



[2018] JMSC 151

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2015HCV03223

BETWEEN	ANNETT ROSE PAGE	CLAIMANT
AND	LESTER GEORGE PAGE	DEFENDANT

IN CHAMBERS

Brian Moodie and Carl Dowding on June 28, 2017 and Monique McLoed on June 19, 2018 instructed by Pickersgill, Dowding and Bailey-Williams for the claimant

Tamara Riley-Dunn instructed by Nelson-Brown, Guy and Francis for the defendant

June 28, 2017, June 19 and December 13, 2018

Application to extend time to file claim under s.13 of the PROSA – Four considerations – Balance of prejudice – Limitation defence is a procedural but complete defence – Timing of application is very significant – There is to be equality of arms – Severe prejudice to be suffered by the defendant – Non-interference by the court with the terms agreed in a consent order as they are final and binding – Preserving status quo as regards first option to purchase family home – Acts of maintenance and upkeep deemed the alternative to the rent owed to the defendant by the claimant – Claimant derives an interest under a resulting trust – Claimant's contribution to purchase and maintenance of motor vehicles bought in sole name of defendant – Quantification of claimant's interests in the motor vehicles

D. FRASER J

Introduction

- [1] The claimant and the defendant were married on December 30, 1990. On July 18, 1995 the parties entered into an agreement to purchase lands located at Huntley Lot 1 Berrick District, Oracabessa in the parish of St. Mary. A house was constructed on this property by the parties which served as the family home.
- [2] Throughout the marriage the claimant worked as a Colporteur while the defendant had different jobs. The defendant initially operated a Nissan motor car as a taxi. When he subsequently obtained a contract with the Jamaica Union of Travellers Association (JUTA) (Ocho Rios Chapter), the Nissan was sold and he purchased a Toyota Minibus, 8480 PP which was used in his employment with JUTA. Later, this bus was sold and replaced by the purchase of a 1996 Toyota Coaster that was also used solely in his employment with JUTA. The Coaster was sold in 2007 when the defendant ended his contract with JUTA and enlisted in the police force.
- [3] The marriage suffered an irretrievable breakdown and the parties were divorced by Decree Absolute on August 4, 2010. On June 25, 2015 the claimant brought this action under the **Property (Rights of Spouses) Act (PROSA)** seeking:
- (1) a declaration that the property at Berrick District was the family home to which each party was entitled to 50%;
 - (2) the first option to purchase the defendant's share limited to \$2,100,000 based on a valuation conducted by Cohen and Cohen Co. Realty Limited in September 2011, failing which the property should (at the claimant's cost) be valued to ascertain the market value, sold, the defendant paid \$2,100,000 and the claimant receive the net proceeds;
 - (3) an order that the defendant compensate her for one-half of the costs to repair and upkeep the house since the date of separation;
 - (4) an order that the claimant is entitled to 50% interest in the Toyota Minibus and the Toyota Coaster, which interest should be valued and paid to her;

(5) an order for the defendant to account to the claimant for 50% of the net profits from the Toyota Minibus and the Toyota Coaster.

[4] On the hearing date June 28, 2017, before the matter commenced, the parties agreed to a consent order which stated at paragraph 1 that:

(1) The Claimant and the Defendant are each entitled to fifty percent (50%) interest in the family home located at Lot 1 Berrick, Oracabessa St. Mary, being all that parcel of land comprised in valuation number 034-06-013-2 (hereinafter referred to as the said property)

The Issues at Trial

[5] At paragraph 3 of the order the remaining issues for the determination of the court at trial were identified as:

- (a) The issue of which party shall have the first option to purchase the other's one-half of the said property;
- (b) That (*sic*) the issue of compensation to the Claimant for one-half of the costs to repair, and upkeep of the house since the date of separation;
- (c) The declaration as to the Claimant's entitlement to fifty percent (50%) interest in the motor bus licensed as 8480 PP as well as a 1996 Toyota Coaster Bus and the consequential orders that would flow from any such declaration;
- (d) The issue of an accounting being done by the Claimant¹ (*sic*) for fifty percent (50) of the net profits from the buses from the date of separation to the date of judgment; and
- (e) The issue of the motor bus valued and the Claimant paid her half interest therein.

The Application to Extend Time to Bring the Claim Under PROSA

[6] At the conclusion of the hearing on June 28, 2017, it was ordered that counsel on both sides should file and serve on opposing counsel closing submissions, on or

¹ This should be Defendant

before July 26, 2017. Closing submissions were filed on behalf of the defendant on July 25, 2017 while those for the claimant were filed on July 31, 2017.

[7] Also on July 31, 2017, counsel for the claimant filed a Notice of Application seeking an extension of time for the claimant to apply for division of property pursuant to ss. 6,7,13,14 and 20 of the **PROSA**, to the date of the filing of the claim. The grounds on which the application was made were that:

- (a) The claimant who occupies the family home was the wife of the defendant and is entitled to apply for a declaration of her interest in the family home and other property pursuant to ss. 6, 7 & 14 of the **PROSA**;
- (b) The claimant is also entitled to apply for an extension of time within which to make an application for the division of property pursuant to s. 13(2) of the **PROSA**;
- (c) The application can be made to extend time after the period has expired with the leave of the court;
- (d) The claimant has a claim with a real prospect of success;
- (e) The delay in filing the application herein was not intentional and ought not to be prejudicial to the defendant;
- (f) The applicant has a good explanation for failing to seek the extension of time to file the claim within the time stipulated; and
- (g) The justice of the case favours the grant of an order to extend time.

[8] The application was supported by an affidavit of Carl Dowding dated and filed July 31, 2017. Among his averments were that the application for extension of time could be made at any time and that the authorities on this point seem to suggest that the matter is suspended until this issue was adjudicated upon. Also he stated that from the inception of the matter a limitation defence was never asserted and that there had been countless hours of negotiation which had led to a partial compromise of the matter. Further he indicated that the failure to comply with the **PROSA** was unintentional, and given that the defendant had participated in the suit filed pursuant to the **PROSA** and agreed that the property in dispute was the family home the application would not materially affect the defendant.

- [9] After due consideration the court invited counsel for both parties to make submissions on the application. These were heard on June 19, 2018. However, before dealing with the issue of the application for extension of time and the substantive issues identified in the Consent Order as remaining for resolution it is important to outline a summary of the evidence in the matter, which provides the necessary context.

Summary of the Evidence

The Acquisition of the Family Home

- [10] It is common ground that the parties got married on December 30, 1990 and in 1995 decided to purchase land at Berrick district in Oracabessa St. Mary. That is however where the agreement ends. Both the claimant and the defendant maintained that they paid the deposit of \$40,000.00 for the purchase of the land with each producing a different receipt in support drawn solely in his/her name and purportedly signed by the vendor, Mr. Kenloy Brown. The claimant also exhibited the sale agreement executed by the vendor, herself and the defendant as well as two other receipts for the balance purchase price for the land totalling \$58,000.00 which listed her as the sole payee.
- [11] For his part, the defendant exhibited a letter from the vendor demanding \$30,000.00 more towards the purchase price. This he said he refused to pay until the vendor provided, electricity, water and road, a position supported by advise he received from the Land Administration and Management Project (LAMP) in 2010. He indicated that he discussed this with the claimant but in his view in an effort to make it seem as if she was the only one who paid for the property the claimant went ahead and paid the balance of \$58,000.00 to the vendor in 2010.
- [12] Mr. Kenloy Brown gave an affidavit filed on behalf of the claimant, but was not present at the trial. There was therefore no third party account received in evidence indicating who made what payment(s) and to whom any receipt(s) was/were issued.

[13] The claimant and defendant each also contended she/he largely individually funded the construction of their home. Each suggested the other lacked the means to make a meaningful contribution, save that the defendant admitted under cross-examination that the claimant paid for a bathroom to be constructed.

The Operation of the Marriage And Its Aftermath

[14] The claimant maintained that throughout the marriage she was the major breadwinner and took care of groceries, furnishings and utilities with the defendant not contributing anything to the running of the household. She explained that sometimes the defendant was not working and had no funds to take care of bills.

[15] Her only source of income is her job as a Colporteur for 33 years, (a person who sell religious and other books for marriage, cookbooks, bibles) and she has a book store – IAPDA – Inter American Publishing Division Association. She said that the defendant was a taxi driver when they met and about 7 months after he started working for JUTA, which became his sole source of income. At one point they had a small business selling water bottles and brake shoes but it was not profitable so it was closed about a year after.

[16] The parties had a very tumultuous marriage, including the claimant accusing the defendant of persistent infidelity and they divorced on August 4, 2010. She eventually obtained an occupation and restraining order against the defendant. She exhibited an Interim (Ex Parte) Protection Order under the **Domestic Violence Act** obtained on October 10, 2012, as well as a report from the Victim Support Unit dated June 18, 2013 in which the community expressed the view that they wished the defendant to stay away from the community.

[17] She subsequently had the house valued and instructed her lawyers to write to the defendant offering to purchase his share but had received no response. The valuation from Cohen & Cohen Realty Limited and correspondence with the defendant's lawyers were exhibited.

- [18] The defendant's evidence was that the claimant's income as a Colporteur was extremely modest at best. The monies he earned from the buses financed the lifestyle he and the claimant enjoyed. When they married he was working as a Taxi Operator for JUTA and he worked there between 1990 to 2007 when he joined the police force.
- [19] He said that between 1992 to 1995 the claimant was a perfect lady. She met all his needs including cooking and cleaning. But this changed in 2006 when she got involved with someone else. He said he bought everything that was needed in the house in terms of groceries as the claimant is a vegetarian and she primarily bought those type of items at the supermarket. He said the utility bills came in his name and he paid them until he moved out and he has receipts for that entire period. They were however not produced to the court.
- [20] He remarried in July 22, 2012 and moved into his wife's rental accommodation but would still go to the family home sometimes to retrieve some of his personal belongings left in the room he had occupied. During one of his regular visits to the home in October 2012 he noticed the locks had been changed. He got angry and removed them, the police were notified and the restraining order was obtained against him for this reason only.
- [21] He did not wish to sell his interest in the family home, but instead wanted to purchase the claimant's interest using his savings from his previous occupation. He doubted that the claimant would be able to purchase his interest. Further, he suggested it would be easier for the claimant to use her one-half share to purchase another home for herself than for him to do so for himself, his wife and two children. He stated that he visited the community from time to time and at no point anyone told him he was not wanted back in the community. He indicated he maintained a great relationship with many persons from the community.

The Acquisition and Operation of the Vehicles Owned by the Defendant

- [22] The claimant's evidence was that the defendant's work was sporadic at best and he had no real earnings. In her second affidavit, she said he "credited" a car, Toyota mini-bus licensed 8480 PP and a Coaster bus on the strength of her savings at the Port Maria Cooperative Credit Union, and further benefitted from her direct investment in each acquisition. Despite her contribution to their acquisition, she was unable to provide the registration plates for the car and the Coaster.
- [23] Combining her affidavit evidence and her testimony on cross-examination, the claimant maintained that the defendant initially purchased the Nissan Sunny motorcar for \$270,000.00 at Best For Less in Port Maria in 1995. She paid the deposit of \$100,000.00 as well as solely paying for the licensing and insurance of the car. The defendant operated it as a taxi through JUTA, the contract with them being his sole source of income. She later wished for a bigger vehicle. The Sunny was sold and the proceeds along with a further investment of \$100,000.00 from her, went towards the acquisition of the minibus at New Line Motors in Kingston, which cost \$900,000.00. She also bought tyres.
- [24] After four years, the defendant wanted a bigger vehicle and requested her support. She gave him \$200,000.00, \$100,000.00 towards acquisition and \$100,000.00 towards tyres. She also contributed to insurance. She said the Coaster was purchased in Montego Bay, but she was uncertain as she did not go with him on that occasion.
- [25] In cross-examination, she said all her contributions to the vehicles were through her account at Scotiabank held in her sole name. She indicated that she had received bank statements which would have been important to have before the court. She explained on re-examination that although she collected the statements, they were husband and wife at the time and she did not think they would be necessary. Further, that based on the duration of time she did not know where she

would get them. She did not bank with that bank again and she did not think to request those statements.

- [26] She maintained that from the purchase of the motor car to the purchasing of the coaster, the defendant had never accounted to her or given her any money from the net profits earned.
- [27] The evidence for the defendant disclosed a substantially different outline of events. In his affidavit evidence he indicated that he had never owned a car prior to the claimant and him separating. Rather he owned two mini buses which were acquired in 2000 using his sole resources. He explained that during his employment at JUTA, he saved from his salary and bought a mini-bus from New Line Motors to conduct his own business of transporting tourists from cruise ship to various places. The minibus cost \$980,000.00, which he bought through credit facilities at New Line Motors which he serviced by making monthly instalments of \$27,180.00 using manager's cheques from his Scotiabank account operated solely by him, commencing around December 20, 2000. Each time he purchased the manager's cheque, a receipt was generated by Scotia but he was unable to find all the receipts issued by the bank but a few were exhibited.
- [28] The business was lucrative as in addition to being paid for the cost of the service he provided, he was also tipped. On October 25, 2002 he received \$196,330.00 from JUTA for services rendered that month. He saved most of that money and together with other money he had saved and the proceeds from the sale of the mini-bus he purchased the 1996 Toyota Coaster Bus for \$1,100,000.00 from Rhea Auto Sales Limited. The reason for the purchase was that his business was growing and he needed a bigger bus. He exhibited a copy of the cheque he received from JUTA. He indicated that the buses were sold when it no longer became feasible for him to continue operating under his JUTA licence. He left JUTA and joined the police force in 2007.

- [29] He steadfastly maintained that the claimant did not contribute to the acquisition of the buses or their upkeep and maintenance. He said there was never an instant where the claimant was considered an investor in his buses as he did not own and operate a private business. He said during the marriage he was never asked to give an account of profits earned from the buses. He stated that he was not required to account to her for any monies derived from their sale.
- [30] There was a lot of detail and some contradictions which emerged in cross-examination. Despite denying he had owned a motor car in his first affidavit and making no mention of it in his second and third affidavits, under cross-examination he admitted that he owned a Nissan Sunny which he said he purchased in 1992 for \$280,000.00. He paid for it through the credit union which gave him a \$50,000.00 loan and a line of credit he received from Fitzroy Laing a long time friend and owner of Best For Less Portmore, from whom he purchased the car. He said he was no longer a member of that credit union, that he never received any documentation nor did the credit union register a lien against the Sunny.
- [31] He also stated that he never received a contract for the money he borrowed from Best for Less. He finished paying off the loan to the credit union in about 2 years. He repaid Best for Less \$21,000.00 every month starting in 1992 and it took him about 3 years to pay that off. He indicated that he used the Nissan Sunny while at JUTA, but could not find the contract. He used it to transport a maximum of 2 persons and explained that for example on a charter to the Blue Mountains he would charge US\$160.00 and JUTA was paid a commission of about US\$10.00. He was paid daily and the arrangement with JUTA allowed him to work privately and for the hotel.
- [32] He said as soon as he was finished paying off the loan, he gave back the car to Best for Less to sell for him as he was moving on to a 15 seater bus. He received \$200,000.00 for it but could not recall the year he sold it.

- [33] Also in cross-examination he stated that he purchased the mini bus from New Line Motors on Hope Road in about 2003 (not 2000 as was in his affidavit) and paid \$800,000.00. In his affidavit evidence he however had said the price was \$980,000.00. He explained that when he sold the car he took the \$200,000.00 and placed \$50,000.00 on it and gave it to Newline. He borrowed \$550,000.00 from New Line Motors but he was not issued any documentation other than receipts he got each time he paid them.
- [34] Concerning his acquisition of the Coaster in cross – examination he stated that he sold the 15 seater to buy a coaster for \$1,100,000.00 in Montego Bay in 2004, (again not in 2000 as was reflected in his affidavit). He financed that purchase through the sale of the bus for \$550,000.00 in about 1997 and with the assistance of a loan from Scotia. He explained that he paid the deposit of \$300,000.00, from the sale of the bus, and took the next \$200,000.00 to Scotia and with the loan of \$600,000.00 he obtained from them, he paid off the vendor. He said that Scotia took the papers and registered their interest on the title. He said that he decided to sell the coaster in 2007 as he was having issues with the driver when he became a Police Officer.

The Submissions on the Application for Extension of Time

Counsel for the Claimant

- [35] Counsel submitted that there is no limitation on when the application may be made. Therefore as final judgment had not been pronounced the discretion to extend time beyond the limitation period of 12 months, preserved by section 13 of the **PROSA**, could be exercised by the court.
- [36] Counsel asserted that the delay resulted from the parties' decision to seek to settle the dispute without obtaining legal instructions. However, when negotiations broke down it was the intention from the beginning to bring the claim under the **PROSA** which was highlighted by the fact that the Fixed Date Claim Form (FDCF) was headed "**IN THE MATTER OF THE PROSA**". Thus, the claimant should be allowed

to proceed under the **PROSA** which has guided the entire proceedings from their beginning.

- [37] Further counsel added that the claimant would suffer prejudice as the **PROSA** has now replaced the rules of equity and common law regarding dealings between spouses (See section 4). The failure to have the claim regularised was entirely the fault of counsel but that could be remedied based on the decision in the conjoined appeals of *Saddler v Saddler and Hoilette v Hoilette and Ano* [2013] JMCA Civ 11. It should also be noted that in the written submissions filed on behalf of the claimant it was observed that in *Saddler v Saddler and Hoilette v Hoilette and Ano* and *Hendricks v. Hendricks* [2014] JMCA Civ 149, the defendants who wished to assert a limitation defence under section 13 did so at the commencement of the suit which had not occurred in this instance and in all these cases the application for extension even if delayed was granted.
- [38] Assessing the claimant's case, counsel contended that she contributed to the acquisition of all 3 motor vehicles, which contribution could be considered pursuant to s. 14 of the **PROSA** and would assist her claim for a share in those motor vehicles as other property owned by the spouses. Counsel however tried to ride two horses by submitting that utilising the principles of common law and equity the same outcome would be achieved as that under the **PROSA**. Counsel maintained that it was clear there were constructive and resulting trusts protecting the claimant's investment in the vehicles, evidenced by the common intention of the parties to increase income for their joint benefit by their acquisition, though each was registered in the sole name of the defendant. Counsel advanced that the length of the marriage also had to be considered. When the court therefore queried whether the application to bring the claim under the **PROSA** was necessary, counsel nevertheless maintained that it was.
- [39] Counsel argued that the only prejudice the defendant would suffer would be regarding the submissions filed at the end of the claim but this would be remedied by the making of oral submissions. This as the defendant had submitted to the

PROSA in dealing with the family home and in proceeding with the claim. Further, the defendant's evidence regarding the motor vehicles, was a "wholesome defence" so that even if the extension had been granted prior to his evidence it would not have had any effect on his defence. Counsel noted that the defence was constructed to defeat the rules of constructive and resulting trusts, therefore the defendant had only been denied the opportunity to make submissions in relation to the **PROSA**.

- [40] Finally, counsel submitted that there are four considerations when applications of this nature are considered: the length of delay; the reason for the delay; whether the claim is worthy of the grant of the extension; and the issue of prejudice. Counsel argued that although the parties were divorced in 2010 and the claim which was filed in 2015, was outside the limitation period by four years, the delay was not extensive as there are matters that had been allowed to proceed over ten years after the grant of the decree absolute (See *Calvern Gavin v Laretta Gavin* [2017] JMSC Civ 119).

Counsel for the Defendant

- [41] Counsel accepted that the **PROSA** does not stipulate when the application is to be made and that the court can hear the application after the FDCF is filed. Counsel however noted that the timing of the application was unusual in this case as there had already been a trial and submissions made. She contended that the case in its present form was brought under equity and therefore, it was with this understanding that the defendant's case had been made at trial. The defendant was accordingly blindsided by the application after "his hand has been revealed."
- [42] Counsel firmly denied that the claim had been brought under or that the defendant submitted to the **PROSA** and/ or made any such declaration. Further, she contended that even if the defendant had made such a declaration, there would still be a "gap", as the Notice of Application would not have to be adjudicated upon by the court because: a) if there was a breach of an agreement, it would have to

be treated as a breach of contract, and b) if it was an Order of the court, it would have to be treated as a separate issue of enforcement and could not automatically be looked at through the lens of the **PROSA**. Based on her denial however counsel maintained that the court cannot hear and treat the matter as one under the **PROSA** unless the application was made and granted.

- [43] Counsel accepted the outline of the four considerations referred to by counsel for the claimant that should be addressed in the determination of the application. However, she stated that the timing of the application was of concern given that consent was contemplated from as far back as 2016, which gave a lot of time for the application to have been made ahead of trial and the trial had taken place a year ago. Further, she argued that the reason for the delay, due to counsel's inadvertence was inadequate and that where there is a limitation, it should be at the forefront of one's mind.
- [44] Regarding the worthiness of the claim counsel submitted that although the claimant alleged to have spent over \$400,000.00 on the motor vehicles and had "floated the family", these were bare assertions unsupported by any documentary evidence. Accordingly there is no merit in her claim, especially as it was one of an unusual nature.
- [45] Counsel further maintained that the defendant would be prejudiced if the application was granted as there is a distinct difference between the application under the **PROSA** and under Equity. Equity looks only to the payment of money, and/ or the dealings with the motor vehicles to decide whether there was a common intent. S. 14 of the **PROSA** however extended the definition of contribution and allows for the inference of interest by virtue of the marriage. There are therefore several other considerations which the law of equity would not include, that the **PROSA** would. Accordingly, the balance of prejudice weighed far more against the defendant in the application.

Analysis

The Scope and Effect of section 13 of the PROSA

[46] Section 13 (1) (a) and 2 of the **PROSA** read as follows:

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) ...
- (c) ...

(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.

[47] The Decree Absolute dissolving the marriage of the parties in this matter, was granted on August 4, 2010. Under S. 13 of the **PROSA** the limitation period for the claimant to bring her claim for division of property therefore expired on August 3, 2011. Having not filed a claim until June 2015, the claimant is almost four years outside the limitation period permitted by the **PROSA**.

[48] In *Delkie Allen v Trevor Mesquita*, [2011] JMCA Civ 36 the appellant brought an action against the respondent, to recover possession of property, rental proceeds and mesne profits. In response the respondent filed a FDCF under the **PROSA** seeking several orders including a declaration that he was beneficially entitled to a 50% share of the property. The respondent subsequently acknowledged that the claim was filed outside the time prescribed by the Act and sought to invoke the court's jurisdiction under the **PROSA** for an extension of time. In outlining the scope and effect of section 13 of the **PROSA** Harris JA writing for the court had this to say at paras. 12 and 18 – 19:

[12] Although section 13(1) of the PRSA permits a spouse to make an application for division of property, section 13(2) dictates that the requisite application shall be made within the prescribed 12 month period. The word "shall" is not mandatory in light of the concluding words of the section, namely, "or such longer period as the Court may allow after hearing the applicant". This shows that the legislature, in its wisdom, empowers the court to extend the period within which an application may be made under the Act.

[18] The court, in exercising its discretion for an extension of time, is required to take into consideration factors such as the length of the delay, the reasons for the delay, whether an applicant has a claim worthy of a grant of an extension of time and the question of prejudice to the other party - see *Haddad v Silvera* SCCA No 31/2003 delivered on 31 July 2007. The respondent claimed that the relationship ended in or about 2007. He filed the fixed date claim form on 22 June 2009, one year outside the time permitted by the PRSA. This being so, he was under a duty to supply reasons for his failure to act within the prescribed time. The failure to advance an excuse is not simply a factor which goes towards deciding the justice of the case, as the learned judge found. The reasons for a tardy application are fundamental factors to be taken into account in determining whether an applicant had explained the delay in not acting timeously. In order to justify an extension of time to carry out a requisite step in any proceedings, there must be some material on which the court can exercise its discretion. Indeed, the absence of good reasons is not in itself sufficient to justify a refusal of an application to extend time, however, some reason must be advanced - see *Haddad v Silvera*.

[19] It is incumbent on the applicant, in seeking the extension of time, to have placed before the court a plausible explanation for the delay. There is little doubt that reasons for the delay have always been the catalysts for supporting an application for an extension of time. Even if the learned judge was clothed with jurisdiction to hear the matter, she had clearly adopted the wrong approach in dealing with the application. She ought not to have granted the application without ensuring that the respondent had put before the court the circumstances outlining his failure to file the claim within the statutory period. No reasons having been advanced, it must lead to the inevitable conclusion that there was no foundation upon which a finding in favour of the grant of an extension of time could have been anchored.

[49] The considerations the court must bear in mind in exercising its discretion under section 13(2) outlined in *Delkie Allen v Trevor Mesquita* are in keeping with the

observations made in the earlier case of *Brown v Brown* [2010] JMCA Civ 12 by Morrison JA (as he then was). At paragraph 77 he observed that:

On an application under section 13(2), it seems to me, that all the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as merits of the case (on a purely prima facie basis), delay and prejudice, also taking into account the overriding objective of the Civil Procedure Rules of 'enabling the court to deal with matters justly' (rule 1.1(1)).

- [50] The operation of S. 13 of the **PROSA** was also given due consideration in the subsequent cases of *Saddler v Saddler and Hoilette v Hoilette and Ano*. In the *Saddler* matter, the parties divorced in July, 1999. On January 15, 2007 the claimant made an application for an order i) extending time to make an application for division of property under the **PROSA** to the date when the FDCF was filed (the said January 15, 2007) and ii) that the FDCF and all supporting documents stand as valid. The judge refused the application on the basis that the marriage was dissolved long before the **PROSA** came into effect and that the **PROSA** did not have retrospective effect.
- [51] In the *Hoilette* case, on a preliminary objection taken that the court had no jurisdiction to hear the claim, I ruled that the FDCF having been amended out of time to include a claim under the **PROSA** without prior permission or extension of time to do so, the FDCF was invalid and could not be corrected by a subsequent order. I however indicated, that the claimant was still free, even at that stage, to make an application for leave to extend time, and for the grant of extension of time to file the claim under the **PROSA**. Leave was granted to appeal.
- [52] The matters were considered together in a conjoined appeal. Phillips JA writing for the court in a comprehensive analysis had this to say at paragraphs 41 and 44 to 45:

[41] It is clear that section 13(2) is a provision which sets out a time line for the application for division of property under PROSA. There are certain

events which trigger the right to apply. They are set out in section 13(1) (a), (b), (c) and (d) above. But the application if being made under subsections (a), (b) or (c) shall be made within 12 months of the dissolution of the marriage, termination of cohabitation, annulment of marriage, separation **or such longer period as the Court may allow after hearing the applicant.** So it is clear that the time to apply under PROSA can be extended, and that would be effected by the exercise of the court's discretion.

[44] Either as former spouses (Saddler claim) or on the basis of separation without any reasonable likelihood of reconciliation (Hoilette claim), prima facie, the parties would have appeared to have been entitled to apply under section 13(1) of PROSA, to obtain the statutory remedies open to them under sections 6, 7, 14 and 23 of the Act. Their claim to apply under PROSA could only be defeated by their failure to comply with section 13(2). That section is a limiting section, and thus provides a limitation defence. A fixed date claim form filed under section 13 claiming relief permitted under PROSA could not therefore be struck out as an abuse of process simpliciter. If filed outside the time limited in the section, the action certainly could not proceed without the court allowing the time period to be extended, for to do otherwise would be in breach of the specific words in the section. The fact that the legislation specifically provides a time within which a claim shall be made, but also refers to a longer period being allowed by the court, indicates that although the time is limited, the time period is flexible, and can be extended, once the court exercises its discretion in favour of the applicant after hearing him/her. If the time is not extended by the court, as the matter could proceed no further, the limitation defence would succeed, as although a procedural defence, it is a complete defence, and the claim would be time barred. Before that application is made, however, the claim, in my view, is not invalid. The words in the statute, in my opinion, give the court a wide discretion to permit persons to access the benefits provided in PROSA, particularly since the statute is dealing with the protection of the rights of persons within families.

[45] In fact I would adopt the dictum of Edwards J in **Chang v Chang**, endorsed by this court on a procedural appeal, that:

“... a claim once filed is an administrative procedure, it's not invalid (unless its life has expired and no application to extend [sic] been made) and can either proceed, be amended or re-filed. There is no such thing as a dead or invalid claim only one which is subject to being struck out as an abuse of process or one whose life has expired.”

Edwards J noted that in **Brown v Brown** the application for leave to present the application for division of the matrimonial home out of time was filed after the claim form although in the same month, yet no argument was made and no decision taken that the claim was invalid. Indeed the learned judge made the further point, which I find compelling, that 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, or section 13(1) (d) if the facts existed. So a claim may not be able to proceed in respect of a division of matrimonial property if the time period had passed and there had been no extension of the period allowed, but may yet proceed under section 11 or section 13(1)(d) using the same claim form. Additionally, also posited by Edwards J, with which I agree, is that a claim which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted in PROSA to the date of the filing of the claim, for the claim originally filed to stand, or if the claim is not yet filed, to a determined date for the filing of the same.

- [53] Therefore the court ultimately found that s. 13 of the **PROSA** was procedural in nature and not a condition precedent to the jurisdiction of the court. Hence any irregularity could be remedied by a subsequent order, *nunc pro tunc*, in the interests of justice, particularly as the grant of the order is under the court's control through the exercise of its discretion. "*The claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted.*" (See para. 86, sub paras. (iii), (iv) & (v)).
- [54] Against this background of the effect of section 13 of the **PROSA**, I now address in turn each of the four considerations mentioned in **Delkie Allen v Trevor Mesquita** to which the court should address its mind, in seeking to determine applications for extension of time in these matters.

The Length of and Reasons for the Delay

- [55] In support of her contention that the length of the delay in the instant case was on the facts not extensive, counsel for the claimant relied on the case of **Calvern Gavin v Laurretta Gavin**. In that matter the parties having been divorced in February 2007 on July 18, 2014, the claimant filed a claim for declaration of interest

in the property. The matter was set for trial on February 23 and 24, 2016. However on January 4, 2016, the claimant filed an application seeking, an extension of time to July 18, 2014, to pursue the claim under s.13 of the **PROSA** and an order that the FDCF filed on July 18, 2014 be permitted to stand. Subsequently an amended Notice of Application for court orders seeking leave to make the application under the **PROSA** out of time was also filed.

[56] Lindo J held that: 1) leave to make the application was not required; 2) the FDCF filed approximately nine years after the dissolution of the marriage was valid, though irregular, and the applicant needed an order of the court extending the time for filing it; and 3) she would grant an extension of time to make the application under the **PROSA**. In arriving at her decision, Lindo J referred to the three cases previously reviewed concerning the effect of section 13 of the **PROSA**; *Brown v Brown, Delkie Allen v Trevor Mesquita and Saddler v Saddler and Hoilette v Hoilette and Ano*. In treating with the length and reasons for the delay under the same heading Lindo J stated at paragraph 18 that she found the delay to be, "extremely inordinate". Considering the reasons for the delay and the posture adopted by the parties on that issue, significantly she noted at paragraph 19 concerning the applicant that:

He states, inter alia, that "to my mind there was never any dispute about the fact that this property was held jointly by the respondent and I...as far as I was concerned we did not need the intervention of the court to assist with the equal sharing up of the property". The reasons put forward also included ignorance, lack of funds and his expectation that they would amicably resolve the issue.

[57] Then at paragraph 20 regarding the position of the respondent she stated:

Mrs Gavin, the Respondent, has filed affidavits in response to the Applicant's claim and application. There was however no evidence put forward by her to negate the reasons proffered or to contradict those reasons, except for certain assertions which relate to the acquisition of a registered title to the property and whether documents were in fact signed by the Applicant.

- [58] Lindo J also stated at para. 22 that in *Delkie Allen v Trevor Mesquita* a case where no reason was proffered by the applicant for the delay, Harris JA said, “the absence of a good reason is not in itself sufficient to justify a refusal of an application to extend time, however, some reason must be advanced”. She however went on in the same paragraph to observe that Harris JA, “noted that the reasons for a tardy application are fundamental in determining whether the applicant had explained the delay in not acting timeously”.
- [59] In coming to her decision under this head, Lindo J took into consideration that the applicant’s counsel in his divorce proceedings was not the same counsel who brought the claim and hence the applicant may have been at a disadvantage regarding the legal advice concerning his entitlement to property. She also gave weight to the fact that the evidence as to protracted discussions aimed at an amicable settlement of the dispute was uncontradicted. Accordingly she found at paragraph 24 “...that the reasons advanced by the claimant for the lengthy delay are plausible.”
- [60] The claimant in the instant matter has offered evidence of some similarity to that put forward in *Gavin v Gavin*. The affidavit filed in support of the application for extension of time within which to file the claim, references the attempts made at an amicable resolution of the matter and that it was following the defendant's lack of responsiveness that the claim was filed. This history is supported by the affidavit that was filed in support of the FDCF to which three letters of June, July and September, 2012 were exhibited though that affidavit was not relied on during the application. The affidavit in support of the application also highlights that after countless hours of negotiation a partial compromise of the matter was reflected in the Consent Order dated June 28, 2017, which included a declaration that the property was the family home. The affidavit also states that the failure to comply with the Act was not intentional. In submissions, counsel for the applicant stated that the failure to make the application was the fault of counsel.

[61] From the authorities reviewed the delay in this case in terms of the number of years is less than that in other matters where the court has seen it fit to exercise its discretion in favour of the grant of the application to extend time. It is also undeniable that the delay, as in the **Gavin v Gavin** matter was largely contributed to by the protracted negotiations in search of an amicable solution, which did bear some partial fruit in the form of the Consent Order declaring the respective equal shares of the parties in the family home. The history however only addresses the delay up to the execution of the Consent Order. It does not explain the failure to make the application before the trial proceeded, once it became clear that the court would have to adjudicate on the issues that were not susceptible to resolution by consent.

[62] The additional delay of just over a month until after the trial had concluded and submissions filed, can only be explained, as admitted by counsel for the claimant, as due to the fault of counsel. Therefore while the court would be prepared to hold that the majority of the delay was credibly and plausibly explained, that conclusion is unsupported in relation to the additional month it took for the application to be filed on July 31, 2017. I will further address the timing of the application after the close of evidence and the filing of submissions, when I deal with the issue of the balance of prejudice.

Is the Claim Worthy of an Extension of Time?

[63] The next factor for consideration is whether the claimant has a claim worthy of the grant of an extension of time. The claimant averred in her affidavit filed on June 13, 2017, that the basis of her claim of an interest in the motor vehicles is the contribution she made to the deposits and further payments on each of them. Further payments included money for licensing, insurance, purchasing tyres and other forms of maintenance. These contributions she asserted were done through the bank. Conversely, the defendant denied that the claimant made these contributions and expressed that because there was no contribution from the

claimant, he was not required to account to her for any monies derived from their sale.

[64] While the parties in the Consent Order agreed to their respective shares in the family home there has not been similar agreement regarding the acquisition and maintenance of the motor vehicles. The claimant has made strong averments regarding her contribution, however, those assertions have not been supported by any documentary evidence. Under cross examination she stated that she received bank statements for the account from which she indicated she took \$100,000.00 to contribute to the purchase of the Nissan Sunny car. However, those statements did not form part of the evidence put before the court though she admitted they would have been important. The defendant on the other hand, exhibited copies of cheques reflecting monthly payments to New Line Motors, which he explained were for monthly instalments on the loan he obtained from them to purchase the mini bus. He also exhibited a Proforma Invoice which indicates purchase of a Toyota Coaster bus by him.

[65] The defendant did however admit on cross-examination that the claimant made significant contribution to the management of the household and the performance of household duties. It is also a fact that the parties were married for almost twenty (20) years. Those facts bring into sharp focus the effect of the provisions of the **PROSA** on the distribution of matrimonial property.

[66] In *Annette Brown v Orphiel Brown* Morrison JA, (as he then was), referring to the effects of section 13 and 14 of the **PROSA** stated at paras. 81 to 82 that:

[81] Some of the specified factors are fairly readily identifiable to persons familiar with the rules of the common law and equity which previously prevailed in this area (such as the making by a spouse of direct or indirect contributions to the acquisition or improvement of the property-section 14(2)(a)), but some are entirely new (such as the definition of 'contribution' to include, for instance, " the effect of any proposed order upon the earning capacity of either spouse"-section 14(3)(i)) Also completely new, and emphasising the essentially discretionary nature of the extensive powers of redistribution of property other than the family

home given by section 14(1), is section 14(2)(e), which enables the court to take into account, in addition to the specified factors, "such other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account".

[82] As with the earlier sections of the 2004 Act which I have already discussed, it appears to me that what the legislature was seeking to do in sections 13 and 14 was to give directions to the court as to how disputes as to matrimonial property are to be resolved as of the effective date of the Act, under what is in significant respects an entirely new dispensation...

[67] It is to be noted that under s. 14 of the **PROSA**, contribution is not limited to money. Further though not included in the extract just quoted, section 14 (4) specifically provides that monetary contribution is not to be presumed of a greater value than non-monetary contribution. Given the definition of contribution and the length of marriage of the parties it is clear that the entitlement of the claimant to an interest in the motor vehicles claimed has a much wider scope for success under the **PROSA** than under traditional principles of common law and equity which it replaced. That is why counsel for the claimant submitted that it was still necessary to make the application to bring the application under the **PROSA** even though on her view utilising the principles of common law and equity the same outcome would be achieved as that under the **PROSA**. Under the **PROSA** it is easier to establish an interest based on the broader definition of contribution and in certain circumstances the extent of the interest may also be more favourable determined under the **PROSA** than under common law and equity. Based on the evidence and law I hold that prima facie the claimant would have a worthy claim in relation to a share of the interests in the motor vehicles based on the operation of s. 14 of the **PROSA** if the application for extension of time is granted.

The Question of Prejudice to the Defendant

[68] In *Delkie Allen v Trevor Mesquita*, Harris JA stated at paragraph 22 that, "A duty resides with the party who seeks an extension of time to show that he would suffer

hardship if it is not granted.” On the other side of the equation she observed at paragraph 30 that:

The common thread which runs through these cases is that a court will not grant an extension of time to file a claim, on the application of one party, where to do so may cause prejudice to the other party and that an applicant must show that there are substantial reasons why the other party should be deprived of the right to limitation given by the law...

[69] In *Gavin v Gavin* Lindo J at para. 25, observed, that:

On the question of prejudice, I have considered the issue of the limitation period. I bear in mind the dictum of Lord Griffith in *Donovan v Gwentoy's Ltd.* [1990] 1 WLR 472 at paragraph 479A where he said:

“...the primary purpose of a limitation period is to protect a defendant from any injustices inherent in having to face a stale claim which he never expected to have to face...”

[70] Then at paragraph 26 she continued:

I also bear in mind what Harris JA said in the case of *Allen*, at paragraph [26] that:

“A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating.”

[71] The above authorities highlight that in addressing the question of prejudice, the claimant has to show that she will be prejudiced if the application to extend time is not granted and the defendant will not. The adjudicating court thus has to determine whether there is any good reason that would prevail against the **PROSA** operating; central in that consideration being what I would call the “balance of prejudice”. There is of course some inherent prejudice in a delayed claim. However, beyond that, if the application is granted the defendant always stands to lose a technical defence. What then is the “balance of prejudice” in this case?

- [72] Counsel for the claimant maintained that it is the claimant who will suffer prejudice if the application is not granted and the claim regularised as is permissible based on the law as outlined in *Saddler v Saddler and Hoilette v Hoilette and Ano*. This in a context where the fault was entirely that of counsel. Further, that since the defendant's evidence regarding the motor vehicles has been a wholesome defence, the success of the application would not affect his defence.
- [73] On the other hand counsel for the defendant insisted that it is the defendant who would be prejudiced based on the distinct differences between the principles applicable under the **PROSA** as opposed to those applicable under Equity. Further that the defendant's case was conducted on the premise that the claim was being pursued and defended under Equity.
- [74] As I noted earlier, on a review of the evidence, it does appear that prima facie, the suggested interest claimed by the claimant in the motor vehicles, has a greater prospect of success under the provisions of the **PROSA**, as opposed to under the rules of Equity. The evidence also reveals that, in keeping with the principles of equity, much of the focus of cross-examination by counsel on behalf of the defendant was on the claimant's source of income and financial contribution to the marriage. The defendant also exhibited some documentary proof in support of his contention that he solely financed the purchase of the two buses.
- [75] That is why the timing of the application is so significant. Modern trials are built on the principles of equality of arms and avoidance of trial by ambush wherever possible. It is not only that the application for extension of time was filed late, the degree of lateness is significant. It was filed not just after the hearing, but also after submissions had been filed on behalf of the defendant. The defendant at trial through his counsel had sought to meet the claim brought by the claimant and his counsel had already made submissions based on the evidence elicited. It is therefore difficult to resist the complaint of counsel for the defendant that the application made at the time it was "blindsided" the defence. The fact that counsel for the defendant unlike those in *Saddler v Saddler and Hoilette v Hoilette and*

Ano, and *Hendricks v Hendricks* declined to assert a limitation defence at the start of the trial but instead conducted the defence on the basis that the **PROSA** did not apply to the matter cannot be held against the defence. It is always incumbent on the party who seeks to rely on a legal principle to ensure that steps are taken to ensure its applicability. Generally, another party is under no obligation to take a legal point if tactically or otherwise he deems fit not to.

- [76] The court is therefore left to observe that if the application had been made on or before June 28, 2017, prior to the start of the trial, any prejudice that might have been caused by the success of the application then, could likely have been mitigated even if the trial would have had to be postponed to allow for the defence to recalibrate its position. As it stands now, the trial having been completed and closing submissions made by counsel for the defendant on the basis that the **PROSA** did not apply to the issues at trial, it seems obvious severe prejudice would now be suffered by defendant, if the claimant's application was granted.

The Effect of the Consent Order

- [77] Before finally ruling on the application I need to address the effect of the Consent Order arrived at between the parties. A Consent Order is very similar to a final order made by a Judge after trial. In assessing the scope of the court's jurisdiction to vary such an order, Smith JA in *Michael Causwell and Ano v Dwight Clacken and Ano* SCCA 129/ 2002 (February 18, 2004) stated at pp 15 – 16 that:

A Consent Order has all the attributes of an order made after a contest save that the parties cannot appeal without leave. It is not in dispute that generally a judge may not change a final order once it is perfected and entered. There are of course, a few exceptions, for example the correction of a clerical error, or the clarification of the judgment, or a variation to facilitate the working out of the order. The authorities show that where a consent order evidences or embodies a real contract between the parties the court will only interfere with it on the same grounds as it would with any other contract, for example misrepresentation, mistake or fraud.

Therefore, where it appears that a Consent Order embodies the conclusion of negotiations between the parties, the Court will give effect to it where

one party is in breach, and will not vary it by giving extra time to perform its terms- see **Tinger-Roche & Co. v Spiro** [1982] 126 S.J. 525 and **The Supreme Court Practice** [1999] Volume 2 paragraphs 17A-24.

[78] Concerning the effect of inserting “liberty to apply” which was a feature of the Consent Order in the instant case, at page 17 he went on to say that:

The insertion of “liberty to apply” does not enable the court to deal with matters which do not arise in the course of the working out of the judgment or to vary the terms of the order except, possibly, on proof of change of circumstances – see **Cristel v Cristel** (supra)². A judgment or order is not rendered any less final because liberty to apply is expressly reserved.

[79] The above extracts reveal the finality with which courts endeavour to treat Consent Orders. The default position is non-interference with the terms arrived at which embody, as in this case, the conclusion of negotiations between the parties. Accordingly, the Consent Order is final and binding to the extent of the terms agreed therein.

[80] Counsel for the claimant submitted that since the defendant agreed by virtue of a Consent Order to treat the property as the family home and divide it in accordance with the provisions of the **PROSA**, by extension, he has also impliedly agreed to do the same with any other property, in a context where the claim was expressly said to be brought under the **PROSA**.

[81] I am however constrained to agree with the submissions of counsel for the defendant that if in fact there had been such an agreement the Notice of Application would not have had to be adjudicated upon by the court because: a) if there was a breach of an agreement, it would have to be treated as a breach of contract, and b) if it was an Order of the court, it would have to be treated as a

² [1951] 2 KB 725.

separate issue of enforcement and could not automatically be looked at through the lens of the **PROSA**.

[82] The mere fact that counsel for the claimant recognised the necessity of making an application for extension of time to bring the claim under the **PROSA** even at this late stage shows that the bringing of the issues reserved for trial under the aegis of the **PROSA** was dependent on the exercise of judicial discretion and not on the agreement of the parties. Further the manner in which the trial was conducted by counsel for the defendant, the focus of the closing submissions and the vigorous opposition of the application by the defence raise the clear inference that there had been no meeting of the minds between the parties before the trial proceeded that the **PROSA** should govern the issues at trial.

[83] The agreement such that may have fallen under or utilised the nomenclature of the **PROSA** was confined to the property being deemed the family home with the parties entitled to it in equal shares. The fact that the heading of all the documents, including the Consent Order referenced the **PROSA** was of no effect. Only the order of the court granting extension of time for the claim to be brought under the **PROSA** could achieve what was sought and applied for by the claimant. The Consent Order therefore does not operate to support the application of the claimant for the extension of time to bring the claim under the **PROSA**. Accordingly, it having been determined that the defendant would suffer severe prejudice if the application were granted at this late stage, the application is refused.

The Applicable Law

[84] Based on the ruling on the claimant's application for extension of time the matter will have to be determined outside of the framework of the **PROSA** by the application of the principles and presumptions of common law and equity and any other relevant statute that may apply. Despite the invitation of the court to counsel for the claimant who appeared at the hearing of the application for the extension

of time to submit further on the law in the event the application was denied, counsel maintained that the outcome would be the same whatever principles were applied.

[85] Counsel for the defendant on the other hand maintained the posture adopted in her initial submissions which was that the remaining issues should be determined by the use of the **Partition Act** and general principles of trusts and equity; an approach that would result in a different outcome than if the principles of the **PROSA** were applicable. In light of the ruling made on the application to extend time, it is clear that the **PROSA** is inapplicable. On each of the issues joined the court will, bearing in mind the submissions made, determine the applicable law and its effect in leading the court to the appropriate resolution.

Issue 1: Which party should have the first option to purchase the one-half share of the other in their property?

[86] Counsel for the claimant in closing submissions had invited the court to utilise the wide powers under section 23 of the **PROSA** to grant the first option to purchase to the claimant. Counsel highlighted the following in support of his submission:

- i) the defendant had moved out in 2012, and now resided elsewhere with his new wife;
- ii) the claimant had offered and demonstrated her ability to buy the defendant's share before the commencement of this action;
- iii) the claimant had in 2012 obtained an Occupation and Protection Order barring the defendant from the premises; and
- iv) there was a commonly held position that the spouse in possession is usually given the option to purchase (*Patsy Powell v Courtney Powell* [2014] JMCA Civ 11).

[87] Counsel for the defendant submitted on the other hand that, where relevant, section 23(1) of the **PROSA** empowered the court to make "other orders" with

respect to the sale of property. However that section gave the court no guidance as to how the discretion should be exercised. Counsel further submitted that as the parties were not relying on the **PROSA** to determine their respective shares in the family home, section 3 of the **Partition Act** should be utilised by the court.

- [88] Counsel advanced that the equivalent of the **Partition Act** in the United Kingdom is the **Trusts of Land and Appointment of Trustees Act 1996**, section 15 of which outlines factors which the court may use to guide the manner in which the property should be sold. Counsel however acknowledged that there is quite some dissimilarity between the wording of both Acts.
- [89] Counsel also relied on the Canadian case of *Mitchell v. Leach et al*, 2015 ONSC 6041 which indicated that there are wide considerations that the Court can review in determining the manner in which the family home can be sold. In deciding who should have the first option to purchase relevant factors include the means of the parties to acquire alternate accommodation, and when, and the fact that the number of years a party resided in the home during the parties' separation was not by itself determinative.
- [90] Counsel highlighted that for the majority of the marriage the parties lived together at the home and even though the marriage was terminated in August 2010, the defendant continued to reside there until he moved out in 2012. Further that after he moved out he continued visiting the premises often, as his belongings were still there and he attended to chores inside and outside the house. Counsel maintained that it was these frequent visits and the defendant's remarriage that led to an altercation which spawned the claimant's application for and obtaining of the order barring the defendant's return to the property.
- [91] Counsel also invited the court to disregard the claim in the claimant's affidavit of June 5, 2017 that the entire community did not want the defendant to return, which was supported by a community report done in June 18, 2013 with respect to alleged abuse that took place when the parties lived together in the same

household. Counsel argued that there was no indication that the defendant had breached his eviction order and as the parties would not be living together in the house there would be no opportunity for conflict

- [92] Counsel further submitted that the defendant strongly denied that the claimant spent the majority, if not all, of the money required to build, improve and maintain the house for which no proof was supplied. The defendant, counsel advanced, was willing and able to purchase the claimant's interest, in a context where he currently lives in rented accommodation with his wife and two young children who he wished to live in a home owned by them. However, given his additional responsibilities he would not be able to use his one-half share of the net proceeds of sale to buy a comparable home for himself and his family. On the other hand it was respectfully submitted that since the claimant remains single it was easier and more financially prudent for her to purchase alternate accommodation using her one-half share of the net proceeds of sale.

Analysis

- [93] Section 3 of the **Partition Act** provides as follows:

In a suit of partition, where, if this Act had not been passed, a decree for partition might have been made, then if it appears to the Court that by reason of the nature of the property to which the suit relates, or by the number of parties interested or presumptively interested therein or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between them or among them, the court may, if it thinks fit on the request of any of the parties interested and notwithstanding to the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential orders.

- [94] The **PROSA** not being applicable based on my earlier ruling on the application for extension of time I agree with counsel for the defendant that the powers granted to the court under the **Partition Act** are relevant to the circumstances of this case.

[95] By way of further legislative guidance, counsel for the defendant also submitted for consideration the United Kingdom's **Trusts of Land and Appointment of Trustees Act 1996**. Under the legislative scheme created by that Act where a property is owned by more than one person, a 'trust of land' is automatically created whereby the owners become trustees and hold the property for one another as beneficiaries of the property. Where they cannot agree on what should happen to the property any of the owners may apply to the court under section 14 to determine what should be done. Section 15 of that Act outlines matters to which the court should have regard in determining such applications.

[96] Section 15 provides:

Section 15 - Matters relevant in determining applications.

- (1) The matters to which the court is to have regard in determining an application for an order under section 14 include—
 - (a) the intentions of the person or persons (if any) who created the trust,
 - (b) the purposes for which the property subject to the trust is held,
 - (c) the welfare of any minor who occupies or might reasonably be expected to occupy any land subject to the trust as his home, and
 - (d) the interests of any secured creditor of any beneficiary.
- (2) In the case of an application relating to the exercise in relation to any land of the powers conferred on the trustees by section 13, the matters to which the court is to have regard also include the circumstances and wishes of each of the beneficiaries who is (or apart from any previous exercise by the trustees of those powers would be) entitled to occupy the land under section 12.

[97] Having examined the legislation, I do not find it to be of much assistance. While it contains obviously relevant considerations such as the intentions of the parties, the purposes for which the property was held and the circumstances and wishes of each of the beneficiaries, it would be imprudent to adopt such guidance given

the wholly different legislative scheme from which those principles arise. It is preferable for the court to have regard to local authority on the point.

[98] In *Patsy Powell v Courtney Powell* the appellant had owned a piece of land on which she had commenced minor construction, prior to her marriage to the respondent. After marriage both parties with the help of family members and others contributed to the completion of the structure which became the family home. The marriage lasted from 1999 until 2005 at which point the appellant excluded the respondent from the family home. One of the issues on appeal was whether the learned trial judge having found that the parties were each entitled to a 50% interest in the family home properly awarded the first option to purchase to the appellant. In upholding the learned trial judge's order on that point, at paragraph 29 Brooks JA had this to say:

It is not unusual for the court, in cases such as these, to give the spouse in possession of the former matrimonial home an option to purchase the former matrimonial home. These orders are sometimes supplemented by orders allowing for sale on the open market in the event that the spouse given the option either refuses or is unable to purchase the remaining interest in the property.

[99] Even though that case was decided under the **PROSA** the principle being relied on does not appear to be dependent on the **PROSA** for its relevance. It seems to have general application, subject to any specific legislative provision or competing case law that would dictate another outcome.

[100] While counsel for the claimant relied on a local authority, counsel for the defendant cited *Mitchell v Leach et al* where it was held that in deciding who should have the first option to purchase the family home, relevant factors the court should consider include i) the means of the parties to acquire alternate accommodation, ii) when this accommodation could be acquired, and iii) the fact that the number of years a party resided in the home during the parties' separation was not by itself determinative.

[101] I agree with counsel for the defendant that the exclusion order and the wishes of the community are not factors to be given much weight in the court's determination, given that the source of the insult on both accounts was the conflict that existed between the parties. Once the parties are not together in the home, there is no indication that, either within the home or the community, there would be any cause for concern. Therefore, whomever is granted the first option to purchase, conflict should not arise based on that decision.

[102] The conflicting evidence given by the parties concerning who was largely financially responsible for the purchase of the land and the construction of the family home is ultimately of very little moment in this decision, given that the parties have agreed that they are each entitled to a 50% share. I will say however that the extravagant effort displayed by each party to suggest that the other did not contribute at all or only very minimally to the purchase and the running of the household I do not accept. Their agreement that each is entitled to a 50% share, I find is at least a tacit acknowledgment that in reality there were shared contributions and responsibilities.

[103] Having given the matter due consideration, I draw the most guidance from the principle enunciated in *Patsy Powell v Courtney Powell*. The status quo for the last six years has seen the claimant being in exclusive possession of the family home. No challenge has been made to the claimant's financial wherewithal to complete the purchase, though apart from the defendant's unwillingness to sell he has challenged the price as being too low. It has also been argued on behalf of the defendant that he would be unable to obtain a comparable dwelling with his half share of the proceeds and he has a family for which to care. It was suggested that it would be easier for the claimant as a single woman to obtain appropriate accommodation.

[104] However opposing arguments can perhaps be even more persuasively employed. In the acquisition of property two working together are often better than one. The defendant who has remarried would be able to use his half share proceeds from

the property together with the joint resources available in his new marriage partnership to acquire other property. That reality coupled with the fact that to grant the defendant first option to purchase would involve the disruption of the status quo for both parties, has led the court to the inexorable conclusion that in the present circumstances there is good reason to abide by rather than depart from the principle recognised in *Patsy Powell v Courtney Powell*. I do not find in these circumstances that the persuasive authority of *Mitchell v Leach et al* would in any way suggest a different outcome.

[105] Accordingly I will grant the first option to purchase to the claimant who is in possession of the family home with the proviso that if for any reason she is unable to complete the purchase within the period stipulated in the Consent Order, that option will determine and pass to the defendant. If neither is able to purchase the share of the other within the requisite time allowed, the property will have to be sold on the open market and the net proceeds after any outstanding mortgage or other relevant debt has been satisfied paid to the parties in equal shares.

Issue 2: Should the defendant be required to compensate the claimant for one-half the cost to repair and upkeep the house since the date of separation?

[106] Relying on section 12(2) of the **PROSA** counsel for the claimant submitted that as the spouse's share of the property crystallizes at the date of separation it means the value of a spouse's share ought to be determined as at the date the spouses ceased to live together. Based on the court's earlier ruling the **PROSA** is not the applicable law at this point. However, it must be pointed out that counsel's submission is misconceived. Though counsel did advert to the fact that section 12(1) gave the court a discretion to direct a value to be placed on property other than the current market value, that amounted to highlighting the exception to the rule rather than the rule. Section 12(1) provides that "*Subject to sections 10 and*

17(2)³, 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 directs. The sub-section speaks clearly for itself. If apart from the exceptions contained within the section the value was determined prior to the date of the Order, then who would benefit from any increase in value since the date of the separation or suffer the loss if the value depreciated? That submission has no merit.

[107] The alternate argument advanced by counsel for the claimant was that the claimant being the owner in occupation since the time of separation and had maintained the house, any appreciation in value ought to inure to her benefit for which she ought to be compensated.

[108] This alternate argument has not improved the claimant's position on this issue. The persuasive authority cited by counsel for the claimant of **Andrews v Andrews**, 1982 CarswellPEI 14 (1982), a case from the Prince Edward Island Supreme Court, I find outlines the correct approach to be taken in circumstances such as exist in the instant case, especially as the **PROSA** is inapplicable. In **Andrews v Andrews** spouses who had separated agreed to sell their property. The defendant (husband) who had occupied the matrimonial home since their separation argued he should be given credit for any increase in the equity of the matrimonial home because of his payment of the mortgage as well as a further credit for upkeep, taxes, insurance and maintenance since the date of separation.

[109] McQuaid J agreed that the defendant should receive credit for mortgage payments made after separation as the cut-off date for the determination of the respective equities was the date of separation and the claimant should not benefit from equity payments made by the defendant subsequent to that date. The court however

³ Section 10 deals with the power of spouses or persons contemplating marriage/cohabitation to contract out of the provisions of the PROSA and section 17(2) indicates that the value of property that may be divided between the spouses shall be ascertained by deducting from the property owned by each spouse certain debts.

disagreed with the defendant concerning his receiving any credit for maintenance since on separation the claimant his wife was obliged to seek alternative accommodation whilst he lived in the matrimonial home rent free. Therefore the court concluded that apart from the mortgage payments and taxes, the acts of maintenance and upkeep of the property were deemed as the alternative to the rent that ought to have been paid by the defendant to the claimant for the privilege of living at the property exclusively, and for free.

[110] Applying that analysis to the instant case the defendant was obliged to seek alternate accommodation whilst the claimant remained in the family home, exclusively, and rent free. As submitted by counsel for the defendant there is also no evidence that the claimant made mortgage or property tax payments during the separation, hence no issue of a credit to her on those grounds arises. Therefore, on both prongs of the argument deployed on behalf of the claimant under this head, there is no evidence to provoke the favourable consideration of the court. Each party would therefore be entitled to benefit from an equal share of the value of the property calculated as at the date of the order, less any relevant outstanding debts or fees.

Issue 3: Is the claimant's entitled to a fifty percent (50%) or any interest in a) the Nissan Sunny motor car b) the motor bus licensed 8480 PP and c) in a 1996 Toyota Coaster Bus all registered in the sole name of the defendant?

The Applicable Law

[111] As the claim is governed by the principles of common law and equity the submissions of counsel for the defendant concerning the applicable case law are accepted by the court. This in a context where all the motor vehicles mentioned in the claimant's claim were legally registered in the defendant's sole name

[112] In *Plummer v Plummer* 2006HCV00864 (June 15, 2009) the court accepted that where the property did not fall within the consideration of the **PROSA** the questions to be asked are as follows:

- i) Was there an agreement or intention on the acquisition of the property that the interest in the property would be shared?
- ii) Could this understanding, though not expressed, be inferred from the conduct of the parties?
- iii) Did the Applicant make a contribution to the acquisition of the property so as to derive an interest under a resulting trust;

At page 21, it was also noted by the Court, that the burden of proof to show the existence of this interest lies on the party who alleges and asserts it.

[113]

The Contending Submissions on the Facts

Counsel for the Claimant

[114] Counsel submitted that the evidence showed that the claimant managed the household, cared for the defendant and performed household duties. She was described by the defendant as “a perfect wife” in the early years of their marriage and on cross-examination he said that she attended to all the household duties as well as to his needs.

[115] Counsel also noted that the claimant indicated she made a monetary contribution to acquiring the motor vehicles and subsequently to their upkeep with funds from her Bank of Nova Scotia account. It was argued that for both parties there was a deficiency in evidence supporting the financing/purchase of the motor vehicles but that the claimant's evidence was that she contributed towards the purchase of all three motor vehicles as follows:-

- i) \$100,000 towards the Nissan Sunny motor car;
- ii) \$100,000 towards the mini-bus; and
- iii) \$200,000 towards the coaster bus

[116] It was highlighted that the claimant was able to recall details such as the exact cost at which each was acquired which, was not disputed by the defendant. Further, the claimant's evidence was that she also contributed \$100,000.00 towards tyres and insurance for the coaster bus when it was first acquired. The explanation given for the failure of the claimant to provide bank records in support of her assertions was that she did not think of it at the time of giving instructions to her attorneys. Despite this evidential lack, the court was invited to draw a favourable impression of the claimant's evidence based on her general demeanour and disposition.

[117] Conversely, counsel submitted that the defendant provided incredulous answers, including that in respect of two loans he alleged he took out to purchase motor vehicles, he was not issued loan documentation, and that only one of the lending institutions registered a lien against the title of the vehicle — practices that did not accord with the manner in which financial institutions normally conduct their affairs.

[118] Counsel placed significance on the fact that the defendant also neglected to provide documentary evidence and had produced no contract evidencing the purchase of the vehicles. In counsel's words the defendant had relied on "non-descript receipts" to substantiate that he made payments.

[119] In respect of the claimant's assertion that she contributed to the defendant's purchase of a Nissan Sunny motor car, counsel highlighted that in his affidavit dated January 20, 2016, the defendant maintained that, "...he never owned a motor car prior to the Claimant and I separating" and in all his affidavits he only mentioned two motor buses. However on cross-examination, the defendant acknowledged that he had purchased/owned a Nissan Sunny motor car during the course of the marriage before he purchased the mini bus and proceeded for the

first time to give significant details about where he bought it, that he worked on and upgraded it himself and the routes and excursions he would take hotel guests on.

[120] Accordingly, counsel invited the court to make the orders sought.

Counsel for the Defendant

[121] The submissions of counsel for the defendant sought to demonstrate that:

- i) there was no expressed intention by either party at trial of any agreement or intention on the acquisition of any of the motor vehicles that they should equally share the beneficial interest of same; and
- ii) there was no evidence from the conduct of the parties that would suggest that the acquisition and use of the vehicles was in some joint enterprise that would create a resulting trust in favour of the claimant.

[122] Highlighting aspects of the claimant's own evidence from her June 13, 2017 affidavit counsel noted that she stated that the defendant purchased the motor vehicles when he "*decided to go into the transportation business, as a means of supplementing his earnings.*" Also that the intention expressed by the defendant when he acquired the minibus was that he "*wished a bigger vehicle*". Further counsel pointed out that after four (4) years of owning the minibus the claimant stated that the defendant indicated a desire to own a Coaster Bus.

[123] Counsel further submitted that in cross examination the defendant confirmed that his intention on acquiring each motor vehicle was to increase his earnings as his contract with JUTA became more lucrative. This in a context where the claimant admitted that they had no corporation or business relating to the motor vehicles and there was no evidence that she participated in any way in obtaining work for any of the vehicles or even of ever receiving any money from the defendant as her share of any "profit" earned from the operation of the motor vehicles. Neither was there any evidence that she drove any of the vehicles.

- [124] Counsel also submitted that the claimant on cross examination said that the motor vehicles were “*put to JUTA*” as part of the defendant’s employment and not part of any joint commercial enterprise devised between the defendant and herself. Counsel specifically highlighted that on cross examination the claimant made the distinction between the short lived joint enterprise between the defendant and herself in selling water bottles and brake shoes and the defendant’s employment with JUTA, which she admitted was not a business that either of them had a stake in. Further counsel pointed out that the parties even agreed that they did not hold any joint accounts at any bank.
- [125] Concerning the evidence of the claimant that she contributed specific sums towards the acquisition of the three motor vehicles acquired by the defendant, and indications that she had used money that she held at the Bank of Nova Scotia to fund the mini-bus, counsel emphasised that any contribution to the purchasing of the vehicles had been denied by the defendant in his affidavit filed January 20, 2016 and he had put the claimant to strict proof of those assertions, which proof the claimant had failed to provide. Though the claimant admitted she could have requested bank statements, she had submitted two affidavits neither of which had any documentation to support her assertion that she had contributed to the purchase of the vehicles and had an equitable interest in them.
- [126] Conversely counsel noted, the defendant had shown proof of his contract between New Line Motors and himself for the credit line he obtained, as well as proof of his payments servicing that loan. While admittedly, he could not locate all of his receipts, he was capable of demonstrating that the financing required to acquire all the motor vehicles came from his own account.
- [127] In summary counsel submitted that it was clear from the evidence elicited that all the motor vehicles purchased during the marriage were used by the defendant in his course of employment. He earned enough money to take care of himself, and his household. There was no joint enterprise. No intention to jointly own and no

proof of contribution to warrant the declaration of a 50% or any interest in any of the motor vehicles in favour of the claimant.

Analysis

[128] It is clear that the onus of establishing an interest in the motor vehicles or any of them that had been owned by the defendant is on the claimant who asserts such an interest. It is also clear that there is no evidence of any expressed intention by either party or express agreement between the parties that they should share equally or otherwise in the beneficial interest in any of the motor vehicles.

[129] The claimant stakes her claim on alleged contributions to the acquisition and maintenance of the various vehicles — \$100,000.00 each for the Nissan Sunny and the Mini bus and \$200,000.00 for the Coaster. There was some affidavit evidence which suggested that she contributed another \$100,000 each for tyres for the Mini bus and the Coaster, however that position did not appear to be supported by the end of her cross-examination. This in addition to the benefit of the use of credit facilities from her Credit Union to facilitate the purchase of the Nissan. Assertions that have been stoutly denied by the defendant. The defendant on the other hand speaks to affording the Nissan through credit from a credit union and essentially a vendor's mortgage from Best For Less. Then the subsequent purchase of the buses was financed by sales of the previous vehicle, his savings from his salary and bank loans.

[130] As in relation to the family home, the evidence of the parties was in significant conflict. The claimant in this case seeking to maximise the contribution she alleges she made, with the defendant denying receiving and at least implicitly wanting any such assistance. The evidence of both parties contains some weaknesses. On the claimant's side she did not exhibit any documentation from her Credit Union or her bank in support of the credit facilities she indicated the defendant utilised to obtain loans and the sums she indicated she invested. While the events occurred some time ago, especially the allegation of the reliance on the Credit Union, from her

own admission the claimant did not seem to appreciate the importance of making an effort to obtain supporting documentation.

[131] On the defendant's side the most striking consideration surrounds the Nissan Sunny Motor Car. In response to the claim and the claimant's first affidavit the defendant categorically stated that he never owned a motorcar prior to the claimant and himself separating. One charitable interpretation of that statement could be that he was referring to immediately before the separation when he had a bus. However, the way the claim and affidavits were drafted makes it clear that the car would have come before the buses. The remarkable thing is that in his three affidavits he did not mention owning the car and there was no attempt to amplify his evidence in chief to refer to the car. It was only on cross-examination that he launched into a detailed outline of the way in which he funded the purchase of the car, earned from it in his work for JUTA and used the proceeds of its sale to acquire the mini-bus.

[132] It is therefore inconceivable that he had "forgotten" about the car which from the uncontroverted evidence, gave him his start in the taxi business and from which he moved on to bigger and better things. The question then becomes why did he wait until the last possible opportunity to make this admission? Especially as he spoke about obtaining a loan from a credit union and the claimant having indicated that the car was obtained with the assistance of credit facilities from her credit union. It is not clear however whether the parties were there referring to the same place or process.

[133] Notwithstanding that, having considered the matter carefully: 1) what I find to have been the consistent subversion by the defendant of the information about the car, coupled with, 2) the claimant's evidence of her contribution to its purchase, 3) at a time when on the defendant's own evidence she was "the perfect wife", and 4) despite the lack of documentary support for her claim, has led me to the inexorable conclusion that the claimant did contribute to the purchase of the Nissan Sunny. From the fact of that contribution an agreement or intention that the interest in the

vehicle would be shared can be inferred and/or the claimant derives that interest under a resulting trust.

[134] The position is less clear in relation to whether or not the claimant has sufficiently established contribution to the purchase of the buses. As highlighted earlier, no documentary proof has been submitted. The evidence of the defendant is also less than desirable, given that he spoke about obtaining a loan at New Line Motors for the mini bus without receiving any documentation, other than a receipt each time he paid instalments, which seems to be contrary to usual business practices. The fact is however that initial contribution lived on, quite apart from any further contributions, as proceeds from the sale of the Nissan Sunny were put towards the acquisition of the mini-bus and when it was sold those proceeds assisted the defendant in acquiring the Coaster bus.

[135] In resolving the question of whether I accept that the claimant made contributions to the buses or any of them and if so whether there was a common intention for her to benefit from that contribution, the sage words of Lord Diplock in **Gissing v Gissing** [1970] 2 All ER 780 are helpful. Referring to how the conduct of spouses may be utilised to determine shares in real property held solely in the name of one spouse, (which principle is equally applicable to the personal property in dispute in this claim), at page 790g he stated:

[P]arties to a transaction in connection with the acquisition of land may well have formed a common intention that the beneficial interest in the land shall be vested in them jointly without having used express words to communicate this intention to one another; or their recollections of the words used may be imperfect or conflicting by the time any dispute arises. In such a case – a common one where the parties are spouses whose marriage has broken down – it may be possible to infer their common intention from their conduct.

[136] Also of assistance in determining the quantification of interests, once the common intention has been found to exist, is a passage from the case of **Stack v Dowden** [2007] UKHL 17, [2007] 2 All ER 929 reviewed by R. Anderson J in the case of

Plummer v Plummer cited by counsel for the defendant. Baroness Hale at para 61 page 950 f – j stated that:

Oxley v Hiscock has been hailed by Gray and Gray as 'An important breakthrough' (see p 931 (para.10.138)). The passage quoted is very similar to the view of the Law Commission in *Sharing Homes: A Discussion Paper* (Law Com no 278) p 69 (para 4.27) on the quantification of beneficial entitlement:

'If the question really is one of the parties' 'common intention', we believe that there is much to be said for adopting what has been called a 'holistic approach' to quantification, undertaking a survey of the whole course of dealing between the parties and taking account of all conduct which throws light on the question what shares were intended.'

That may be the preferable way of expressing what is essentially the same thought for two reasons. First, it emphasises that the search is still for the result which reflects what the parties must, in the light of their conduct, be taken to have intended. Second, therefore, it does not enable the court to abandon that search in favour of the result which the court itself considers fair. For the court to impose its own view of what is fair upon the situation in which the parties find themselves would be to return to the days before *Pettitt v Pettitt* [1970] A.C. 777 without even the fig leaf of s 17 of the 1882 Act. (Emphasis added.)

[137] As noted earlier in the analysis the parties have each sought, in my view in a manner inconsistent with the reality that existed during their marriage, to render *de minimis* any contribution made by the other. As Lord Diplock observed in **Gissing v Gissing**, no words may have been used by the parties to express their common intention, or their words may be subject to conflicting recollections, in which case recourse to their conduct is necessary to infer their common intention.

[138] Having found that the claimant contributed to the purchase of the Nissan Sunny motor car is there any reason I should find I do not accept that she contributed to the buses or any of them? With due regard to the deficiency of the absence of any documentary evidence, following the approach recommended in **Stack v Dowden** and based on my impression of the claimant as a witness, I am prepared to hold

that she did make the contributions as alleged. Taking a “holistic approach’ to quantification, undertaking a survey of the whole course of dealing between the parties”, I bear in mind that the buses were acquired during the course of the marriage. I have accepted that there was joint contribution to the acquisition of the home and I also accept that both parties contributed to the other major acquisitions of the family, the vehicles purchased. Both parties I find benefitted from the income generated from the defendant working at JUTA and the claimant’s Colporteur business. Both parties made financial contributions to the running of the household from their respective sources of earning. In those circumstances it is not difficult to understand why the claimant would make and the defendant would accept contributions towards the vehicles’ acquisition.

[139] The question now is how should the interest of the claimant be quantified? Considering the evidence I have accepted I find the interest of the claimant should be proportional to the sums contributed to the acquisitions of the respective vehicles. In respect of the Nissan Sunny that will be a straight percentage based on the amount she contributed to the purchase relative to the purchase price. In respect of the Mini bus and the Coaster bus, it will be a percentage based on her contributions plus the value of her shares of the proceeds of the sale of the Nissan Sunny and of the Mini bus that went into the purchase of the Mini bus and the Coaster bus respectively. I have used the final prices given by the defendant for the cost of the vehicles he purchased; \$280,000.00 for the Nissan Sunny; \$800,000.00 for the Mini bus and \$1,100,000.00 for the Coaster bus.

[140] *The claimant’s share of the Nissan Sunny* would therefore be $\$100,000.00/\$280,000.00 = 35.7\%$.

[141] *The claimant’s share of the Mini bus* is calculated as follows: As she contributed 35.7% of the purchase price of the Nissan Sunny, that should be the percentage of the proceeds derived from its sale due to her. The Nissan was sold for \$200,000.00, which was put towards the purchase of the Mini bus. She therefore contributed 35.7% of \$200,000 from the sale which is \$71,400. This added to the

\$100,000 I found she directly contributed to the purchase of the Mini bus means that her overall percentage contribution to the purchase price of the Mini-bus was $\$171,400.00/\$800,000.00 = 21.4\%$.

[142] *The claimant's share of the Coaster bus* is calculated as follows: As she contributed 21.4% of the purchase price of the Mini bus, that should be the percentage of the proceeds derived from the sale due to her. The Mini bus sold for \$550,000.00, \$500,000.00 of which was put towards the purchase of the Coaster bus. She therefore contributed 21.4% of \$500,000.00 from the sale which is \$107,000. This added to the \$200,000 I found she directly contributed to the purchase of the Coaster bus means that her overall percentage contribution to purchase price of the Coaster bus was $\$307,000.00/\$1,100,000.00 = 27.9\%$ which I will round up to 28%.

Issue 4: Should there be an accounting by the Defendant for a percentage of the net profits from the buses from the date of separation to the date of judgment?

[143] From the affidavit evidence of the defendant, sometime in 2005 the parties commenced living separate and apart from each other in separate areas of the home, even though he did not commence divorce proceedings until 2008 and they were not finalised until August 4, 2010. The evidence of the defendant which I accept on this point is that the Coaster bus was acquired in 2004 before the parties' separation. Therefore, the parties would have jointly borne the costs and obtained the benefits of ownership of the Nissan Sunny and Mini bus during the subsistence of their marriage together, and jointly transferred their equity through to the ownership of the Coaster bus prior to their separation. Consequently, the only accounting that is due to the claimant is in relation to the Coaster bus. In accordance with the 28% interest of the claimant in the Coaster bus the defendant shall account to the claimant for 28% of the profits derived from the operation of the Coaster bus from the date of their separation in 2005 until the date in 2007

when the bus was sold, with interest thereon at the rate of 3% per annum to the date of judgment.

Issue 5: Should the motor bus be valued and the claimant paid her interest therein

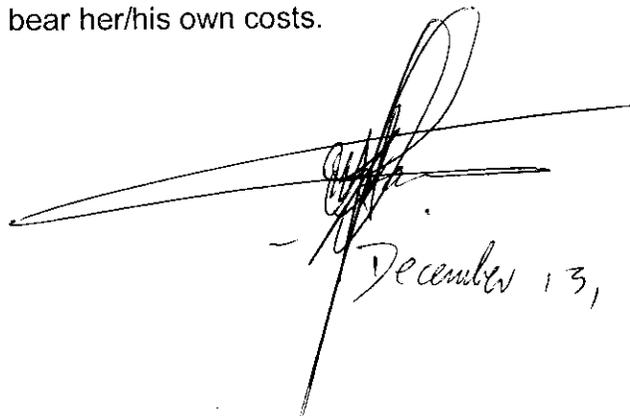
[144] In accordance with the finding that the claimant is entitled to 28% interest in the Coaster bus, the defendant shall pay to the claimant 28% of the net proceeds of the sale of the Coaster bus in 2007, with interest thereon at the rate of 3% per annum to the date of judgment.

Disposition

[145] The court accordingly makes the following order:

- a) The claimant is awarded the first option to purchase the defendant's 50% interest in the family home located at Lot 1 Berrick, Oracabessa St. Mary, being all that parcel of land comprised in valuation number 034-06-013-2.
- b) The said property shall be valued by CD Alexander and the cost of the Valuation shall be shared equally by both parties.
- c) The claimant shall exercise her first option to purchase within thirty (30) days of the date of the receipt of the valuation, by paying to the Attorneys-at-Law having carriage of sale the equivalent of ten percent (10%) of the market value of the one-half interest being transferred. The claimant's Attorneys-at-Law shall have carriage of sale.
- d) Should the claimant not exercise her option within the time limited the defendant shall have the right to exercise an option to purchase within thirty (30) days of the expiration of the first option by paying to the Attorneys-at-Law having carriage of sale the equivalent of ten percent (10%) of the market value of the one-half interest being transferred. In the event the option to purchase is being exercised by the defendant, the defendant's Attorneys-at-Law shall have carriage of sale.

- e) The stamp duty payable on the transfer of the said property is to be borne equally by the parties.
- f) If after the expiration of sixty (60) days following the receipt of the valuation, neither party has exercised her/his option in the manner detailed above, then the property shall be advertised for sale at the market price stated in the valuation report and sold on the open market by private treaty with the net proceeds of sale being shared equally between the parties. In this case the claimant's Attorneys-at-Law shall have carriage of sale.
- g) If either party fails or refuses to sign any documents which are necessary to effect the transfer of the property located at Lot 1 Berrick, Oracabessa, in the parish of St. Mary within fourteen (14) days of being required so to do, the Registrar of the Supreme Court is empowered to sign any such documents.
- h) The application for an order that the defendant be required to compensate the claimant for one-half the cost to repair and upkeep the family home house since the date of separation is refused.
- i) The defendant shall account to the claimant for 28% of the profits derived from the operation of the Coaster bus from the date of their separation in 2005 until the date in 2007 when the bus was sold, with interest thereon at the rate of 3% per annum to the date of judgment.
- j) The defendant shall pay to the claimant 28% of the net proceeds of the sale of the Coaster bus in 2007, with interest thereon at the rate of 3% per annum to the date of judgment.
- k) Each party to bear her/his own costs.



December 13, 2018