consideration, in absence of evidence to the contrary by the Defendant.

[53] In light of the evidence of financial contributions provided by the Claimant, it is clear that the Claimant made a significantly greater financial contribution to the acquisition and maintenance of the property than the Defendant. She exhibited receipts for payments of the mortgage, including evidence led that she solely paid the mortgage arrears after the bank notified the parties of the foreclosure on the property. The Defendant did not assist with paying the arrears after the bank served the foreclosure notice. It is the Defendants evidence that he was not aware of the arrears with regard to the mortgage and neither was he told of this by the Claimant or Mr. Mason their agent.

[54] The Claimant led further evidence that she had the sole responsibility for paying the property taxes, paying the costs of general repairs, upkeep and renovating of the property. These are all payments the Court believes and accepts that the Claimant made without any assistance from the Defendant. The Defendant, on the other hand could only speak to payments he made towards his half of the deposit and half cost on the Agreement for sale and valuation costs when purchasing the property, and admitted that he only made one mortgage payment. The Defendant's

evidence was also that after he made the first mortgage payment, he sought a tenant to rent the property. The Defendant did not provide the Court with any details of that initial rental so that it can assess whether the amount that was being paid from the rental was sufficient to service the monthly mortgage payments. The Defendants evidence is that the Claimant agreed to cover the shortfall to service the mortgage when they were involved in a relationship and this continued till the mortgage was paid off. Despite the change in circumstances of their relationship he made no enquires with regard to maintenance of the property.

[55] The Court therefore concludes based the evidence of both parties, that after their separation the parties did not communicate much nor did they make any effort to despite the fact that they had a child together. There were issues between them from initial stages when the Defendant had the responsibility to collect the rent, which he failed to do in a timely manner, which ultimately led to untimely payments of the mortgage.

[56] Claimant maintains that the rental income was always less than the amount for the mortgage even though she agreed to pay the difference to cover the mortgage payment it was an expense she always carried alone. Her evidence is that the Defendant never enquired how the mortgage was being paid, or how general repairs and renovation works were being paid for. The Claimant maintained that this conduct by the Defendant constituted an abandonment of his interest in the property as a co-owner and joint tenant.

Abandonment of interest – To possess or dispossess

[57] The parties agree that the Defendant played an active role in the management of the property in the initial years from the time of the acquisition of the property, but only until 2008. At that time, the parties agreed that Mr. Errol Mason (the Claimants step-father) would take over the management responsibilities as the property agent. The evidence on the Claimant's case is that the parties came to this

agreement because the Defendant would sometimes pay over the mortgage payments from the rental income late or not at all.

[58] The evidence from both parties for the period after 2008 is that the Claimant took on a more active role in overseeing the management of the property's general and financial affairs. Counsel for the Claimant suggested that the Defendant had abandoned his interest in the property and showed disregard for the happenings of the property. The Defendant contended that this was not the case, as the Claimant was the one who kept pertinent information about the property from him; and that when he followed up with Mr. Mason he would reassure the Defendant that everything was well.

[59] The Claimant stated there were times when the property had no tenant and there was no evidence that the Defendant even had knowledge of times when the property was rented and when it was not. The evidence from the Defendant that the subject property is approximately 5-7 minutes from his residence. He stated in cross-examination :-

Q. You can easily visit the property?

A. Yes, as I daily did

This bit of evidence is questionable as the when one assesses the evidence as a whole I conclude that the Defendant knew very little as to what was happening at the property and took no clear decisive action to know.

[60] The Defendant did not provide evidence that he contributed to payment of property expenses, including the mortgage whenever the property was not being rented or whenever there was a shortfall. Neither did the Defendant make financial contributions to property taxes; general repairs; upkeep or renovating of the property. The Defendant was also asked in cross-examination if he paid property taxes, he responded No, Mr. Mason agreed to. This is against the background that the rental amount did not cover the mortgage sum so one would have to wonder where would Mr. Mason derive the sums to cover this expense.

- [61] In the case *Valerie Freckleton v Winston Freckleton* (unreported) Claim No HCV01694 of 2005, Sykes J (as he then was) briefly addressed the issue of the possibility of an inactive joint tenant being dispossessed by an active joint tenant who is exercising possession and control over the property as if he or she were the sole owner. Although the **Freckleton** case was within the context of extinguishment of title by adverse possession, the principles relating to the responsibilities of a co-owner or joint tenant are applicable. The principle is that a joint tenant has obligations as co-owner of property to be proactive and keep updated in the management and finances of the property, and not delegate that responsibility to the other joint tenant. This is subject to mutual agreement between the parties to the contrary.
- [62] The course of conduct between the parties over the years demonstrate that there was an element of mutuality in agreeing to sever joint tenancy. The evidence is that the Claimant lived overseas and the Defendant live relatively near to the subject property. I find that he was not in communication with the Claimant and showed very little interest in the affairs of the property.
- [63] The parties acted in such a way that I conclude that their common intention to hold beneficial interests as joint tenants changed to holding their interests unequally. The Defendant took no active interest in ensuring the mortgage was being paid and any other expenses associated with the property. He spoke about the water and electrical bills being in his name but admitted that the bills were not being paid, which caused services to be suspended. The evidence suggests that the Defendant was not aware of the general affairs and finances relating to the property.
- [64] In cross-examination, the Defendant admitted that he was not aware the mortgage was in arrears but that he eventually received a letter from the bank about the arrears. The Defendant also admitted that he eventually became aware that the Claimant paid the arrears and paid off the mortgage. He is suggesting that it is not that he failed to show interest but that the Claimant and Mr. Mason failed to advise

him of any issues when he enquired as whenever he asked Mr. Mason about the property he was told everything was in order.

[65] The Defendant admitted in cross-examination that he never paid Mr. Mason for his services as agent. Neither did the Defendant provide funding for maintaining the property. The Defendant further admitted that he found out about the new windows when he drove by the property, and expressed that if he had been made aware he would have changed them. Despite these active occurrences with the property, the Defendant never saw it fit to join the Claimant in its upkeep and maintenance. This course of conduct showed that by 2008 and onwards, the behaviour of the Defendant is best described as a general disinterest in the property and did not actively participate in the management and financial affairs of the property.

[66] Further indication that the parties developed the common intention to sever joint tenancy is seen in the fact that the parties ended their relationship and separated over fifteen years prior to the commencement of the claim, with the Claimant residing overseas and the Defendant residing in Jamaica, and that the parties no longer communicated with each other.

[67] On the other hand, the Claimant provided evidence that in addition to the financial burden of solely paying the mortgage when the property was not being rented, as well as any shortfall when the rental income was insufficient. It is evident that the Claimant made the greater financial contributions to the property and played a more active role in the management of the property. Several expenses the Claimant incurred included:-

- Closing the mortgage account
- Property taxes
- Installing sliding windows
- Home repairs
- Out of pocket mortgage payments

[68] The monthly mortgage payment was a joint obligation, therefore, the fact that the rental income serviced the mortgage is a benefit that would be equally accrue to

the parties. However, Claimant's claim that she made a greater financial contribution is, grounded whenever she had to pay the mortgage directly out of pocket. The Claimant gave evidence that the rental income ranged from Fifteen Thousand Dollars (JMD\$15,000.00) to Twenty-Thousand Dollars (JMD\$20,000.00) per month and that the mortgage payment was Thirty Thousand Dollars (JMD\$30,000.00) per month, which the bank later reduced to Twenty-Seven Thousand Nine-Hundred and Forty-Eight Dollars and Forty-Nine Cents (JMD\$27,948.49). The accounting evidence shows that whether or not the property was being rented, there would always be a shortfall between the rental income and the mortgage payment, which the Defendant never assumed responsibility for paying, even after the end of the relationship.

[69] The only form of documentary evidence provided by the Defendant was (i) receipt for payment of the valuation cost (JMD\$6000.00) and (ii) receipt for payment of the deposit, further payment and half cost of the Agreement for Sale (JMD\$395,125.00) which was a shared cost between him and the Claimant. The Defendant, having provided no compelling reason why there should not be partition or severance of joint tenancy, and a sale of the property and distribution of the proceeds, the Court therefore finds that a fair, just and reasonable apportionment based on the evidence presented is eighty-five percent (80%) to the Claimant and fifteen percent (20%) to the Defendant.

DISPOSITION

- i. Joint-tenancy is severed and the parties are to be endorsed on the Duplicate Certificate of Title registered at Volume 1293 Folio 257 of the Register Book of Titles as Tenants in Common.
- ii. Application under the Property (Rights of Spouses) Act is refused.
- iii. The property situated at Lot 190, Sandown Park, Greater Portmore, St. Catherine being the land comprised in Certificate of Title registered at

Volume 1293 Folio 257 of the Register Book of Titles is to be sold and the proceeds of sale divided 80% to the Claimant and 20% to the Defendant

- iv. The property is to be appraised by Benchmark Properties, real estate appraiser and valuers, and each party is to bear the cost of such valuation in accordance with their respective shares.
- v. The Claimant is given the first option to purchase the Defendant's share at the market value appraised by the said Benchmark Properties within Thirty (30) days of the valuation being provided to her Counsel.
- vi. If the Claimant fails to exercise the first option to purchase the Defendants share the Defendant may within thirty (30) days of expiration of the Claimants option offer to purchase the Claimants share.
- vii. If both parties are unable to purchase the other's share then the subject property is to be placed on the open market for sale and the proceeds of such sale be divided between the parties with 80% to the Claimant and 20% to the Defendant.
- viii. All incidental and related expenses of the sale of the said property is to be deducted from the proceeds of sale and are to be divided between the parties in accordance with their respective shares.
- ix. The Registrar of the Supreme Court is empowered to sign or execute any document to effect transfer of the property in the event either party fails, neglects or refuses to do so.
- x. The Claimant's Attorneys-at-Law, Michelle Thomas & Associates are to have carriage of sale
- xi. Each party to bear his own costs