



[2021] JMSC Civ. 104

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

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2019 CV03135**

<b>BETWEEN</b>	<b>MAUREEN DAWN SIRJUE-SINCLAIR</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>WELSFORD LEO SINCLAIR</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Gordon Steer instructed by Chambers Bunny & Steer for the Claimant**

**Annaliesa Lindsay and Josemar Belnavis instructed by Lindsay Law Chambers for the Defendant.**

**Heard: February 8, March 12, 2021 and June 4, 2021**

***Division of Matrimonial Property - Family Home - Whether the equal share rule should be varied - Mortgage registered against the title of the Family Home - Whether the mortgage was a joint venture or personal debt - Other Property - No financial contribution by wife - Whether non-financial contribution established. (Section 6, 7, 13, 14, 15 and 17 of The Property (Rights of Spouses) Act.***

***Spousal maintenance- parties separated - Decree nisi was granted. The wife has not worked during the marriage but was fully supported by the husband - Whether - requirements of capacity, necessity and reasonableness of needs are satisfied Sections 4,5 and 14 of the Maintenance Act.***

**A. THOMAS, J.**

**INTRODUCTION**

[1] The parties to this claim, Mrs. Maureen Sirjue-Sinclair (the Claimant) and Mr. Welsford Sinclair (the Defendant) got married on the 22<sup>nd</sup> of December 1995. The marriage produced four children who are now ages 20, 21 and twins 23. In this action, Mrs. Sinclair is seeking the Court's "determination of questions under Sections 3, 6, 7, 11, 13, 15 & 23 of The Property (Rights of Spouses) Act 2004" (hereinafter refers to as PROSA) concerning the ownership of properties between the Claimant and the Defendant. She is also asking the court to make an order for spousal maintenance.

[2] The Claimant in particular seeks the following orders. That:

- (i) She is the sole proprietor of 49 Sunset Avenue, Cherry Gardens;
- (ii) She is entitled to 80% of the Defendant's shares in Radiology West Ltd and Pines Imaging Centre Limited;
- (iii) She is entitled to 50% of the Defendant's shares in:
  - (a) Island Radiology Incorporated;
  - (b) Greysville Pharmacy Ltd.;
  - (c) Traffic Mode Ltd.;
  - (d) Sibron Company Ltd.;
  - (e) YMEC Health Care Services;
  - (f) Serron Pharmaceuticals Ltd. (trading as York Pharmacy 2012);
  - (g) Choice Trucking Co Ltd.;
  - (h) Alpha Imaging Ltd.;
  - (i) The Palmyra (The Jewel Grand Hotel) St. James Hotel - Unit #A802 Sabal Palm Tower Vol. 1437 Folio 478 (Lot#16 and part of Lot #17B);
  - (j) BMW - 2012;

- (k) Mercedes Benz - 2016;
  - (l) Toyota Prado - 2013;
  - (m) Suzuki Grand Vitara - 2016;
- (iv) She is entitled to spousal maintenance in the sum of \$835,000 per month.

[3] The Defendant husband, Mr. Sinclair, is challenging his wife's claims. He is resisting her claim to 100% interest in 49 Sunset Avenue, Cherry Gardens (the Cherry Garden's property) and is asserting an interest in that property. It is also his case that with the exception of Pines Imaging Centre Limited, in which the Claimant has some shareholding interest, she is not entitled to any interest in any of the other companies in which he has any interest. Additionally, he is resisting her claims to the motor vehicles with the exception of the Toyota Prado in which he is claiming no interest.

[4] As it relates to her spousal maintenance claim, Mr. Sinclair is not challenging his wife's request for maintenance, but asserts that he is not able to provide the sum that she is seeking. However, he is prepared to offer a specified sum that is way below that sought by her. The sum offered in his Affidavits, which were admitted as his evidence in chief, was subsequently adjusted upwards on cross examination. This sum will be highlighted in a later segment.

## **ISSUES**

### **The Properties**

[5] There being no denial that the Cherry Garden's property is the family home of the parties, the issues which arise are:

- (i) Whether there is any reason to find that the Claimant is entitled to sole interest in that property;

- (ii) As it relates to the other properties, that is, the shares in the various companies, as well as the motor vehicles, whether there is sufficient evidence of contribution on the part of the Claimant.

#### Maintenance

- (iii) Whether the Claimant is capable of maintaining herself;
- (iv) Whether the Defendant is able to maintain her.

#### **Entitlement to the Properties**

##### **49 Sunset Avenue (The Cherry Gardens Property)**

#### The Evidence

- [6]** The evidence of the Claimant as it relates to the acquisition of the Cherry Garden property is that an intimate relationship developed between herself and Mr. Sinclair in early 1993. They commenced living together at 5-7 Ruthven Road in an apartment owned by herself, her father, mother and brother. The afore-mentioned co-owners transferred their ownership of the said apartment by way of gift to her, on the 18th day of March 2003. She then sold the apartment for Three Million Dollars (\$3,000,000.00). in December, 2004.
- [7]** She states that in April, 2004 she saw a lot of land registered at Volume 1082 Folio 985 situated in Cherry Gardens. She says that she showed the land to Mr. Sinclair who said he was not interested in it. She used moneys from a bank account held jointly with her mother to make a deposit on the purchase of the land. Her intention at the time was to return the sum to the bank account, from the proceeds of sale of the apartment.
- [8]** She also says that the title to the Cherry Gardens property, now known as 49 Sunset Avenue, was taken in her sole name, as it was acquired from the proceeds of sale from the Apartment gifted to her by her family. She states that in April, 2006 as she was not working, her husband took the decision to assist with

construction of the house on the Lot of land at Cherry Gardens, on which she had already commenced construction.

- [9]** Mrs. Sinclair further states that Mr. Sinclair borrowed the sum of Twenty Million Dollars (\$20,000,000.00) and a further Thirteen Million Five Hundred Thousand Dollars (\$13,500,000.00) against the Title of the property. These mortgages were registered on the 15<sup>th</sup> of February 2006 and the 25<sup>th</sup> of September 2008 respectively. She alleges that the entire borrowing was paid to the Defendant without her knowledge or consent.
- [10]** She says that in August of 2009 the parties, along with their children moved into the unfinished house at Cherry Gardens with only one section partially habitable as her plan was to complete it slowly. Prior to this time, they were living in rented premises. She contends that the Thirty-three Million Five Hundred Thousand Dollars (\$33,500,000.00), borrowed by the Defendant then, would have been more than enough to complete the house, had the borrowings been so applied but the Defendant took sole charge of the loan proceeds without her knowledge or consent, lodging it to his personal account only giving her contributions towards the construction as he determined.
- [11]** She indicates that in July of 2010 a further mortgage of Thirteen Million Dollars (\$13,000,000.00) with the Bank of Nova Scotia Jamaica Limited was registered on the Cherry Gardens property. She maintains that this further sum was also paid to her husband alone without her knowledge or consent. It is also her evidence that except for asking her to sign documents in haste, her husband has never explained his loan arrangements to her or ever accounted to her as to how these loans were disbursed or applied or to whom. She asserts that the mortgages on the property were not used solely for the construction of the house, but were also used to invest in other properties and businesses owned by the Defendant.
- [12]** She also states that the Defendant moved out of the house at Cherry Gardens completely in April 2018 and they have been separated since then. She says that

the Defendant serviced his debt, for which the property was used as a collateral, until shortly after he completely moved out of the house, at which time, he stopped servicing his debts. She states that she has received Demands from Banks who claimed to be owed a sum in excess of Thirty-One Million Dollars (\$31,000,000.00). She says that the house is now under foreclosure. She tendered 4 demand letters which were admitted into evidence.

- [13] On cross examination, Mrs. Sinclair states that when the Cherry Gardens property was purchased in 2004, it was just land and thereafter a house was built on it. She agrees that the house was built by virtue of a mortgage registered against the title for the land. She also admits that herself and Mr. Sinclair signed the mortgage document. She states that construction of the house commenced in 2006 and the family moved into the property about the 7<sup>th</sup> of August 2009. She says that save and except when her children went overseas for school, herself, her husband and their children lived at this house from 2009 to 2017. She accepts that as it relates to the three mortgages that are registered on the title, of which she is aware her husband was responsible for repaying these mortgages.

### **The Evidence of the Defendant**

- [14] The Defendant contends that despite the fact that the Cherry Gardens property is registered solely in the name of the Claimant, he has been solely responsible for repaying all of the mortgages in relation to the loans for the construction of the house on the land, so he is entitled to an interest in that property. In his evidence in chief, he states that that his wife agreed that the title to the property would be used as collateral and he agreed that all loan financing obtained would be repaid by him. He refutes her claim that she had commenced construction prior to the receipt of the mortgage loan. He admits that at a point in time Mrs. Sinclair had offered to place his name on the title as an owner, but he declined that offer.
- [15] Mr. Sinclair refutes Mrs. Sinclair's claim that the sums borrowed against the title were done without her knowledge and consent. He states that she was aware of

all the sums borrowed, in that the mortgages could not have been registered without her consent. He further states that Mrs. Sinclair signed the mortgage loan documents in the bank.

- [16]** He explains the reason for an additional loan of Thirteen Million Dollars (\$13,000,000.00) from the Bank of Nova Scotia: He states that the sum was required as a retaining wall that was built on the property had collapsed because of dumped up land and had to be rebuilt urgently to secure and preserve the house. He admits that he asked the Claimant to agree to a further loan financing that would be secured by the Cherry Gardens property. The reason for that loan, he explains, was to secure further funds to complete the construction of the house.
- [17]** Mr. Sinclair denies that any further borrowing was done without the Claimant's knowledge or consent. He states that he gave Mrs. Sinclair various sums for expenditure throughout the construction and furnishing of the Cherry Garden's house so she would have evidence of those expenditure. He says that the construction of the house is not complete and that the unfinished portion includes the master bathroom, the basement and the pool. He also states that he was desirous of consolidating all his loan obligations so as to attract a reduced interest rate and thereby reducing his mortgage payments, as he was experiencing financial difficulties in meeting his loan obligations. He, however states, that Mrs. Sinclair did not agree to that.
- [18]** On cross examination, Mr. Sinclair says that Pines Imaging Centre Limited commenced business in 2001. No money was borrowed to benefit the establishment of Pines Imaging Centre Limited, using Cherry Gardens as a security, as the property at Cherry Gardens was bought in 2004. He also says that he is not sure if Ms. Sinclair gave personal guarantees over loans to benefit Pines Imaging Centre Limited. He asserts that whatever she does a shareholder in the company would have been done by multiple shareholders, as other shareholders gave unlimited guarantees.

- [19]** He states that the Pines Imaging Centre Limited has borrowed multiple loans. He also agrees that in 2012 there was a second legal mortgage over Pines Imaging Centre Limited and that the document regarding that mortgage indicates an “unlimited guarantee by Maureen Sinclair”. He explained that in relation to that mortgage, there is a group of shareholders in Pines Imaging Centre Limited. The company was seeking to acquire a MRI machine with a loan from Scotia Bank and being shareholders, they were using property from the company, including the machine, and the Cherry Gardens property, which by then had a house on it, as security. He contends that the Cherry Gardens property by then would have been owned by himself and his wife, because by then the house would have been on the land.
- [20]** Mr. Sinclair, maintains that his wife, in allowing the property to be used as security was not doing this for him, because as a shareholder she would have been doing this for her benefit as well as the benefit of the other shareholders
- [21]** He admits that there were times when he defaulted on the mortgage for the Cherry Gardens home and that they are not currently up-to-date. He however asserts that he can afford to service the mortgage. He says that in and around 2016, he approached the Bank of Nova Scotia to restructure his loans and that they agreed to consolidate his loans and reduced his payments by half, for him to pay approximately Eight Hundred Thousand Dollars (\$800,000.00) per month They also agreed to give himself and his wife a further loan of Ten Million Dollars (\$10,000,000.00) to complete the house but his wife refused to sign the documents. He says that this is the reason why the house has not been completed. He says that during that period of time, he struggled to pay the mortgage but he always pays it even if it is paid late. He asserts that it will be paid.



## The Law

[22] **The Property Right of Spouses Act (PROSA)** is the applicable legislation governing the entitlement and division of property between spouses. **Section 6** of **PROSA** states that:

- “(1) *Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home -*
- (a) *on the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
  - (b) *on the grant of a decree of nullity of marriage;*
  - (c) *where a husband and wife have separated and there is no likelihood of reconciliation*
- (2) *Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one half share of the family home.”*

Section 7 states:

- “(1) *Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust...for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following-*
- (a) *that the family home was inherited by one spouse;*

- (b) *that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;*
  - (c) *that the marriage is of short duration.*
- (2) *In subsection (1) "interested party" means-*
  - (a) *a spouse;*
  - (b) *a relevant child; or*
  - (c) *any other person within whom the Court is satisfied has sufficient interest in the matter."*

Section 11 states:

- “(1) *Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property, either party or any bank, corporation, company, public body or society in which either of the spouses has any stocks, bonds or shares may apply by summons or otherwise in a summary way to a Judge of the Supreme Court or, at the option of the applicant irrespective of the value of the property in dispute, to the Resident Magistrate of the parish in which either party resides*
- (2) *The Judge of the Supreme Court or the Resident Magistrate, as the case may be, may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.*
- (3) *A spouse may make an application to the Court in respect of any title, interest or rights to property which had been in the*

*possession or under the control of the other spouse but has ceased to be in the possession or under the control of that other spouse.*

(4) *The Court may, on an application under subsection (3), make such order as it thinks just for the payment of a sum in respect of-*

(a) *money to which the application relates or the spouse's share thereof, as the case may be;*

(b) *the value of property to which the application relates or the spouse's interest therein, as the case may be if the Court is satisfied that the property was in the possession of or under the control of the other spouse who has not made to the applicant, such payment or disposition in relation to the property as would have been appropriate in the circumstances.'*

(5) *Where a Court makes an order under subsection (2) or (4), it may make an order as to costs and may make such consequential orders including orders as to sale or partition and interim or permanent orders as to possession.*

(6) *An order made under subsection (2) or (4)(a) by a Judge of the Supreme Court shall be subject to appeal in the same manner as would be applicable to an order made by that Judge in any proceedings in that Court; or*

- (b) *by a Judge of the Family Court or by a Resident Magistrate shall be subject to appeal in the same manner as would be applicable to any other order made by that Judge or Resident Magistrate.*
  
- (7) *In respect of an application under subsection (1), any bank, corporation, company, public body or society shall, for the purposes of that application (including costs referred to in subsection (5) be treated as a stakeholder only*

Section 13 states:

- “(1) *A spouse shall be entitled to apply to the Court for a division of property-*

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

- (2) *An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant*
- (3) *For the purposes of subsection (1) (a) and (b) and section 14 the definition of "spouse" shall include a former spouse.*

### **Submissions**

#### **On behalf of the Claimant**

- [23] Counsel for the Claimant, Mr. Steer submits that Section 7 of PROSA is applicable in these proceedings. He is of the view that there is a basis for varying the equal share rule with regards to the family home. He accepts that *"the property in dispute is the family home of the parties as it falls squarely within the definition of 'family home' defined by section 2 of the Property (Rights of Spouses) Act."*
- [24] He has advanced various reasons in support of his position that the equal share rule should be varied. He states that "Mr. Sinclair has not, by any of his affidavits filed in these proceedings, stated that he believes himself to be entitled to an equal share in the property", He makes reference to the portion of the Defendant's affidavit which states *"the Claimant had offered to place my name on the title as an owner, but I declined that offer."*
- [25] Counsel says that he "appreciates that the provisions of PROSA prevail over common law principles with regards to transactions between spouses". However, relying on the case of ***Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam*** [2018] JMCA Civ 1, he suggests that there are instances when the intention of the parties should be considered.
- [26] He submits that "it is evident by the language of both parties in their affidavit" evidence in these proceedings "that the property was treated as the Claimant's

and though the Defendant assisted with the maintenance and improvement of same, he is willing to relinquish any interest he may have gained.”

- [27] Counsel advances the argument that between 2004 and 2010 the Defendant “borrowed the sum of over Forty-Five Million Dollars (\$45,000,000.00) against the family home, fallaciously stating that the sum was used solely to construct the dwelling house on the Claimant’s land, but the sum was also injected into several businesses owned by the Defendant over the years”.
- [28] Counsel is of the view that the Defendant has given no evidence in this matter that the Claimant had access to the monies from the mortgages, nor the source of his funding for his business ventures, nor how the mortgage loans were expended over the years on the construction of the property.
- [29] He takes the position that “the Defendant had the benefit over the years of utilizing the Claimant’s title in order to fund and expand business ventures. This has assisted the Defendant in becoming a man of great wealth and as such any share the Defendant may have in the subject property has been paid out to him several times over whether directly by the share he received from the mortgages or indirectly by increasing his earning capacity several times” (He also relies on the case of Carol **Stewart v Lauriston Stewart** [2013] JMCA Civ 47).
- [30] As it relates to the outstanding mortgage on the Cherry Gardens property, relying on section 17 of **PROSA**, Counsel submits that the court should find that the Defendant is solely responsible for the discharge of same.
- [31] He relies on the of cases of **Bell-Booth v Bell-Booth [1992] 2 NZLR 7 and Wilson v Wilson [1991] 1 NZLR** to say that there was no element of togetherness or common venture in relation to mortgage loans so as to find the Claimant equally responsible for their repayment. He submits that although the loans were signed by both parties, they were not at any stage ever considered by the parties to be joint loans or taken in the course of a joint venture. Counsel says that:

“Though the Claimant herein possibly benefitted by virtue of her maintenance received from the Defendant and the continued construction of the matrimonial home, these ‘fruits’ as stated above do not mean she is equally indebted. However, Mrs. Sirjue did not benefit in anyway. As indicated by her affidavits, though she is a shareholder of Pines Imaging Centre Limited Imaging Centre Limited, she has never received a share of profit from same. The loan and its consequences were at all times the responsibility of the Defendant and by extension, the companies that benefitted from them. Having acknowledged that the debts charged against the property are his sole responsibility these debts clearly fall within personal debts as outlined by section 17 of PROSA”

**On behalf of the Defendant**

[32] Counsel for the Defendant, Ms. Lindsay submits that:

“From a preliminary point of view and pursuant to section 13 of the Act, the Claimant’s pursuit of the claim, without the permission of the Court may be pre-emptive as there has been no grant of decree for the dissolution of the marriage, the claim being filed on July 30, 2019, prior to the Defendant’s Petition and Amended Petition for Divorce which were filed on January 6, 2020 and February 12, 2020 respectively. In answer filed to these proceedings filed by the Defendant the Claimant has stated that the Defendant is not entitled to the divorce which he seeks. Whilst it must be noted that the Defendant albeit, opposing the application made herein, is not opposing the Court exercising its discretion in hearing the matter. This preliminary point is however an important consideration of the Claimant’s conduct when the Court comes to consider the manner in which it will exercise its discretion in this case”.

[33] She further submits that the court should apply the 50% equal share rule to the Cherry Garden’s property as none of the section 7 provisions of PROSA is applicable. She relies on the case of **Christian v Christian** [2012] JMSC Civ 36

to say that “if it is that the spouse seeking to rebut the presumption cannot show that it would be unjust and unreasonable, the presumption will apply.” She also points out that the marriage was one of a relatively long duration and that the Claimant has provided no evidence that there was any agreement between the parties in relation to the family home that is contrary to the section 6 presumption.

[34] She is of the view that there is no evidence presented by the Claimant that the justice of the case requires a departure from the equal share rule. She urges the court to find that section 6 of **PROSA** applies and that both parties have a 50% interest in the family home.

[35] As it relates to the outstanding mortgage, she urged the Court to find that “with the joint and equal interest that both parties have in the family home, comes the equal and joint responsibility for the repayment of the mortgages registered thereon”.

[36] Counsel takes issue with the fact that the Claimant is seeking the sole ownership and equity in the property, yet seeking to distance herself from the liabilities attached to that ownership. Further, she is of the view that “the Claimant cannot stand in the position of knowing that the Defendant is encumbering himself with loans in constructing the family home, benefitting from that endeavour, and then say, she is solely entitled to the asset itself and not its lawful expenses”. She submits that such a position is unjust and unreasonable, and she invites the court to reject the Claimant’s claim of being” the sole legal owner of the property, free of all liens, charges and encumbrances registered on the Title”.

### **Discussion**

[37] Let me first of all address the preliminary point raised by counsel for the Defendant. It is clear that if the parties are approaching the court for a division of property they will have to come under section 13, of PROSA, thereby satisfying the provisions of that section. That is, either on the termination of the marriage or cohabitation, or there being a separation with no likelihood of reconciliation or that the marriage or cohabitation is still in existence but one party is endangering the property



resulting in diminution of its value, or possible dissipation. Counsel has raised the point that despite the fact that the husband, Mr. Sinclair, has filed a Petition for the dissolution of marriage, Mrs. Sinclair has filed an answer contesting the Petition. It is her view that in those circumstances the provisions of Section 13 would not have been satisfied as it relates to the there being no likelihood of the resumption of cohabitation.

- [38] However, when I examine the Fixed Date Claim Form, despite making reference to Section 13, the Claimant has not specifically asked for the division of property. Mrs. Sinclair, in the Fixed Date Claim Form, states that she is seeking “determination of questions concerning the relevant properties”. Notably the Claimant also made reference to section 11. Under that section, the court is empowered by virtue of subsections (1) and (2), to settle questions that arise in relation to the parties’ interest in property during the subsistence of the marriage.
- [39] Therefore, the fact that the issue as to whether there is a likelihood of resumption of cohabitation is not settled, does not prevent a court from making declarations regarding the parties interest in the properties **during the subsistence of the marriage** or cohabitation by virtue of Section 11(1) and (2) of PROSA. However, I also take note of the fact that counsel indicates that the Defendant began proceedings for divorce in January 2020 and on the 11<sup>th</sup> day of February 2021, the Decree Nisi was granted by this Honourable Court. The Defendant now awaits the grant of the Decree Absolute. It has not been indicated whether the Claimant had subsequently withdrawn her contest to the petition. Therefore, the point raised by counsel would now be moot.
- [40] There is no denial that the Cherry Gardens property is the family home of the parties. Therefore, in accordance with Section 6 of the **PROSA**, each spouse is entitled to 50% of the family home. Essentially, this provision establishes a rule of equal entitlement to the beneficial interest in the family home. This was discussed by Mc Donald Bishop J (Ag) (as she then was) in the case of **Graham v Graham**

**Claim** No 2006 HCV 03158 (delivered 8 April 2008). At paragraph 15 she stated that:

*“By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See R v R [1992] 1 AC 599, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in Miller v Miller; McFarlane v McFarlane [2006] 2 AC 618, 633.”* (See also Carol **Stewart v Lauriston Stewart** [2013] JMCA Civ 47 paragraph 15)

- [41] It should also be noted that where section 6 is applicable, contribution is not a factor to be taken into consideration. (See in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, and **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam**)
- [42] However, a party can approach the court under section 7 to vary the equal share rule established under section 6. Nonetheless, for section 7 to apply there are certain conditions that must be satisfied. One of the considerations under section 7 is whether the marriage is of a short duration. In the instant case, the parties having gotten married on the 22<sup>nd</sup> of December 1995 and separated in 2017, the marriage can by no means be described as a marriage of short duration.

[43] In the case of ***Margaret Gardner v Rivington Gardner*** [2012] 39. Edwards J as she then was) at paragraph 17 stated:

*“Section 7 makes it clear that, upon an application by a spouse the Court may make an order varying the equal share rule provided for in section 6. There exists by virtue of PROSA, therefore, a presumption of equality which may be displaced by the application of section 7. The onus rests on the spouse who is alleging that it is unreasonable and unjust to apply the equal share rule to provide evidence to rebut the presumption”.*

[44] She also stated at paragraph 18 that:

*“In considering whether to vary the pertinent consideration is fairness This is clear from the factors the legislators chose to list in section 7. For instance, it may not be fair, in the circumstances of a particular marriage, to divide the family home equally, if one party inherited that home prior to the marriage and the other made no contribution or no significant contribution to its improvement, expansion or preservation. Again, in a short marriage fairness may dictate that a claimant should not be entitled to a share in a defendant’s property acquired prior to the marriage. If the family home was not acquired by the joint efforts of the parties, then the brevity of the marriage may justify a departure from the yardstick of equality”*

[45] At paragraph 19 she stated that:

*“The matrimonial properties envisioned by section 7 are recognized as those which are not attributable to the joint efforts of the parties in a marriage or cohabitation and thus it would be unfair, unreasonable and unjust for them to share equally in any such property”.*

[46] However, it is important to note that the mere fact that one of the conditions listed in section 7 exists does not mean that the equal share rule will automatically be varied. The party seeking the variation of the equal share rule will have to establish that in light of the circumstances of the case, the existence of one or more of the conditions listed in Section 7 will render it unreasonable or unjust for the equal share rule to apply.

[47] Additionally, as was stated by Brooks JA the case of Carol **Stewart v Lauriston Stewart** [2013] JMCA Civ 47, the use of the word “including”, in section 7 “implies that the court is entitled to consider factors other than those listed in section 7(1). (c) . The equal share rule has to be shown to be unreasonable or unjust; equality is the norm”. (See paragraph 27)

[48] At paragraph 34 he stated that

*“The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration. For instance, the family home may have been inherited by one spouse, but the other may have, by agreement with the inheriting spouse, solely made a substantial improvement to it at significant cost. In such a case the court would be unlikely, without more, to award the entire interest to the spouse who had inherited the premises.*”

[49] It is also crucial to note that, as stated by Brooks JA at paragraph 51:

*“If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure.”*

[50] Brooks JA also pointed out at paragraph 63 that:

*“Since contribution, by itself, does not qualify as a section 7 factor, there was no section 7 factor proved and, therefore, there was no basis to consider a departure from the statutory rule of an equal division. As a result, the order should have been that the parties were equally entitled to the beneficial interest in the property.”*

[51] Therefore, the fact of Mrs. Sinclair being the sole provider of the money to purchase the land on which the family house stands, is insufficient to displace the application of Section 6 of PROSA, or to put it another way, to invoke the application of section 7.

[52] As it relates to the issue of intention of the parties as was raised by counsel for the Claimant, the provisions of **PROSA**, and in particular Section 4, make it clear that the statutory provisions displace the principles of common law and equity, to include common intention.

[53] In the case of **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam** [2018] JMCA Civ 15 paragraph 131 to 133 Edwards JA stated:

*“There is therefore no question that since the implementation of PROSA, the ‘presumptions of common law and equity’ are no longer applicable to transactions between spouses in respect of property*

*and between them and third parties, where provisions are made for it by the Act. Therefore, all claims as to an entitlement to a share of the matrimonial property under PROSA must satisfy the factors set out in section 14, for property other than the 'family home' and section 6 and 7 where the division of the 'family home' is in issue. This means that submissions regarding any reliance on common law presumptions and equitable principles and the authorities dealing with those presumptions and principles are not relevant to transactions between spouses in respect of property for which and in cases where provisions have been made in respect thereof, by PROSA. All submissions must be referenced by the relevant factors as set out in PROSA, unless there are no provisions in PROSA covering that issue. This, of course, is subject to the caveat that issues relating to the common intention of the parties might be a relevant question of fact, as a starting point to show what the parties' interests were, even in a claim under PROSA, without having to resort to the rules or presumptions of common law or equity. See *Miller and another v Miller and another* [2017] UKPC 21, where the Privy Council commented that PROSA was a robust enactment which stood on its own two feet and there would rarely be any occasion to resort to English authorities under the Married Woman's Property Act. However, the Board did caution that the issue of the intention of the parties should not be disregarded, as it was an issue that could be considered as a question of fact as a starting point, without regard to the rules or presumptions of common law and equity. I accept that the intention of the parties in the ordering of their affairs is a relevant starting point whether it is being considered under PROSA or under the principles of equity or the common law presumptions. So, for example, if there is evidence of the parties' clear intention that one spouse should work outside the home and the other in the home and that the assets acquired during the*

*marriage would belong equally to both spouses, it is difficult to see how the court would disregard that intention because the application was made under PROSA. So too, an agreement under section 14(2)(d) would be evidence as to the common intention of the spouses and any other evidence of intention can be taken into account under section 14(2)(e), if the justice of the case so requires.”*

[54] However, at paragraph 134 she noted that in that particular case,

*“the appellant’s reliance on **Hammond v Mitchell** and the other authorities based on the application of common law and equitable presumptions is misconceived.”*

[55] Therefore, it is clear that the common law and equitable principle of common intention is not applicable to these proceedings. It is also significant to note that in the aforementioned authority, intention as a factual consideration should only be a starting point and not a conclusive determination of the issues. However, I find that the contention of counsel for the Claimant that, it was the parties’ intention based on their affidavit evidence that the Cherry Gardens property was to be treated as the Claimant’s, and that the Defendant is willing to relinquish any interest he may have gained, is not supported on the evidence. In fact, there is nothing in the Defendant’s evidence to suggest that at any point the Defendant was willing to relinquish any interest he may have gained in the property. In his cross examination, having admitted that the property was used as security in relation to the Scotia Bank loan for the purchase of the MRI machine for Pines Imaging Centre Limited, he stated that by that time, that is in 2012, the property was his and his wife’s as the building was now on it.

[56] Nonetheless, it is my view that the evidence reflects the usual partnership of marriage between the parties; the wife providing the land and the Defendant financing the construction of the house. This is inconsistent with an intention for the Defendant to have no share in the property. This is especially in light of the fact

that there is no evidence that the Defendant, up to the date of separation, owned another home.

- [57] In case of **Carol Stewart v Lauriston Stewart**, in deciding whether or not to vary the equal share rule Brooks JA addressed other possible factors that the court could consider, other than those listed in section 7(1) c. He did allude to the fact that the intention of the parties in exceptional circumstances may be a relevant consideration within the context of Section 7. He went on to make reference to a scenario where the parties entered into an agreement post-separation where, in contemplation or exchange for the interest in the family home, one party transfers his or her interest in another property to be solely owned by the transferee. If such a scenario exists Justice of Appeal Brooks intimated that it would be unjust to declare half interest in the family home to each party, the other party having been given, by agreement, complete ownership to the other property.
- [58] In any event in this instant case I find no evidence pointing to a clear intention to open the gateway under section 7. That is, the evidence has not established any clear intention of the parties that would render the application of the equal share rule unjust. Essentially, it is my view that it is not in all circumstances that the court will give effect to the intention of the parties as a factual consideration in order to displace the equal share rule. It will do so only in circumstances where to do so would be reasonable and just. On the contrary if to do so would render injustice and unfairness, then the court will find that the gateway under section 7 has not been opened. For example, it may very well be that at the inception of the purchase of the family home, it was intended that one party should have all the interest in the family home because the parties intended to purchase a second home for the other party to have full interest in the second home. Where the plan to purchase the second home did not materialize, in those circumstances it would not be just and reasonable to give effect to the intention of the parties.
- [59] It is also of significance, in accordance with the uncontested evidence, that it was Mr. Sinclair who borrowed the money to build the house on the land at Cherry



Gardens. Despite the Claimant's evidence that the entire borrowing was paid to the Defendant without her knowledge or consent, she has not denied that he financed the construction of the house. I do take note of her evidence that he took over the construction that she had already commenced. However, I am not convinced by her evidence that she had commenced construction, as apart from this general statement, she has provided no further evidence of her commencing construction. That is, what aspect of the construction she had commenced and her source of funding, bearing in mind that it is her evidence that she was unemployed at the time.

- [60] Additionally, I find that that the Claimant's evidence that the loans against the property were taken without her knowledge and consent lacks credibility. In the absence of forgery, which she is not alleging, the fact that hers is the sole name on the title, her husband could not have secured a mortgage against the title without her consent/signature. In fact, on cross examination she admitted that she signed the mortgage documents.
- [61] In essence, the fact is, it cannot be said, as provided by section 7, that the family home was gifted to Mrs. Sinclair or solely owned by her prior to the marriage. Neither can it be said that it was inherited by her prior to the marriage. In fact, the practical application of what transpired is that she would have provided the land and the Defendant the house. The question now is: having failed to satisfy the list of factors specified in section 7, whether there are other (exceptional) factors falling within the provisions of section 7, that would make the application of the equal share rule unjust.
- [62] With regards to the submission of counsel for the Claimant that Mr. Sinclair has not specifically pleaded that he is entitled to a 50% share in Cherry Gardens, the case of **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam** (Supra) is relevant. At paragraph 45 Edwards JA noted that:

*“However ...despite the fact that it was not indicated in the claim that the property at Dillsbury Avenue was to be treated as the family home, in my view, there was nothing to prevent the judge from considering whether or not the property fell to be treated as the family home.”*

[63] Applying this principle, I find that the fact that there is no denial that Cherry Gardens is the Family Home and the Claimant has filed an action seeking the courts declaration of their interest, the fact that Mr. Sinclair did not specifically state he is entitled to 50 % would not oust the application of Section 6. The court would generally proceed under section 6 in the absence of a section 7 application.

[64] The fact is, the Defendant states that he is opposing the application of the Claimant for 100% share in the property and that he has an interest in the property. It therefore falls to the court to decide whether the Claimant has satisfied the requirement for the application of Section 7. If the requirement is not satisfied, then the entitlement to property falls to be considered under Section 6. This approach is supported by the reasoning of Edwards JA in the case of **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam**. At paragraph 47 she stated:

*“Therefore, in this case, met with an application to divide property on which the evidence indicated there was a dwelling house and one party was claiming on the evidence that it was the family home, the judge was duty bound to consider whether it was in fact the family home and whether an order could be made under section 6 or 7 of PROSA. The judge was therefore wrong not to have considered this question”.*

[65] As it relates to the submissions of counsel for the Claimant that “in deciding whether the equal share rule should be varied, the court should consider that Mr. Sinclair used the sums from the mortgage received on the Cherry Gardens

property for his personal benefit to expand his businesses, becoming a man of great wealth” I find that this has not been established on the evidence.

**[66]** The evidence from both parties in fact establishes that the Defendant did expend on the construction of the house. The fact is, the Claimant has admitted that there was a habitable structure on the land by 2009 for herself, 4 children, husband and 2 live-in helpers to occupy. Therefore, the fact that the expense of the intended structure has not yet been achieved does not by itself indicate that the sum borrowed against the title was not expended on the structure.

**[67]** It is a trite principle of law that he who alleges must prove. The Claimant is alleging that all the sums were not spent on the construction of the house without adducing any supporting evidence to substantiate same. No evidence has been presented to the court as to the size of the house and the cost of construction to counter Mr. Sinclair’s evidence that the moneys were expended on the house. For example, evidence of the valuation of the house up to the date of the last mortgage, indicating the valuation to be so far below the sum borrowed that it would be so apparent that the total sum could not have been spent on the construction of the house. In these circumstances, as it relates to the submission of counsel that there is evidence that the Defendant borrowed against the property for personal benefit is not supported on the evidence.

**[68]** Counsel made specific reference to Twenty Million Dollars (\$20,000,000.00) borrowed from JN Bank evidenced by Exhibit 26. There is no admission on the part of the Defendant that this loan was used for his benefit or that of Pines Imaging Centre Limited. His evidence is that it was used in the construction of the house. When I examine exhibit 26 it indicates that both parties were applicants. I notice that the loan was granted in November 2005. That is during the time, based on the evidence, of both parties that the construction of the house would have been taking place and prior to the family moving in.

**[69]** Additionally, the document indicates that the loan was for construction. There is nothing on the evidence of either party to indicate that any construction was being carried out at the location at Pines Imaging Centre Limited at that time or any other time. Therefore, on the evidence I find that the Twenty Million Dollars (\$20,000,000.00) from JN Bank relates only to the construction of the house at Cherry Gardens. Additionally, the evidence is that there was a Scotia Bank loan for the purchase of a MRI machine for Pines Imaging Centre Limited. The Claimant has not denied that she was and still is a shareholder at Pines Imaging Centre Limited. Contrary to counsel's submission, she has also admitted that she received dividends from that company. Therefore, it would not be correct to say that she did not benefit from the profits of that company. Additionally, there is no evidence to support the assertion that the Defendant has become a man of great wealth. Despite the uncontested evidence that he owns shares in several companies I have no evidence of his net worth. Additionally, his evidence that he at times defaulted on the outstanding loan. because he was at times having financial difficulties has not been contradicted. Therefore while the evidence does not point to him being impecunious, it certainly does not establish affluence on the part of the Defendant

**[70]** In any event, I find that Mr. Sinclair would have presented more credible evidence that the sums from the mortgage loan, were in fact expended on the construction of the house., which in my mind amounts to a significant improvement to the land. Therefore, in applying the relevant provisions of section 7 to the circumstances of this case, I find that it would be unreasonable and unjust to declare that Mr. Sinclair has no interest in the property. I equally find that it would not be unreasonable and unjust to find that he has 50% interest in the property. Essentially I find that the Claimant has failed to open the gate under section 7. Therefore she has failed to convince this court to vary the equal share rule.

**[71]** Consequently, I find that each party is entitled to a 50% share of the Cherry Gardens property registered at Volume 1082, Folio 985 of the Register Book of Titles.

### **The Outstanding Mortgage**

[72] Having found that the parties have equal interest in the house, generally they would be both responsible for any outstanding mortgage. This however is subject to the provisions of **Section 17** of **PROSA** which exempts any personal debt incurred by the parties. The relevant subsection reads:

*“(2) The value of property that may be divided between the spouses shall be ascertained by deducting from the value of property owned by each spouse*

*(a) any secured or unsecured debts (other than personal debts or debts secured wholly by property) owed by one spouse; and*

*(b) the unsecured personal debts owed by one spouse to the extent that such debts exceed the value of any property of that spouse*

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

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

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

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

*(a) by both spouses jointly; or*

- (b) *in the course of a joint venture carried on by both spouses whether or not with any other person; or*
- (c) *for the purpose of effecting improvements to the family home or acquiring, repairing or effecting improvements to the family chattels; or*
- (d) *for the benefit of both spouses or any relevant child in the course of managing the affairs of the household or for caring for the relevant child, as the case may be.”*

**[73]** Counsel for the Claimant, is of the view that the court should hold the Defendant responsible for the full payment the mortgage, partly because it is his view that a portion was used for his personal benefit and also because the Defendant has committed to repay same. However as indicated is her submissions counsel for the Defendant is of the view that the parties are equally responsible for the discharge of the outstanding mortgage.

**[74]** Nonetheless, I note that in his evidence on cross examination the Defendant has agreed to pay the outstanding mortgage. Additionally, in light of the fact that prior to and subsequent to the separation, he assumed the full responsibility of the repayment, it is a reasonable inference that this was the arrangement between the parties that the Claimant, having provided the land, the Defendant would have taken on full responsibility for the repayment of the mortgages. Even in response to the fact that he had defaulted at some point after separation, he has raised no objection to payment but states that the reason that he defaulted was because he was having financial difficulties, but that he would pay it.

[75] However, before moving on from this issue I find it necessary to make the point that, in my view the cases of *Wilson v Wilson* [1991] 1 NZLR 687 and of *Bell-Booth v Bell-Booth* [1992] 2 NZLR 7, do not support the position put forward by counsel for the Claimant. This is in light of the fact that in these cases the mortgages against the property were not in relation to construction of the family home but related to enterprise unconnected to the property.

[76] Additionally, the court in those cases found that there was no common enterprise, that is no element of togetherness in those enterprises. In the instant case it is recognized that the evidence reveals that one of the mortgages relates to an enterprise that is unconnected to the family home. That is the Pines Imaging Centre Limited. However, it cannot be said that the Claimant merely signed the mortgage document in relation to this property. Though not having equal shares as the Defendant there is evidence of togetherness as from the inception she owned shares in that Company. She also testifies that she worked in the company for a short period and as a shareholder she receives dividends. However, the fact that the Defendant has agreed in his evidence to pay the outstanding mortgages, there is no necessity to discuss this point any further.

## **The Companies**

### **The Evidence of the Claimant**

[77] The Claimant states that when she met the Defendant in 1990 he was a medical doctor with his private practice in Westmoreland. In 1993, when they began living together at the Ruthven Road Apartment, she was employed as a Senior Auditor. In 1993, Mr. Sinclair told her to stop working and look after him and he would maintain her; and as a result she stopped working. She says she has not worked since that time, except for 2 years in Pines Imaging Centre LTD, and he has supported her fully.

[78] Mrs. Sinclair says that she has 4 children by the Defendant. A pair of twins who were born in 1997, another child who was born in 1999 and the last child who was

born in the year 2000. She also says that in 1995 the Defendant decided to specialize in radiology and cut back on his medical practice. As a result, his income was reduced. The apartment at Ruthven Road was rented. Her family allowed her to use all of that rental income from the Apartment for her sole benefit, which she states, assisted greatly in the household expenses.

**[79]** Mrs. Sinclair states that the Defendant finished the radiology programme in 1999, after which they discussed going into their own Radiology business together. They decided to start the business in Montego Bay as there was no radiology facility in that area. She asserts that they had no savings and had a problem getting credit for start-up capital.

**[80]** She explains that the Defendant asked herself and her family to allow him to obtain a mortgage of the sum of Two Million Two Hundred Thousand Dollars (\$2,200,000.00). against the Ruthven Road apartment in order for him to commence the Radiology West Company to which they all agreed. She says that just prior to this loan being disbursed to the Defendant the said Company, Radiology West was incorporated on the 1st day of September 1999 with the Defendant and Konrad Kirlaw as equal shareholders. She states that the proceeds of the mortgage of the Apartment went directly into this company and that the mortgage was registered on her family's Title on the 28th day of September 1999.

**[81]** The Claimant further states that the mortgage on the Ruthven Road apartment was discharged on the 28th day of February 2003 by the Defendant out of the business income as by then the business was doing very well. She asserts that by reason of the initial contribution by herself and her family the Defendant was able to advance himself. Thereby his businesses did well. She states that from 1995 to date, the Defendant has been able to incorporate and operate a number of companies. She has named the following companies in which she is claiming 50% of the Defendant's shares.



- (i) Island Radiology incorporated;
- (ii) Greysville Pharmacy Limited;
- (iii) Traffic Mode Limited;
- (iv) Sibron Company Limited;
- (v) YMEC Health Care Services Limited
- (vi) Seron Pharmaceutical Limited (trading as York Pharmacy 2012);
- (vii) Choice Trucking Company Limited;
- (viii) Alpha Imaging Limited.
- (ix) The Palmyra (The Jewels Grand Hotel), St. James Unit #A802-Sabal Palm Tower – Hotel

**[82]** She also names Radiology West Limited and Pines Imaging Centre Limited in which she is claiming eighty percent (80%) of the Defendant's shares. She says that she owns 316 shares in Pines Imaging Centre Limited and the Defendant owns 912. She states that she only discovered the existence of some of these companies through her research done in preparation for this case. She contends that for the almost twenty-seven (27) years of marriage, she was a devoted mother, wife, home maker, and provided financial and other support to the Defendant and has raised their children to become independent and progressive persons. She also states that during the time of the Defendant's further studies in radiology, she supervised directed and controlled his businesses, whilst also being a housewife and full time mother to their four (4) children.

**[83]** She asserts that she told Mr. Sinclair that she could assist in one of the businesses and he told her to stay home and look after the family. She says that initially when they started Radiology West, herself and three children of the marriage went to reside with Mr. Sinclair in Montego Bay from February 2000 to August 2000. She states that she returned to Kingston because she became pregnant with her fourth child and that the children and herself went to Portview Court, Manor Park to live while Mr. Sinclair came into Kingston only on some weekends. She contends that then she was the only person taking the children to and from school and doing everything else, but her husband would give her money to run the household.

- [84]** She states that in and around May 2001 they discussed opening a business in Portmore St Catherine. They both viewed a property in Portmore Pines Plaza and agreed that it was suitable for the Radiology business, which is now Pines Imaging Centre Limited. She says that Mr. Sinclair returned to live in Kingston full time in May 2001. By then they had moved to Widcombe Road and she would take the babies to Wynter Academy on Widcombe Road, now Reach Academy, and Mr. Sinclair would take the older two (2) children to Hillel on his way to work. She would then pick up all the children after school and take them to whatever extra-curricular activities they had.
- [85]** She mentions that she did an associate degree at M.I.N.D. in Accounting in August 2011 and thereafter pursued a degree at the University of the West Indies (UWI) in 2012 in Management Studies and Accounting, which she completed in September 2018. She maintains that the Defendant never encouraged her to further her education and always told her during her studies, that she was wasting her time and money. She also maintains that the Defendant never encouraged her to work at any point in time during their relationship or marriage other than in the company as previously stated.
- [86]** On cross examination Mrs. Sinclair states that she worked in Pines Imaging Centre Limited from 2001-2003 but never received a salary. She says that the annual salary for an accountant at that time was about \$1.5M. She states that she signed a document admitting that she was one of the original shareholders of Pines Imaging Centre Limited but admits that she was not an original shareholder of Radiology West and that she does not now own any shares in that Company. She also admits that with the exception of Pines Imaging Centre Limited, she was not an original shareholder and is not now a shareholder in any of the other Companies. However, she says that before Greysville Pharmacy Ltd was incorporated as a limited liability company and was functioning as a sole trader enterprise, she used to assist Mr. Sinclair with book keeping.

- [87] She states that to her knowledge only two of the named companies are not now in operation. These she names as Traffic Mode and Sibron. She says that Traffic Mode was owned by Mr. Sinclair and one of his children's mother, and Sibron was owned Mr. Sinclair and his brother and his brother's wife. She says that of the other companies that are still in operation, she has an idea who the shareholders are because they are listed in the Articles of Association. She admits that she discovered the information in relation to these companies through research.
- [88] As it relates to the loan taken out against the Ruthven Road apartment, she states that she did not know the details of Mr. Sinclair's arrangement with the bank. She says she will take his word for it that it was supposed to be repaid in 5 years. She also states that she signed the documents because she was trying to help her husband. She agrees that, that loan from City of Kingston Co-op Credit Union was fully paid before it was due.
- [89] She does not agree that what Mr. Sinclair did was to switch the loan by City of Kingston Co-op Credit Union from the Ruthven Road apartment to another apartment. She says she knows of Richard Parchment but she is not aware of him providing security that would have substituted for the Ruthven Road property.
- [90] On furthering questioning Mrs. Sinclair states that two live-in household helpers were employed to work in the household from 1995 to present. Her husband gave her separate money to pay the salaries of these helpers. She also informs that she receives dividends as a shareholder in Pines Imaging Centre Limited and when she worked as the Accountant in that Company her husband was the Managing Director. He was paid Two Million Dollars (\$2,000,000.00) for his services as the Radiologist Consultant and not as the Managing Director.

### **The Evidence of the Defendant**

- [91] The Defendant contends that the Claimant only has a shareholding interest in Pines Imaging Centre Limited and has no further shareholding or other interests in any of the businesses in which he has any active and continuing interest. He

admits that he finished his radiology programme in 1999 but denies having any discussions with the Claimant with respect to raising funds for his businesses. He denies telling the Claimant to stay home to look after himself and the children.

**[92]** He explains that as it relates to the Ruthven Road apartment the agreement was that if the title to the Ruthven Road apartment were made available to him, to facilitate the business that he had already started with Mr. Konrad Kirlew he would repay the loan. He says that immediately after receiving the loan the Claimant started to harass him about using her family's property for security. The loan that he received was initially to be repaid over a period of five years, but as a result of the Claimant's harassment, he released the security against the Ruthven Road apartment within three (3) years by paying off the loan. He says he was able to do this because a friend of his assisted him with the financing and provided him with necessary security for the business he started with Mr. Kirlew.

**[93]** He denies that the Claimant worked in, supervised, directed or controlled the business while he was studying. He states that some of the businesses listed by the Claimant are no longer in operation, but were sold years ago as a whole business. In some, he only has shareholding interests while some are businesses in which his name was added for investment and loan purposes, but in which he has no real interest. He maintains that in only one of those businesses the Claimant has a shareholding interest which is Pines Imaging Centre Limited.

**[94]** He also asserts that as a result of him liquidating the loan initially taken on the Ruthven Road apartment, the Claimant was able to become the sole owner of that property free and clear of any obligations and insists that she is not entitled to 50% or any percentage of any of the businesses in which he currently has any interest. He maintains that he did not discourage the Claimant from finding and keeping employment generally but that throughout their marriage Mrs. Sinclair always compared herself to another doctor's wife, who worked in her husband's practice. Mr. Sinclair states that he had no desire for the Claimant to work with him, and as such he always discouraged her in those thoughts.

- [95]** On cross examination he states that his wife worked at an accounting firm or with a relative. He agrees that after he completed his studies in either 1998/1999 he wanted to invest in a radiology facility in Montego Bay. He admits that he needed money to invest in the company and his wife and her family assisted him in raising capital by providing the security. He agrees that it was their property that was at risk of foreclosure if the loan was not repaid but says that he was also at risk of losing more than \$3,000,000 that is 50% of the cost to establish the practice
- [96]** He also states that while he was working at Radiology West his wife and children came to live with him in Montego Bay about a year after the business started. He admits that it was his wife who cut the ribbon in the official opening. He cannot recall the exact date when that function took place, but says that when the ribbon was cut at the official opening his wife might have been pregnant with his last child who was born in 2000.
- [97]** He agrees that there was a loan from Jamaica National Bank of Twenty Million Dollars (\$20,000,000.00) and that himself and his wife were the applicants. The Application in support of that loan, dated November 2005 which was tendered and admitted into evidence as exhibit 26, having been shown to him, Mr. Sinclair admits stating in that document, that Ms. Sinclair was employed to Pines Imaging Centre Limited as company secretary, and that she was in receipt of an annual salary of \$1.5 million.
- [98]** He however mentions that she is a director and shareholder of the company and that her input into the company is at board meetings, for which all board members are paid Forty-Five Thousand Dollars (\$45,000.00) per board meeting and dividends at the end of the year. He nonetheless, insists that his wife did not assisted him in any of his business ventures.

## **Submissions**

### **On behalf of the Claimant**

**[99]** Mr. Steer submits that the Court should order the Defendant to transfer 34 % of his shares in Pines Imaging Centre Limited to the Claimant, which in effect, would give the parties equal shareholding in the company as the Claimant contributed to the acquisition, maintenance and improvements of the said companies by not only providing security for the loan that was used as start up for Radiology West, but made her title available in order to secure loans for Pines Imaging Centre Limited, and worked in the business without a salary, doing all this whilst being the primary caregiver of the parties' children, staying home at the Defendant's request.

**[100]** He further submits that the Defendant's earning capacity grew exponentially from the decision to pursue radiology and incorporate businesses to offer these services and that the loan was paid off due to the success of the venture and not for any other reason as contended by the Defendant. He takes the position that the Defendant has failed to produce any evidence whatsoever to support his assertions that a friend assisted him with securing capital to pay off the loan earlier than the time given.

**[101]** He is also of the view that "it is irrelevant when the initial loan to Radiology West was paid off as what is of importance is that the Claimant not only gave up her career as an accountant to attend to the parties' children as primary caregiver, but without providing the security for the loan against her family's property the Defendant would not have had sufficient capital to pursue this venture".

**[102]** He also submits that this consideration would apply to Pines Imaging Centre Limited as the Defendant agreed that Mrs. Sinclair gave a personal guaranteed loan in that Company. It is his view that these loans never benefitted the Claimant. He submits that the Defendant's statements are contradictory, as the loans obtained were for the benefit of his company, and in turn benefitting the Defendant. He points out that the Defendant admits that the Claimant was employed to Pines

Imaging Centre Limited. He asks the court to find that the Defendant is not a witness of truth.

[103] Mr. Steer is of the view that the Claimant is entitled to a share in the other companies and motor vehicles purchased during the subsistence of the marriage because in his view, the Defendant used monies earned through their company, Pines Imaging Centre Limited for his benefit and the Claimant gave up her career and raised the children of the parties. He takes the position that the fact that the parties always had a helper ought to be disregarded. He points out that the marriage was not of a short duration, having subsisted for over twenty (20) years. (He relies on the cases of ***Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam*** [2018] JMCA Civ 15.) and ***Margaret Gardner v Rivington Gardner*** [2012] JMCA Civ 54,)

**On behalf of the Defendant**

[104] Counsel for the Defendant submits that with regards to Mrs Sinclair's contention that she is entitled to 50% of the Defendant's shares, in the Companies, of relevance is that both parties acknowledge that the money received by the Defendant in 1999 was a loan secured by the property owned by the Claimant and her relatives and was not an investment by the Claimant. She submits that It was not treated as an investment by the Claimant. and this loan was repaid in full earlier than expected and at no time has she said that the proceeds from that sale was invested by her into any of the Claimant's businesses. She is of the view that other than the initial loan made by the Claimant with her family members to the Defendant, which was repaid in full, the Claimant has shown no nexus between herself and the Defendant's businesses.

[105] She further submits that "the "Claimant's behaviour would not have been consistent with that of an investor in the various companies as she admitted under cross examination that she only knew of the full extent of the Defendant's business

dealings and company involvement after she “did her research” in contemplation of bringing this claim currently before the court”.

[106] Counsel also submits that the evidence shows that the Claimant undertook no responsibility as it relates to the payment of the mortgage associated with the Ruthven Road property and that she was clearly unaware of the extent of the financial responsibility as she merely facilitated the title being used as security for the Defendant to obtain financing.

[107] She further submits that despite the fact that the Defendant has acknowledged that the Claimant has shares in one of the companies, that is Pines Imaging Centre Limited, there is no evidence that the Claimant has any connection to the running of that business,” or that she contributed or facilitated the Defendant’s effective and productive functioning in this or any other business”. She takes the position that “the Claimant is not entitled to 50% interest in any of the Defendant’s shares in any of the companies, be they active or not”.

### **Discussion**

[108] The relevant provision that governs the determination of the parties’ interest in property other than the family home is Section 14 of **PROSA**. It reads:

*“14 - (1) Where under section 13 a spouse applies to the Court for a division of property, the Court may-*

*(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or*

*(b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2), or, where the*



*circumstances so warrant, take action under both paragraphs (a) and (b)*

- (2) *The factors referred to in subsection (1) are:*
- (a) *the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;*
  - (b) *that there is no family home;*
  - (c) *the duration of the marriage or the period of cohabitation;*
  - (d) *that there is an agreement with respect to the ownership and division of property;*
  - (e) *such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.*
- (3) *In subsection (2) (u), "contribution" means-*
- (a) *the acquisition or creation of property including the payment of money for that purpose;*
  - (b) *the care of any relevant child or any aged or infirm relative or dependant of a spouse;*

- (c) *the giving up of a higher standard of living than would otherwise have been available;*
- (d) *the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-*
  - (i) *enables the other spouse to acquire qualifications; or*
  - (ii) *aids the other spouse in the carrying on of that spouse's occupation or business;*
- (e) *the management of the household and the performance of household duties;*
- (f) *the payment of money to maintain or increase the value of the property or any part there of*
- (g) *the performance of work or services in respect of the property or part thereof;*
- (h) *the provision of money, including the earning of income for the purposes of the marriage or cohabitation;*
- (i) *the effect of any proposed order upon the earning capacity of either spouse.*

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

[109] In light of the provisions of Section 14 of **PROSA**, it is clear that contribution is a relevant consideration as it relates to the division of property other than the family home. However, it is apparent that the contribution does not have to be direct neither does it have to be financial.

[110] I accept the evidence of the Claimant that since 1993 she quit her job as a senior auditor and since then has been managing the household of the parties while the Defendant concentrated on enhancing his career as a radiologist. Despite the evidence of the Defendant that he did not ask the Claimant to quit her job and stay home to care for himself and the children, it clear on the evidence that this is the status quo that the parties accepted and how the parties have ordered their lives during the 27 years of marriage. Therefore, I find that at this stage it is immaterial as to whether this decision was initiated on the Defendant's request or on the Claimant's own volition.

[111] Additionally, despite the evidence of the Defendant that he employed two (2) helpers, he has not denied the Claimant's evidence that she was the person that actively managed the household. That is, he was the party that provided the finances but she did the active management. I have no doubt that this arrangement inured to the benefit of the Defendant. That is, he was able to concentrate on building his practice without being encumbered with the details of the day to day running of the household and the care of the children.

[112] I take note of his evidence that at some point he assisted in taking the children to school, which Mrs. Sinclair has not denied. However, he has not challenged her evidence that she was the person who picked them all up from school and took them to their extracurricular activities. Additionally, he has not denied that there was a period when, while he was in Montego Bay working at Radiology West, the

Claimant remained in Kingston assuming the full non-financial care of the children. His evidence is that they came to live with him one year after the practice was first established. He however has not challenged her evidence that she had to return to Kingston within six months, that is in August 2000 due to the fact that she became pregnant. He has also not denied that during that period up until May 2001, he only came into Kingston on some weekends.

[113] The Defendant has asserted that the Claimant has not worked because she only wanted to work in his practice. However, despite denying that he never encouraged her to work, the impression I form based on how the parties conducted their affairs during the marriage is that Mr. Sinclair was comfortable with that status quo. It may very well be that the Defendant acquiesced in this arrangement so as to prevent the Claimant from working alongside him at his place of business. However, my view on the evidence is this: whether or not it was explicitly discussed, this is an arrangement that the parties had accepted and around which they had ordered their life in their partnership of marriage which was to both their benefit. A clear indication that Mr. Sinclair allowed Mrs. Sinclair to take command of the management of the household is borne out in his evidence with regards to the construction of the family home in which he states that *“I remind the Claimant that she was paid sums by me throughout the construction and the furnishing of the Cherry Gardens property and as such she would have those expenditures”*.

[114] Accordingly, this kind of non-monetary contribution falls squarely within the provisions of Section 14(3)(b) and 14 (3)(e) of **PROSA**. In the case of **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam** the non –monetary contributions of the wife that the court took into consideration were the fact of her caring for the children, transporting them to and from school. The court also made the observation that even if she had helpers and nannies that would not have reduced the value of the contribution as it was clear from the evidence that she was the primary care-giver.

[115] At paragraph 133 of that judgment Edwards J A had this to say

*“if there is evidence of the parties’ clear intention that one spouse should work outside the home and the other in the home and that the assets acquired during the marriage would belong equally to both spouses, it is difficult to see how the court would disregard that intention because the application was made under PROSA. So too, an agreement under section 14(2)(d) would be evidence as to the common intention of the spouses and any other evidence of intention can be taken into account under section 14(2)(e), if the justice of the case so requires.”*

[116] At paragraph 140 she stated:

*“The issue the court had to decide with regard to the businesses was how and when were these businesses acquired and what contribution, whether financial or otherwise, did the appellant make to the acquisition, conservation or improvement of them. Section 14(2) of PROSA lists the factors a court must take into account in dividing property as it thinks fit. Section 14(3)(a)-(i) defines what the Act recognises as ‘contribution’ by one part”.*

[117] Therefore, I will now go further to determine specific contribution as it relate to the particular properties.

### **Radiology West**

[118] Counsel for the Defendant has taken the point that the provision of the title of the Ruthven Road Apartment as security for the loan that was invested in this company does not qualify as an investment. I am inclined to agree with counsel on this point. However, it is my view that it in fact qualifies as a non-financial contribution within the scheme of section 14 of **PROSA**. That is, in my view, the provision of the aforementioned security facilitated the grant of the loan. The Defendant

asserted that the company was in existence prior to his acquiring the loan, thereby challenging the evidence of the Claimant that she would have contributed to the start-up capital. However, the provisions of section 14 make it clear that in assessing the contribution of a party, the consideration should not be restricted to acquisition, but should also include contribution to conservation or improvement of the property.

**[119]** In the instant case Counsel for the Defendant has raised the point that the full sum was repaid and the property was released from any encumbrance within a relatively a short period of time. However, despite the fact that this may be a relevant consideration in the determining the percentage of the interest that the Claimant may hold in the property in which the interest is being claimed, it does not negate the fact that this represents an initial non-financial contribution. Additionally, the fact that the Claimant's portion of contribution is limited to a quarter of the total contribution of the security provided, as the property at the time, was owned by herself and three other family members, will also impinge upon the determination of the value of her interest in the property in issue.

**[120]** However in determining whether the Claimant has acquired an interest in Radiology West, in addition to providing the initial security I take into account the following factors: (i) this property was acquired early in the marriage and (i i) ,With the exception of the short period that the Claimant and the children resided in Montego Bay with the Defendant , despite him providing the financial support, while the Defendant was pursuing his career at this location the Claimant for the most part was in Kingston managing the household and caring for the children. Consequently, it is my view that the Claimant is entitled to an interest in the Defendant's share in the company, Radiology West Limited. However I do not believe the value of her contribution is as such to give her an entitlement of 80% of the Defendant's shares. In this regard I take into account the fact that the Claimant did not take part in the active running of this Company.

[121] In the case of **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh** where the court found that the wife did less work in some companies than in others, she was awarded 33% of the husband's shares in the company where it was found that she did less work, whereas she was awarded 50% in the companies where it was found that she did more work. In the in instant case having found that the Claimant did no direct work in Radiology West Limited, I find that her interest in that Company is valued at 20% of the Defendant's shares.

### **Pines Imaging Centre Limited**

[122] In relation to Pines Imaging Centre Limited the Memorandum of Association which was admitted into evidence was signed by the respective shareholders on the 22nd of February, 2001. The total number of shares as indicated by the Memorandum of Association is 243. They were allotted as follows: 115 to Mr. Welsford Sinclair; 48 to Maureen Sinclair, 40 to Keith Gentles and 40 to Wayne Gentles. It is apparent that at some point the holdings were increased as based on the evidence the Claimant now owns 316 and the Defendant now owns 912.

[123] In fact, it is my view that section 14 (2) (d) of PROSA is applicable as it relates to the interest in this property. That is, the Memorandum of Association signed by the parties indicates that the parties from the outset previously agreed what their initial interest in this property should be. Subsequent to that there was an increase in both parties' holding. No evidence has been provided by either party as to when or the basis on which their holdings were increased.

[124] Mrs. Sinclair's evidence is that she worked for only two (2) years in this company for which she was not paid. Though it was initially denied by the Defendant that she ever worked in this company, he later admitted signing a document to this effect. It is also uncontested evidence that apart from income as a shareholder Mr. Sinclair also has been receiving a salary for the specialist duties he performs as a radiologist in this company.

[125] However in my view, despite the fact that there were other shareholders in the Company Mrs. Sinclair would have performed these unpaid duties, not for the benefit of the other shareholders but simply because she was the wife of the Defendant. Therefore, she would have performed these unpaid duties for the benefit of the Defendant. It is my view therefore that the Claimant is entitled to the value of the unpaid salary for the two (2) years she worked in Pines Imaging Centre Limited.

[126] I also consider the evidence that the family home, with the consent and knowledge of the Claimant, she having signed the document of unlimited guarantee, was used to secure a loan for an MRI machine for the company. However the evidence of the Defendant that other shareholders also provided security was not challenged by the Claimant. Additionally having found that both parties are entitled to half interest in the family home, the provision of this security was equally shared by the parties. In any event, in light of the finding that Mr. Sinclair, based on his agreed position, should repay all the outstanding mortgage, I cannot agree that Mrs. Sinclair should receive additional benefit from the provision of this security while refusing to share in the liability.

[127] Accordingly, I find that the Claimant is entitled to an increase in the number of shares in Pines Imaging Centre Limited in light of the fact that she worked for that company for two (2) years. without being paid. In view of their present holdings, the Claimant now holds 25 % of the shares held by both parties in Pines Imaging Centre Limited. It is my view in light of the foregoing that her holding should be increased to 40% of their total holdings. I therefore find that the Defendant should transfer 15 % of his shares to the Claimant.

### **The Other Companies**

[128] It is my view that the assertions of the Claimant that it was out of Radiology West that the other businesses were formed are mere assertions without any supporting evidence. With the exception of Greysville Pharmacy Limited she has no personal



knowledge of the formation of these companies at the time they came into existence. She admits that she only discovered their existence through research. She has admitted on cross examination that she never worked at any of these other companies. She states that she worked at Greysville Pharmacy when it operated as a sole trader, assisting with the book keeping. However, she has provided no further details such as for how long she performed these duties and whether she received a salary.

[129] I note her evidence that during the time of the Defendant's further studies she supervised directed and controlled his businesses, whilst also being housewife and full time mother to their four (4) children. However, this conflicts with her lack of knowledge in relation to the formation and or operation of these companies.

[130] Additionally, I find that contrary to the case of **Sam Hugh** there is no evidence of co-mingling of the resources or operation of Radiology West or Pines Imaging Centre Limited with any of these companies. Therefore, despite the assertions of Mrs. Sinclair I find that she has not proven that she made any direct or indirect financial or non-financial contribution to the acquisition, conservation or improvement to these other companies. Therefore, I find that her evidence falls short of establishing that she is entitled to shares in any of these companies.

### **The Motor Vehicles**

#### **The Evidence of the Claimant**

[131] The Claimant states that she is claiming 50% share in the following vehicles: 2012 BMW, 2016 Mercedes Benz, 2013 Toyota Prado, and 2016 Suzuki Vitara. She states that the Defendant gave her the Toyota Prado as a "gift", as she had no other means of transport for herself and the children. She said she borrowed money from her family to discharge the debt due to the Bank. She says the 2016 Vitara was for the use of the children, as such she was banned from even entering this vehicle by her husband. She has given no further evidence with regards to the acquisition of the other vehicles.

### **The Evidence of the Defendant**

[132] The Defendant, Mr. Sinclair, admits that he bought the Toyota Prado as a gift for his wife. He states that, that motor vehicle was registered in his name and the loan was also in his name. He asserts that he never stopped paying the loan but says that as some of his children were overseas at college he later suggested to his wife that they buy a smaller vehicle so as to make the loan payment more affordable. He states that Mrs. Sinclair took the decision to repay the loan balance on that vehicle as she wished to keep it. He said she repaid the balance and he transferred the title to her and as such he claiming no interest in the 2013 Toyota Prado.

[133] As it relates to the 2017 Suzuki Vitara Mr. Sinclair states that it was bought in his name for the benefit of their two younger children, as he could no longer manage the transportation duties where they were concerned. To the extent that they have now migrated for school, it can be sold, and the proceeds used to liquidate some of his other financial obligations.

[134] He says that the 2016 Mercedes Benz is the vehicle he now uses for transport to work. He admits that he previously purchased a 2012 BMW, which he used to drive, but this vehicle was sold to his friend, Joseph Jenkins around the time that he bought the Mercedes Benz. He is not certain whether Mr. Jenkins has transferred over the car to himself, but he paid him in full in 2016 for it and he has no further interest in that car. He however states that Claimant has no interest in the BMW, Mercedes Benz nor the Suzuki Vitara

### **Discussion**

[135] The evidence of the parties as to how they ordered their lives points to the arrangement that the full benefit of the Toyota Prado should be for Mrs. Sinclair and the Suzuki Vitara for the benefit of the Children whom they both had an obligation to maintain under the Maintenance Act. The Claimant has not challenged the evidence of the Defendant that the 2016 Mercedes Benz was

essentially bought as a replacement for the 2012 BMW which the Defendant uses to transport himself. Additionally, the Claimant has presented no evidence of contribution whether financial or non-financial or direct or indirect to the acquisition, conservation or improvement of the BMW, Mercedes Benz or the Suzuki Vitara.

[136] Additionally, in light of the fact that the Defendant's stance is for the Claimant to have 100% interest in the Toyota Prado in my view justice and fairness dictates that the Defendant should have 100% interest in the Mercedes Benz. Additionally, the fact that the Claimant admits that the Suzuki Vitara was bought for the benefit of the children the Claimant has not proven that she has any interest in this vehicle.

### **Maintenance**

#### **The Evidence of the Claimant**

[137] The Claimant states that since her marriage to the Defendant she has not been employed because the Defendant has always told her to stay home and look after the home and see to the needs of the children. She was the one who took the children to and from school and to their various academic, non-academic and sporting activities, as well as all of their medical appointments and social events. She says that she travelled overseas for various reasons with the children alone.

[138] She states that the thought of losing her only home and being without an income at this stage of her life when she is least marketable, has caused her much despair and distress, emotionally, physically and psychologically. She also says that based on the conduct of the Defendant since he moved out of the Cherry Gardens house completely, she is forced to apply for maintenance for herself. She asks that the Defendant pays maintenance to her in monthly sums of Eight Hundred and Thirty-Five Thousand Five Hundred Dollars (\$835,500.00).

[139] She set out her monthly expenses as follows: -

Gasoline	\$	60,000.00
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Hairdresser	40,000.00
Manicure and pedicure	15,000.00
Massages	20,000.00
Facial	20,000.00
Live-in Helper	100,000.00
Gardener	20,000.00
Property Tax	10,000.00
Car Loan	132,000.00
Car Maintenance	25,000.00
Dental.	12,500.00
Entertainment	40,000.00 (Why need)
Insurance	15,000.00
Medical drugs	12,000.00
Electricity.	60,000.00
Water	22,500.00
Cable & Internet.	25,000.00
Telephone (land & cellular)	6,500.00
Groceries	200,000.00
Total =	\$ 835,500.00

**[140]** She says that she has sought employment without success. She tendered into evidence copies of these applications. She also states that in addition to failed attempts to finding feasible employment, her scope has been severely limited due to her medical conditions and that she is unable to perform any function that will require strenuous activity or long work hours and as such she found it extremely difficult to find viable job opportunities. To this effect she tendered into evidence

a copy letter from Dr. Stacy Davis, Consultant Rheumatologist, dated the 20th of March 2020 outlining her diagnoses.

**[141]** She says that she is required to visit Dr. Davis every three to six (3-6) months depending on how she is improving and that the usual cost per visit is Eight Thousand Dollars (\$8,000.00) and that Dr. Davis has prescribed the use of seven (7) or more over the counter or prescription drugs that she is expected to take on a regular, sometimes daily, basis.

**[142]** Mrs. Sinclair states that she also experiences severe pain in her foot and was diagnosed with a condition of her right great toe which requires surgery. To this effect she has tendered into evidence, copy letter from Dr. Akshai Mansingh and correspondence from Sagicor Jamaica outlining the cost break down for this procedure. She says that she has not been able to schedule the surgery as she cannot afford to do so. She also says that she is required to visit Dr. Mansingh at least twice per year, the cost for each visit being Seven Thousand Dollars (\$7,000.00) and that he has also prescribed pain medication that she has to take regularly.

**[143]** She adds that she is visually impaired and is required to have cataract surgery done as soon as possible on both eyes which she has not yet done as she is unable to afford same. In support of this claim she has tendered into evidence a copy letter from Dr. Maynard McIntosh, Ophthalmologist, dated August 13, 2020.

**[144]** She asserts that she is also being treated for depression by Dr. Wendel Abel on a monthly basis and that each visit costs Seven Thousand Dollars (\$7,000.00). She states that Doctor Abel has prescribed antidepressants for her condition. Psychiatric report of Doctor Abel was tendered and admitted into evidence.

**[145]** She says that upon the direction of Dr. Davis and Dr. Mansingh, she is required to do physiotherapy sessions at Physical Therapy Solutions located at 11 Braemar Avenue, Kingston 10 with Mr. Satish Gollamudi to treat her back, neck, shoulder and knees at Five Thousand Dollars (\$5,000.00) per session and also for her toe,

three times per week at \$3,500 per session. She states that she has fallen behind in her sessions because she cannot afford this regular expense and has been experiencing severe pain and stiffness due to this.

**[146]** Ms. Sinclair also states that she visits her general practitioner Dr. June Francis and her gynaecologist, Dr. Frederick, at regular intervals to preserve her health and ensure that she “is doing well outside of the aforementioned conditions. Their cost per visit is Five Thousand Dollars (\$5,000.00) and Seven Thousand Dollars (\$7,000.00) respectively.” She says that she is required to do regular blood tests at the direction of her doctors and other extensive testing such as MRIs, CT scans and X-RAYS to ensure she is doing well.

**[147]** She alleges that she has only been able to manage her expenses thus far through loans gained from family and friends since the separation along with the insurance benefits she enjoys from the Defendant. She asserts that even then, these have been vastly insufficient for her care and that she is expected to repay all sums due and owing to her friends and family. She outlines her debts as follows:

I.	Pines Imaging Centre Limited	Director's loan -\$1,000,000.00
II	Evelyn Sirjue -	\$350,000.00
III.	Richard Sirjue	\$2,000,000.00
IV.	Paul Sirjue	\$1,250,000.00
V.	Dr. Charmaine Watson-Brown	\$500,000.00
VI.	Debbie-Anne Gordon-Crawford	\$850,000.00
VII	Robert McIntyre	\$500,000.00
VIII.	Berthram Thomas	\$700,000.00
IX.	Phillip Smith	\$2,000,000.00
X.	Ronald Graham	\$2,150,000.00
XI.	Dr. Novelette McKnight	\$600,000.00

XII.	Edwin Noble	\$750,000.00
XIII.	Michael Vanhome	\$700,000.00
XIV.	Beverly McNaught	\$500,000.00

**[148]** Mrs. Sinclair contends that the Defendant is a man of means who can easily provide her with the sums sought for maintenance. She mentions that three (3) of the four (4) children of the marriage have now returned home since March 2020 and have been residing with her in the home, two (2) having completed college, but her husband has not been supporting the three (3) children. She is the one that has undertaken the full financial costs, care and maintenance of the children.

**[149]** On cross examination Mrs. Sinclair admits that her husband was the one who paid for the children's schooling and provided money for them while they were overseas along with the travelling expenses for them to return home. She adds that all four (4) children were present in Jamaica for Christmas but one went back abroad to school. The twins T and T are 23 and A just turned 20 in December. She also admits that she signed all the receipts that she alleges are indication of loans to her.

**[150]** She agrees that all the receipts speak to loans subsequent to her separation from Mr. Sinclair. She explains that exhibit 17 speak to a loan in relation to a car. She explains that Ms. Evelyn Sirjue wrote a letter to JMMB giving instructions for the bank to pay her the sum of \$2,300,000. She says that, that cheque was not made payable to her but the payee was the Bank of Nova Scotia.

**[151]** She says that she did not lodge the cheque to any of her accounts. She agrees that for the other receipts there are no particulars as to the purpose for these loans. She agrees that the medical report from Dr. Davis was not addressed to the court and did not state the cost of treatment. She also agrees that Dr. McIntosh in her medical report states that she will need only two weeks out of office to help with the recuperation process.

[152] She disagrees with the suggestion that Mr. Sinclair has been paying her \$150,000 per month. She states that she received \$250,000 in last the month and the month prior to the last. She says that three (3) of the children returned home in the middle of March of last year and from March to December she received \$150,000 for some of those months. She states that it was in May that Mr. Sinclair started to pay \$250,000 per month. She says he started to pay \$150,00 in October 2019.

[153] Mrs. Sinclair also states that Mr. Sinclair left the matrimonial home in September 2017 and that between September, 2017 and early 2019 he gave her \$350,000 per month. She says he stopped giving her this sum in April 2019. In that month he gave her \$100,000, in August he gave her \$100,000 and \$150,000 for September. She also says she received \$150,000 per month for January to April 2020. She says that during this period the children were away at college. She states that the twins went off to college in August of 2016 and the next set of children went off in August 2019. She also says that from May to November 2020 she received \$250,000 per month, as the children had returned home. She admits having a bank account at JMMB but states that she did not disclose it because her sister's and my brother's names are on it.

### **The Evidence of the Defendant**

[154] The evidence of the Defendant is that throughout the marriage the Claimant had no desire to work except to work with him in his practice. He asserts that while he did not discourage her from finding and keeping employment generally, he had no desire for her to work with him so he always discouraged her in those thoughts. He contends that the Claimant is not unemployable as she received academic qualifications from CAST, (now the University of Technology (UTECH) from years ago and she recently received (last year) a degree from the University of the West Indies (UWI) and that there may have been a time for about a year or two, during the marriage, when she was employed.



- [155]** He says that he still financially supports their children including the cost of attending tertiary institutions overseas. He adds that he is financially responsible for his other children (not of the marriage), whom he cannot in good conscience treat in any lesser manner than the children he fathered with the Claimant. He also asserts that he continues to be faced with financial difficulties with his loan obligations.
- [156]** He says that notwithstanding his financial obligations he is prepared to assist the Claimant with monthly maintenance until she is able to secure employment in the amount of \$75,000.00. He contends that for him to commit to any higher amount, it would be to the detriment of all his children, and his other existing financial obligations.
- [157]** Mr. Sinclair mentions that while the Children were studying overseas he gave the Claimant approximately \$150,000.00 every month, but since their children's return, from college overseas he increased that amount to \$250,000.00 per month. He also points out that all their children are above the age of 18 years old but he gives them money from time to time to cover their gas for transportation and other needs when they request of him.
- [158]** He asserts that he covers the expenses for all their trips to and from Jamaica, their college tuition, and school and living expenses. He informs that the twins graduated in June 2020 and are back home. His son P is away having started his second year in College and that he has already paid all his first semester fees. His daughter A has also started her second year at College. She is here in Jamaica as she started it online and will return overseas in January 2021.
- [159]** Mr. Sinclair alleges that over the years, the Claimant had ample opportunity to find employment but chose not to. He says he was not aware that she was borrowing monies from anyone, and if she did in fact borrow the sums as stated, he is not responsible for the repayments of these sums. He also says that since he left the family home his expenses to include rent, groceries, light, water, and cable at the

apartment that he currently leases have increased. He lists his expenses as follows:

(a)	Maintenance for four other children, one of whom has a special condition	520,000.00
(b)	<b>Mortgage payments for the Cherry Gardens</b>	<b>625,000.00</b>
(c)	BNS loan	313,000.00
(d)	Sagicor Loan	372,000.00
(e)	ISP Finance Loan	135,000.00
(f)	Other loan obligations	440,000.00
(g)	Car loan	425,000.00
(h)	Car loan for the kids in the marriage	<u>68,000.00</u>
	TOTAL	2,898,000.00

[160] Mr. Sinclair further states that he receives no earning from: Morant Bay Imaging Limited; MoneyGram in York Pharmacy; Asia's cafe in York Pharmacy and the UHWI; or the Supreme Ventures Outlet in York Plaza. However, from the Clock Tower Medical Diagnostic Limited and the Jamaica Cancer Society, which is a charity, he earns collectively approximately \$105,000.00 per month. In addition to that amount, he states that he also earns approximately \$3,770,000.00 per month. He says that although he is a shareholder in other businesses, the income he receives from these businesses is dependent on their annual profitability. He also says that he maintains a very modest account at the Ocho Rios Branch of Sagicor Bank.

[161] Mr. Sinclair also testifies that he was diagnosed with Brain Tumor and is receiving ongoing medical treatment for this medical condition. (Medical Report of Dr. Dwight Webster MBBS, FRCS, DM, Consultant Neurosurgeon dated the 24th day of February, 2021 which details his diagnosis and prognosis was tendered and admitted into evidence).

**[162]** On cross examination Mr. Sinclair states that presently his salary from Pines Imaging Centre Limited is not \$3,370,000.00. He insists that he does not earn an income from Mordant Bay Imaging, nor Money Gram in York Pharmacy, nor Asia's café in York Pharmacy nor UHWI. He admits that he earns income from Supreme Ventures in York Pharmacy, Clock Tower Medical Diagnostics, and Jamaica Cancer Society. He says that other than Pines Imaging Centre Limited he also earns income from York Pharmacy and Island Radiology. He says that his income from Island Radiology varies as he is not a salaried worker, if he does not work, he does not earn an income from that company. He states that he receives a percentage from the income generated on the day he works. For January last year, he earned about \$340,000 from that company. From York Pharmacy, he earned \$300,000 and from Pines Imaging Centre Limited he earned about 2.2 million dollars.

**[163]** He asserts that earlier when he said he received no income from Supreme Ventures in York Pharmacy that was an error on his part. He says that his main sources of income are from Pines Imaging Centre Limited and Island Radiology. Pines Imaging Centre Limited sometimes write him a cheque or as in recent times pay him by wire transfer. He states that the account in which the transfer is done is in his name and the name of one of his other children's mother.

**[164]** He admits that he has a National Commercial Bank (NCB) account which he says he opened about 6 years ago. He admits that he wrote cheques on that account in December 2019. He agrees that he was the sole account holder on that account in 2017. He admits that he also maintained an account at the Bank of Nova Scotia Portmore but says it was closed in 2017. He agrees that he did not comply with the Court Order to disclose all accounts in his sole name up to 2017, as he did not disclose that account.

**[165]** Mr. Sinclair says that he has nine (9) children, four (4) of whom are minors. The eldest child after his last child with his wife is 12 years old. He maintains that his wife has not worked for the past twenty (20) years because she did not want to

work. He asserts that they had two (2) live in helpers and every morning except on a Thursday when he went to Ocho Rios, he would take the children to school. Whenever his wife took them to school he had to pay her.

**[166]** Mr. Sinclair agrees that up until 2017 when he moved out of the family home he fully supported Mrs. Sinclair. He states that after he moved out he would give her \$350,000.00 per month but this is now reduced. He asserts that he has loans and obligations separate and apart from the loans on the Cherry Gardens Property. He admits that he has a surplus of just about \$1,000,000.00 after his expenses are deducted from his income. He says he will be 63 years of age this year.

**[167]** He testifies that a brain tumour is a legion that occurs within the cranium, within the brain itself and the nerves that emanate from the brain. He agrees that in his medical report Dr. Webster describes a legion and not a tumour. He however maintains that tumours and legions are synonymous. He insists that a tumour is a legion. He explains that this legion is situated on the nerve of the inner auditory canal that causes him to suffer from vertigo.

**[168]** He accepts that apart from the vertigo, the legion does not now affect his daily living. He explains that he is presently on medication; but if the tumour enlarges then the vertigo will increase in its frequency and severity. He adds that this legion could be cured if the tumour is removed. Otherwise he has to use preventative treatment. He states that he can reduce the symptoms and severity with medication.

**[169]** Mr. Sinclair explains that Vertigo is an imbalance that causes spinning. He has had three severe cases where he needed to be at home for up to seven days. Other times, the spinning last for about 15-30 minutes or an hour. He insists that he earns per day so if he does not work he does not earn. He also asserts that he does not earn more now than he was earning in 2018 because now he works less days.

**[170]** On re-examination Mr. Sinclair explains that when the children were at home with Ms. Sinclair he gave her \$350,000. When the children went off to college he

reduced the sum to \$150,000n per month. When the twins returned home he increased the sum to \$250,000 per month.

## **Submissions**

### **On behalf of the Claimant**

[171] Mr. Steer submits that the Claimant's qualifications, cannot be viewed in a vacuum. Her age, ailments and absence from the work force for over twenty (20) years has put her at an extreme disadvantage in seeking employment which can be appreciated from her failed attempts thus far. Relying on the case of ***Suzette Ann Marie Hugh Sam v Quentin Chin Chong Hugh Sam [2015] JMMD: FD 1*** he submits ***that*** the court should take into consideration not only the fact that she has been unemployed for over 20 years but that she is quickly approaching the age of retirement and has had difficulties seeking employment.

[172] He also submits that "the offer of One Hundred Fifty Thousand Dollars (\$150,000.00) per month by the Defendant with no specific period is woefully inadequate. He is of the view that the Defendant has understated his income and overstated his expenses but in any event it is clear that he is able to provide sufficient maintenance for the Claimant as he is clearly a man of means".

[173] Counsel raises the point that ~~the~~ Defendant even admitted on cross-examination that he failed to disclose bank account, in which his salary is deposited. He also points out that the Defendant admitted that after paying his itemized expenses, his excess or net income was just about a million dollars. He adds that "this was solely from his income from Pines Imaging Centre Limited and does not include his earnings admitted otherwise".

[174] Counsel also submits that the court should take account of the Defendant's evidence that though he suffers from vertigo due to the lesion on his brain stem it is "not life threatening" and that he goes to work most days. He also submits that the Claimant has given "evidence of grave medical and optical concerns that have

gone untreated due to financial inability. The Claimant has only been able to afford what she can presently through the health insurance policy she receives from the Defendant, which is a major medical policy covering a large portion of her expenses thus far”.

[175] He makes the point that “at the Claimant’s current age, it is unlikely that she will be able to increase her earning capacity more than her current status even though she has made considerable effort thus far “He states that the Claimant cannot meet her medical expenses on her own “without the assistance of the Defendant who can provide the maintenance as sought by the Claimant”.

[176] He submits that the Court ought to grant the Claimant, maintenance at a reasonable sum in light of “the lifestyle she has now become accustomed, her debts and medical conditions whether by periodic payments or lump sum as Court deems fit”

#### **On behalf of the Defendant**

[177] Counsel for the Defendant submits that the Claimant has “exhibited several medical reports which she claims supports her assertion that she cannot work. However, none of those reports support that assertion. Most of them speak to procedures that the Claimant may need and has requested that she be afforded the requisite time off from work to be able to recover from those procedures. There is no evidence before the court that suggests that Claimant cannot work”.

[178] She further submits that “it would be in keeping with the clean-break principle that the Claimant eventually works to support herself given that she has admitted under cross-examination that she was an accountant when the Cherry Gardens property was bought and then described herself as an auditor when the Ruthven property was bought. In any event, the professions listed and admitted by the Claimant underscore that she is a trained professional capable of obtaining work”. She is of the view that the Claimant has not made genuine efforts to obtain work. (She refers to the case of **Mc Ewan v Mc Ewan**, [1972] 2 All ER 708)

**[179]** Counsel for the Defendant has also taken issue with evidence of the Claimant that she took several loans to manage her expenses. She points out that the receipts put forward by the Claimant have provided no details as to the purpose, for the sums stated on them so the court should reject these as evidence of any loans at all. She further submits that “If the court is minded to accept the existence of these loans, these would be loans for substantial amounts of money. It is therefore arguable and can be inferred that the Claimant, in obtaining these loans, has the requisite resources necessary for persons to have confidence that these loans will be repaid.”

**[180]** She is of the view that the Defendant not being a party to these loans should in no way be held responsible for the repayment of them. She submits that the sum of \$150,000.00 being paid by the Defendant is reasonable in the circumstances, and that the Defendant should be ordered to continue to pay the monthly maintenance of \$150,000.00 to the Claimant for a period of two additional years from the date of the Order. She is of the view that “since their separation in 2017, the Defendant has been supporting the Claimant, he should not be held to provide this support for an indefinite period of time”. She points to the medical condition of the Defendant as well as “his continuing obligations as a father in providing for his children, the youngest being only ten (10) months old”. She asks the court to take into consideration the following:

- “(i) The Financial support that the Defendant continues to provide to the children of the marriage including university fees and living expenses overseas.
- (ii) Maintenance of his other four children, one of whom has a special condition and whose expenses may vary from time to time.
- (iii) Mortgage payments on the family home.

- (iv) Several loan obligations, including loans acquired in the purchase of the very vehicles that the Claimant claims but without the liabilities.
- (v) Having moved out of the family home, rent for his current accommodation, together with the attendant utilities, groceries, cable, and other personal incidentals.”

[181] She adds that “the expenses for the Defendant outlined total approximately Three Million Dollars (\$3,000,000.00)” and that “neither the Claimant nor the Defendant are particularly young and as such the burden of any sum above (\$150,000) imposed on the Defendant may only serve to ensure that he is in default and incapable of surviving to continue to earn to provide for himself and his children whose interests are paramount”.

### **Discussion**

[182] Section 3 (2) of the **Maintenance Act** makes provision for a court hearing matters for the division of Property under PROSA to make maintenance orders in accordance with the provisions of that Act. It reads:

*“In any case where an application is made for the division of property under the Property (Rights of Spouses) Act, the Court hearing the proceedings under the Property (Rights of Spouses) Act may make a maintenance order in accordance with the provisions of this Act*

[183] The relevant provisions of the Maintenance Act that address maintenance as it relates to the parties before the court are Sections 4,5 and 14. Section 4 reads;

- (1) Each spouse has an obligation, **so far as he or she is** capable, to maintain the other spouse to the extent that such maintenance is necessary **to meet the reasonable needs** of the other spouse, **where the other spouse cannot**



**practicably meet the** whole or any part of those needs having regard to-

- (a) the circumstances specified in section 14 (4); and
- (b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account,

Section 5 reads: -

- (1) A maintenance order for the support of a spouse order re spouse. shall-
  - (a) contain such provisions as will ensure that the economic burden of child support is shared equitably;
  - (b) make such provision as the Court considers fair with a view to assisting the spouse to become able to contribute to that spouse's own support
- (2) In determining the amount and duration of support to, be given, to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4)- the length of time of the marriage or cohabitation; the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse; the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity; the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation; whether the spouse

has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support; the effect of the spouse's child care responsibilities on the spouse's earnings and career development; the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties; the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund or scheme, and the rate of that pension, allowance or benefit.

Section 14 (4) reads:

- (4) In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections **5(2), 9(2) or 10(2), as the case may require, and-**
- (a) the respondent's and the dependant's assets and means;**
  - (b) the assets and means that the dependant and the respondent are likely to have in the future;**
  - (c) the dependant's capacity to contribute to the dependant's own support;**

- (d) **the capacity of the respondent to provide support;**
  
- (e) **the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment; the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures; any legal obligation of the respondent or the dependant to provide support for another person; the desirability of the dependant or respondent staying at home to care for a child; any contribution made by the dependant to the realization of the respondent's career potential; any other legal right of the dependant to support other than out of public funds; the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income; the quality of the relationship between the dependant and**

the respondent; (m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

[184] It is clear that the Maintenance Act places an obligation on spouses to maintain each other in circumstances where one spouse is not practicable able to meet his or her need. This was aptly expressed by Edwards, J. (acting) as she then was “in the case of **Margaret Gardner v Rivington Gardner** [2012] JMSC Civ.54. At paragraph 110 she stated that “Maintenance of a spouse is not automatic. It involves necessity, capacity and reasonability”

[185] The Act also indicate that needs should be assessed based on accustomed or expected standard of living during the marriage. *The* court in awarding an appropriate sum for maintenance should also take into consideration the other circumstances outlined in section 5 and 14(4) *one of which is to* “ensure that the economic burden of child support is shared equitably”.

[186] In the case of **Suzette Hugh Sam v Quentin Hugh Sam** [2015] JMMD FD1 (E. Brown J expounded on the principle governing spousal maintenance by stating that:

*“It must be demonstrated by evidence, firstly that the spouse who is tasked with the responsibility of spousal maintenance has the capability to fulfil that role. Secondly, the claimed maintenance must be demonstrably necessary. Thirdly, the needs being considered must meet the bar of reasonableness. Finally, the evidence must show that it is impractical for the spouse to wholly or partially satisfy those needs”. (See paragraph 52)*

[187] Therefore in deciding whether or not one spouse should be ordered to maintain the other spouse, the court must make certain essential determinations. As such the court is required to determine whether at the time that the matter is being heard

the Claimant spouse is able to meet her reasonable needs. In the instant case it is clear on the evidence of both parties that presently the Claimant is not able to meet her reasonable needs. Both parties have admitted that she presently unemployed and has been so for over 20 years of the marriage. Both parties admit that she worked for approximately 2 years during the marriage. It is also the undeniable evidence that during the course of the marriage up to the time of separation she depended on her husband to meet her financial needs.

**[188]** I must also decide whether the spouse who is being asked to provide the spousal maintenance, in this case Mr. Sinclair has the capacity to so provide. The evidence, clearly points to Mr. Sinclair possessing the capacity to provide maintenance for his wife. He is gainfully employed and owns shares in several companies. Despite his medical condition of Vertigo, and its limitations, the Defendant has admitted that currently there is no grave impact on his ability to carry on his career. Additionally, he has admitted that, when balancing his listed obligations/expenses against his income he is left with a surplus of approximately 1 million dollars (\$1,000,000.00).

**[189]** However, the fact that it is established on the evidence that the Defendant has this surplus does not mean that the Claimant will automatically receive the level of maintenance that she seeks. She must meet the requirements laid down by the Maintenance Act and the cases. In keeping with the establish principles of law the court will make orders to meet the cost of needs that are reasonable. This assessment will be made in accordance with the lifestyle that the Claimant has become accustomed. Therefore it must be demonstrated on the evidence that the items and cost for which the Claimant is seeking maintenance are reasonable.

**[190]** In the instant case the Claimant has listed several items of need for which no supporting evidence has been provided. For example, whereas she should have had no difficulty obtaining bills from the only providers of electricity and water in Jamaica she has presented no utility Bills. Additionally, she could have presented some supermarket receipts for the cost she has listed for the item, "groceries".

Furthermore it is my view that some items listed by the Claimant appear to be unreasonable. She has not substantiated the need for facial and massage every month or the cost for entertainment or what this entertainment entails. That is, she has adduced no evidence that during the marriage she was accustomed to having facial and massage every month or what type of entertainment she had become accustomed to.

**[191]** I must also make the observation that the Defendant himself has failed to provide documentary evidence in relation to his expenses for some of the items he has listed. That is apart from his loan obligations.

**[192]** As it relates to the Claimant's items of indebtedness I find that with the exception of the receipt from Evelyn Sirjue dated the 20<sup>th</sup> of February 2019 indicating "*Car Loan 2013 Toyota White Prado - Owner Dr. Welsford Leo Sinclair Disbursement Loan BNS Bank, by Evelyn Sirjue in the sum of \$2,350,000*", there is no indication on the other receipts as to what these loans represent. That is, there is no evidence that these relate to the reasonable needs of the Claimant. Additionally, in her affidavit evidence the loan to her from Evelyn Sirjue is stated as \$350,000.00.

**[193]** As it relates to medical expenses I take account of the fact that on the Claimant's own evidence she is benefitting from medical insurance provided by the Defendant that appears to covers 80% of her medical cost. Additionally, in determining an adequate sum to meet the reasonable needs of the Claimant I also take into account the following factors:

- (i) Despite the fact that Claimant is not presently employed she has some source of income. That is being a shareholder in Pines Imaging Centre Limited, she admits that she is receiving dividends on her shares.
- (ii) In light of the fact that it has now been declared that she is entitled to shares in Radiology West and an additional amount in Pines Imaging Centre Limited it is expected that her income from dividends will increase shortly.

- (iii) The Claimant admits that she has an account in JMMB with her sister and brother as joint holders and another account with her mother. However, I do not have the benefit of the information as it relates to the sums in those accounts or the portion to which the Claimant is entitled.
- (iv) The Claimant has been in sole occupation of the family home since the date of separation while the Defendant has been solely responsible for the mortgage and the maintenance of the children of the marriage.
- (v) The Defendant has admitted that when he separated from the Claimant in 2017 he at first gave her \$350,000 per month for maintenance. This was while he was taking care of the expenses of two of his children who were studying overseas. It has been revealed on the evidence that these children have completed those studies and have returned home. He is therefore at this time no longer encumbered with the educational expenses of these two children.

[194] In determining the duration of the maintenance to be provided by the Defendant I take into account the clean break principle. The general approach is that unless there are extenuating circumstances the order for maintenance should not be perpetual. It should be such so as to enable the dependant spouse, in this case Mrs. Sinclair to be independent. That is to provide for her own maintenance. In the case of ***Suzette Ann Marie Hugh Sam v Quentin Chin Chong Hugh Sam***) the court stated that:

*“That obligation is now cast in a mould which recognises that few persons, if any, can support two households at the same standard. So, there is no longer any right to lifelong support from a former spouse. The emphasis is now on the former spouses becoming financially independent of each other at the earliest possible time post-divorce.”* (See paragraph 47)

[195] Having examined the medical evidence presented by the Claimant I find that she does not lack capacity for future employment. None of the doctors have said that

her condition will prevent her from working. In his report dated the 15<sup>th</sup> of September, 2020, Doctor Able states that the Claimant first presented to him in November 2018. He makes reference to major depression on the part of the Claimant which he states "is a treatable condition." He also makes reference to physical, emotional, verbal, and financial abuse, (abuses which were not mentioned in the evidence of the Claimant). He says that these impacted negatively on her ability to function and that she may need extended period of psychotherapy to deal with the trauma and abuse she reported in her marriage.

**[196]** I will refrain from making any decision on the veracity of the report as it relates to the occurrence of these abuses, however I am of the view that the fact that they were not mentioned in her evidence even up to the time of trial, the situation is of such that the Claimant may no longer need the "extended period of psychotherapy"

**[197]** Doctor Stacy Davis states that the Claimant suffers from "autoimmune disease degenerative lumbar spine and osteoarthritis of the feet and right shoulder" which will cause varying degrees of disability." She says that the Claimant will require chronic therapy as well as follow up visits. In relation to the cataract to the eyes Doctor Maynard McIntosh states that that "post operatively she will need approximately two weeks out of office to facilitate her recovery process" Doctor Akshai Mansinsh states that the Claimant was diagnosed with "condition of the right great toe which require surgery and will require two (2) weeks out of office to help with recuperation".

**[198]** Consequently, there is clear evidence that both parties are suffering from medical conditions which may limit their full potential to work but does not prevent them from engaging in work. On her own evidence the Claimant suggests that her limitations relate to jobs that require strenuous activity or long hours. However there is no evidence that the job for which she is qualified requires strenuous activity. As it relates to the limitation regarding long hours I take into consideration the fact that the approach to employment has now evolved globally where persons



do not always have to go into a physical office space to work but jobs to include those for which the Claimant is qualified can now be performed from a virtual office

**[199]** In my determination of this issue I also take into account, the fact that the Claimant was able to advance herself academically during the marriage from the sole support of Mr. Sinclair. Her evidence is that at the commencement of the marriage she was a Senior Auditor. Nonetheless during the marriage, she was able to acquire two degrees, Accounting and Management Studies and Accounting respectively.

**[200]** Additionally, I find that the Claimant's efforts to find a job since the separation have not been consistent and sustained. The evidence that she has presented indicates that within a period of 2 years she made only 5 applications. In relation to the application to Jet Blue, in light of their response to her, she applied for a position for which she was not qualified. To my mind if she was quite serious about finding a job she would have been sending out at least five (5) applications per month instead of five (5) applications within a period of two (2) years. Therefore "I am not convinced, after hearing her evidence that she has made a genuine effort to retain and obtain work suitable to her intelligence and experience" (See **Mc Ewan v Mc Ewan, [1972] 2 All ER 708**). Moreover, it is also my view that the Claimant's skill set as an accountant affords her the capacity of being self-employed. That is, she has the option of setting up her own Accounting practice.

**[201]** Furthermore, I take into consideration the fact that the Claimant is 8 years Junior to her husband. Referable to the retirement age in the public service she has 10 years of working life while he has only 2. In light of the Defendant's medical condition, that is the diagnosis of Vertigo, I also take into consideration the fact that two of the children of the marriage are currently pursuing tertiary education for whom he has been providing the entire financial support. I also consider the fact that he has other young children, not of the marriage, for whom he has to make provision. This provision cannot be limited to their day to day maintenance, but the fact that he is age 63, it is expected that he must make provision for their future, in

the event that due to effect of aging and his medical diagnosis he is no longer able to work.

[202] It is also my view that in light of the fact that the Claimant for almost the entirety of the marriage has not worked she should be given reasonable time to put herself in a position to maintain herself. In the case of ***Margaret Gardner v Rivington Gardner*** Edwards J (Ag) as she then was found that three years (3) is a reasonable time. In the instant case I will adopt the same approach.

[203] Therefore, having assessed the reasonable needs of the Claimant, her capacity to provide for herself in the near future, the Defendant's capacity and obligations, I find that in all the circumstances the Claimant should be paid maintenance in the sum of \$350,000, per month for over a period of 3 years. It is also my view that the Defendant should continue to cover the cost of the insurance premium that offers the Claimant a coverage of 80% cost of medical bills for the next 3 years.

### **Orders**

[204] In light of the foregoing findings I make the following orders:

- (i) The parties are each entitled to 50% share in the family home registered at Volume 1082 Folio 985 of the Register Book of Titles, and situated in Cherry Gardens, St Andrew.
- (ii) The Defendant Mr. Sinclair is solely responsible for all outstanding mortgages endorsed on the title of the family home registered at Volume 1082 Folio 985 of the Register Book of Titles, and situated in Cherry Gardens, St Andrew.
- (iii) The Claimant is at liberty to purchase the Defendant's share in the family home.
- (iv) Should this option to purchase the Defendant's share in the family home be exercised the Claimant is to serve notice on the Defendant

within 60 days of the date hereof that she intends to exercise this option. Thereafter, the property is to be valued by a reputable valuator agreed upon by the parties.

- (v) If the parties are unable to agree on a valuator, within 90 days of the date hereof either party may apply to the Registrar of the Supreme Court to appoint a valuator within 120 days of the date hereof.
- (vii) If the Claimant is unable to exercise the option to purchase the Defendant's share in the Family Home then the property is to be sold on the open market. The Claimant's attorney-at-law is to have the carriage of sale.
- (viii) The outstanding mortgage is to be repaid from the value of the Defendant's Share in the Family Home.
- (ix) The Defendant is ordered to transfer 20% of his shares in the Company Radiology West to the Claimant.
- (x) The Defendant is ordered to transfer 15% of his shares in the Company Pines Imaging Centre Limited to the Claimant
- (xi) The Defendant is at liberty to purchase the shares of the Claimant in Radiology West and Pines Imaging Centre Limited at full market value. If the Defendant chooses to exercise this option, he is to serve notice of his intention on the Claimant within 60 days of the date hereof. Thereafter the Claimant's shares in the companies are to be valued by a reputable valuator agreed on by the parties within 90 days of the date hereof. If the parties are unable to agree on a valuator, either party may apply to the Registrar of the Supreme Court to appoint a valuator within 120 days of the date hereof;
- (xii) If the Defendant fails to exercise the option to purchase the Claimant's shares in the companies, the Claimant is at liberty to sell

the said shares on the open market by private treaty or by public auction.

- (xiii) The Registrar of the Supreme Court is empowered to sign any document where the parties fail to do so in order to give effect to orders (i) to (xii)
- (xiv) The Claimant is entitled to 100% interest in the 2013 Toyota Prado.
- (xv) The Claimant has no interest in the 2016 Mercedes Benz.
- (xvi) The Claimant has no interest in the Suzuki Vitara.
- (xvii) The Defendant is ordered to pay spousal maintenance in the sum of \$350,000 per month to the Claimant for the next 3 years with effect from the 30<sup>th</sup> of June 2021.
- (xviii) The Defendant is ordered to continue to pay the insurance premiums for the insurance coverage that he has in place for the Claimant for the next 3 years.
- (xix) The Defendant is ordered to pay half of the Claimant's Cost.
- (xx) Cost to be agreed or Taxed.
- (xxi) Orders to be prepared filed and served by Claimant's attorney-at – law.