



[2020] JMSC CIV. 212

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

**CIVIL DIVISION**

**CLAIM NO. 2017 HCV03289**

<b>BETWEEN</b>	<b>NICOLA PATRICIA SMITH</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>COLLIE LAWRENCE</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>CATCHITA SMITH</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>AGRICOLA SANDERSON</b>	<b>3<sup>RD</sup> DEFENDANT</b>

**IN OPEN COURT**

Ms Vivienne Washington and Ms Joni-Ann Miller for the Claimant and Mr Gordon Steer instructed by Chambers, Bunny & Steer Attorneys-at-Law for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

**Heard:** July 2<sup>nd</sup> 2018, July 19<sup>th</sup> 2018, March 20<sup>th</sup> 2019, November 13<sup>th</sup> 2020

**Property (Rights of Spouses) Act - Division of Matrimonial Property - Family Home  
- Whether property owned by one spouse and other persons can be the family home or is other property under PROSA - Claim to interest in Company**

**BROWN BECKFORD, J**

**INTRODUCTION**

[1] Three of the parties bear the same surname. For ease of reference, I will use their first names after introducing them. I mean no disrespect to them in employing this approach.

[2] The Claimant NICOLA PATRICIA SMITH is the estranged wife of the 1<sup>st</sup> Defendant COLLIE LAWRENCE SMITH. At the demise of their marriage, they resided at 8 Park Avenue, Kingston 19 (**“Park Avenue”**). This property has on it two dwelling houses, one occupied by Mr and Mrs Smith, and the other occupied by the 2<sup>nd</sup> Defendant CATCHITA SMITH who is Collie’s sister. The property is jointly owned by Collie, Catchita and their mother AGRICOLA SANDERSON, who resides overseas, and they hold the property as tenants in common. The property was acquired with the aid of two mortgages from the National Housing Trust (**“NHT”**) and Jamaica National Building Society (**“JNBS”**).

[3] Nicola has brought a claim under the **Property (Rights of Spouses) Act 2004 (“PROSA”)**, for a half interest in this and other personal property owned by Collie. Ms Sanderson was served but has not defended the claim. Collie and Cachita have stoutly resisted the claim. The court has been asked to consider whether the property at Park Avenue is the “Family Home” of Collie and Nicola or “other property” under **PROSA** and what if any share is to be given to Nicola. The Court was also asked to consider her entitlement to other property owned by Collie.

[4] The court has determined that Park Avenue is not the Family Home of Collie and Nicola but is other property under **PROSA**. Nicola is entitled to a thirty percent (**30%**) share of the smaller dwelling at Park Avenue to be realized by payment of a lump sum. She is also entitled to a twenty-five percent (**25%**) share of the Montero Sport motor vehicle.

## **THE CLAIM**

[5] Nicola’s claim is detailed in the Fixed Date Claim in which the following Orders/Declarations are sought against the Defendants: -

1. The property located at 8 Park Avenue, Kingston 19 in the parish of Saint Andrew registered at Volume 1366 Folio 91 is the family home or in the alternative;
2. The Claimant is entitled to an interest in the property located at 8 Park Avenue, Kingston 19, in the parish of Saint Andrew registered at Volume 1366 Folio 91 pursuant to Section 14 of the Property (Rights of Spouses) Act;
3. That the Claimant and the 1<sup>st</sup> Defendant are both entitled to fifty percent (50%) interest of one-third portion of the property located at 8 Park Avenue, Kingston 19, in the parish of Saint Andrew and registered at Volume 1366 Folio 91 or in the alternative, that the Claimant is entitled to fifty (**50%**) of the value of the building located at 8 Park Avenue, Kingston 19 in the parish of Saint Andrew which has been the family home of the Claimant and the 1<sup>st</sup> Defendant from 2003 to present.
4. That a valuation agreed upon by the Claimant and the 1<sup>st</sup> Defendant to be taken and the cost of the said valuation be shared equally by the Claimant and the 1<sup>st</sup> Defendant.
5. That in the event that the parties cannot or do not agree on a valuator within fourteen (**14**) days of the date of this Order, the valuation shall be carried out by W L and Associates Limited. The cost of the valuation to be borne equally by the parties.
6. The Defendants shall have the first option to purchase the Claimant's interest in the said property and this option shall be exercised within thirty (30) days of the presentation of the Valuation Report and by payment of a ten percent (**10%**) deposit on the purchase price.
7. That in the event the Defendants fail to exercise the option to purchase the said property within the stipulated time or complete the sale, then the

property shall be put up for sale on the open market or by public auction or by private treaty and the net proceeds of sale divided in accordance with the court determined entitlement of each party.

8. That the Claimant's Attorney-at-Law Vivienne Washington shall have Carriage of Sale in respect of any sale or transfer of the said property located at 8 Park Avenue, Kingston 19, in the parish of Saint Andrew and registered at Volume 1366 Folio 91 if any party is unwilling or unable to do so.
9. That the Registrar of the Supreme Court is empowered and authorized to execute any and all documents, necessary to effect any sale and transfer of the said property located at 8 Park Avenue, Kingston 19 in the parish of Saint Andrew and registered at Volume 1366 Folio 91 if any party is unwilling or unable to do so.
10. That the Claimant be declared to be entitled to fifty percent (**50%**) interest in 2003 Mitsubishi Montero Sport Station Wagon Motor Vehicle bearing registration No. 2578EV, Chassis No. JMYORK 9603J0011, Engine No. 6G720K6779.
11. That the motor vehicle with registration no. 2578 EV be valued by a reputable valuator agreed upon between the parties and the said valuation to be carried out within five (**5**) days of the date of the Order. The cost of the valuation is to be borne equally by the Claimant and the 1<sup>st</sup> Defendant.
12. That in the event that the parties cannot agree on a valuator within the time specified, the vehicle shall be valued by MSC McKay Limited.
13. The 1<sup>st</sup> Defendant shall have the first option to purchase the Claimant's interest in the said motor vehicle with registration number 2578 EV and this option is to be exercised within twenty-one (**21**) days of the receipt of

the valuation report by the payment to the Claimant of the one-half of the sum stated to be the value of the said motor vehicle in the valuation report.

14. That in the event that the 1<sup>st</sup> Defendant fails to purchase the Claimant's 50% interest in the 2003 Mitsubishi Montero Sport motor vehicle, the said motor vehicle shall be sold by public auction or private treaty and the net proceeds of the sale divided equally between the parties.
15. The Claimant's Attorney-at-Law shall have conduct of the sale of the said Mitsubishi Sport motor vehicle.
16. The Registrar of the Supreme Court is empowered and authorized to execute any and all documents necessary to effect any sale and transfer of the said 2003 Mitsubishi Montero Sport Station Wagon motor vehicle bearing registration No. 2578 EV, Chassis No. JMYORK9603J0011, Engine No. 6G720K6779, if any party fails or is unwilling to do so.
17. The Claimant be declared to be entitled to forty **(40%)** interest in PADCO Jamaica Limited which is a company registered under the laws of Jamaica of which the Claimant and the 1<sup>st</sup> Defendant are the only registered shareholders.
18. The 1<sup>st</sup> Defendant to have the option to purchase the Claimant's 40% share of the company, failing which the company be wound up and its assets valued and sold and the net proceeds divided between the parties in accordance with the court declared entitlement.
19. The Claimant is declared to be entitled to a share of the household furniture and appliances and other household items.
20. The 1<sup>st</sup> Defendant to bear such costs as are incidental to these proceedings.

21. Any other order or relief as this Honourable Court deems just.
22. Liberty to apply.

## ISSUES

[6] The Issues that arise for determination are:

- (a) Whether Park Avenue was the family home and subject to be divided pursuant to **S.6 of PROSA**; alternatively
- (b) Whether the Park Avenue is 'property other than the family home' and therefore to be divided according to the factors set out in **S.14(2) of PROSA**
- (c) Whether the Claimant is to be awarded a share of Park Avenue and if so the extent of her share
- (d) What share, if any, is to be awarded to the Claimant in the motor vehicle being a 2003 Mitsubishi Montero Sport Station Wagon
- (e) What share, if any, is to be awarded to the Claimant in the company known as PADCO Limited

## THE LAW

[7] There is no dispute that the applicable law with respect to the division of matrimonial property is the **Property Rights of Spouses Act**. The relevant sections are restated here for ease of reference.

[8] The first part of **S.13** set out below deals with *locus standi*. It speaks to entitlement and the circumstances in which a spouse may seek relief.

13. – (1) *A spouse shall be entitled to apply to the court for a division of property—*

*(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation*

The following parts deal with the definition of the family home and how it is to be divided.

*Part I. Preliminary*

2.— (1) *In this Act –*

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

*Part II. Family Home*

6.— (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 onehalf share of the family home.*

7.— (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.*

**[9] S. 14** deals with the matters to be considered when property other than the family home is to be divided among spouses.

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

- (b) subject to 17(2) divide such property, other than the family home as it thinks fit, taking into account the factors set out in subsection (2) or where the circumstances so warrant, take action 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 the property of the spouses or either of them;*
- (b) that there is no family home;*
- (c) the duration of the marriage or the period of cohabitation*
- (d) that there is an agreement with respect to the ownership and division of property;*
- (e) such other fact or circumstance which in, the opinion of the Court, the justice of the case requires to be taken into account;*

*(3) In subsection (2) (a), "contribution" means-*

- (a) the acquisition of 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 dependent 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 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 property or any part thereof;*
  - (g) *the performances of work or services in respect of the property or part thereof;*
  - (h) *the provision of money, including the earning of income for the purpose 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*

## **ANALYSIS AND DETERMINATION OF ISSUES**

[10] In addition to the useful submissions of Counsel, which I have made full use of, the court has also had the benefit of the Court of Appeal's determination of some of the issues raised in **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam** [2018] JMCA Civ 15 ("**Hugh Sam**"). Reference will be made to this case as appropriate.

### **A. PARK AVENUE**

#### **(1) Family Home**

[11] The law provides that the family home is subject to be divided equally between the spouses, unless a court finds it would be unjust or unreasonable to do so. This has come to be known as the equal share rule. The basis for the equal share rule has been stated

and accepted to be that a marriage is a partnership of equals in which each commit themselves to sharing their lives and working together for the benefit of the union. This sharing is frequently manifested in the acquisition of a family home. It is this contribution to the union, and not the financial contributions made, that underpins a spouse's entitlement to an equal interest in the family home.

[12] According to Nicola, both herself and Collie lived together since 2003 as man and wife at Park Avenue as their only and principal place of residence up until December 2017. Park Avenue was therefore the family home. It was further submitted that exclusive occupation of the smaller dwelling was evidence of the severance of the tenancy in common and of sole ownership by Collie of that dwelling house. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants while not disputing that Park Avenue was the matrimonial home of Collie and Nicola, submitted that it cannot be taken as the 'family home' as it is not wholly owned by Collie.

[13] The weight of authority is against the Claimant. In order for a property to be declared the 'family home' under **S.2 of PROSA**, the dwelling house would have to wholly owned by either or both of the spouses. This issue has been dealt with in previous cases<sup>1</sup>, helpfully reviewed in **Hugh Sam**. Edwards JA (Ag) (as she then was) approved the principle stated in **Minshall v Lloyd**<sup>2</sup> that "[w]hatever attaches to the soil becomes a part of it". Therefore, Park Avenue which is the "land, building or improvement appurtenant to it", must be wholly owned by one of, or both parties of the marriage. As said by McDonald-Bishop JA in **Lambie v Lambie**<sup>3</sup>, whether the property is the family home "involves a mixed question of both fact and law as to whether the statutory definition has been satisfied." She referred to them as the 'ownership elements' and the 'evidence test'. The

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<sup>1</sup> **Greenland v Greenland 2007HCV02805**

**Patsy Powell v Courtney Powell [2014] JMCA Civ 11**

**Hyacinth Gordon v Sidney Gordon [2015] JMCA Civ 39**

**Weir v Tree [2014] JMCA Civ 12**

**Cunningham v Cunningham (unreported) Supreme Court Jamaica, Claim No 2358 HCV 2009 delivered 16 September 2011**

<sup>2</sup> [1837] 2 M & W 450

<sup>3</sup> [2014] JMCA Civ 45

legal question relates to the ownership structure and the factual question relates to whether or not the parties habitually resided at the premises. Both must be in unity. In this, she seems to have acknowledged and accepted that she was wrong in **Cunningham v Cunningham (unreported) Supreme Court Jamaica, Claim No 2358 HCV 2009 ...delivered 16 September 2011 (“Cunningham”)** that the dwelling house only, without the land appurtenant, could be the family home. **Cunningham**, a decision at first instance, was also expressly declared to be wrong on this issue in **Hugh Sam**. Simply put, where there is any third party interest in a dwelling house or the land on which it is permanently affixed, such property cannot be the family home.

[14] Given the undisputed evidence that Catchita Smith, Collie Smith and Agricola Sanderson are joint owners of the property, holding the property together as tenants-in-common, Park Avenue, or any part of it, could not be the family home as defined under **PROSA**. This means it is not subject to the equal share rule by which Nicola would be entitled to be awarded fifty percent of the family home unless it was unjust or unreasonable to do so.

## (2) Property other than the Family Home

[15] There being no family home, the next issue is whether or not Park Avenue could be ‘other property’ under **S.14 of PROSA**. A review of previous cases shows this question to be answered in the affirmative.

[16] In **Camille Greenland v Glenford Greenland et al (unreported) Supreme Court, Jamaica Claim No. 2007 HCV 02805, judgement delivered 09 February 2011 (“Greenland”)** Mr Greenland and his then new wife identified a parcel of land on which their matrimonial home was built. This was purchased and a house built primarily through the financial and physical efforts of Mr Greenland. They lived with Mr Greenland’s six children from a previous marriage. The land was registered in the names of Mr Greenland and two of his then young children. Mr Greenland contended that the Mrs Greenland was

fully aware that the property was acquired for the children of his first marriage and that she was in full agreement. The learned trial judge found that;

*The matrimonial home in this case did not become the family home. This is because it was, at no time, “wholly owned by either or both of the spouses”. It, therefore, is not subject to the provisions of section 6 of the Act. **It may however, be considered for the purposes of section 14 of the Act.** Despite the fact that Mr. Greenland had intended for the matrimonial home to belong to the children of his first marriage, Mrs. Greenland had contributed to its acquisition, and, by her role as homemaker and caregiver to Mr. Greenland’s children, to its conservation and improvement. (Emphasis mine)*

[17] In **Mistelle Corine West-Brown v Beresford Elisha West** [2014] JMSC Civ 166 (“**West Brown**”) the matrimonial home was situated on land registered in the names of the defendant, his brother Alphanso West and his sister Millicent West as tenants-in-common. The house was built solely from the defendant’s resources more than ten **(10)** years before his marriage to the claimant. After the marriage, the dwelling house became the parties’ principal residence. When the claimant went to live with the defendant in this home, she knew that the defendant was one **(1)** of three tenants-in-common registered on the title. There was a second dwelling house on the premises which was owned by the defendant’s mother. The court determined that the property did not qualify as the family home but could be divided under **S.14 of PROSA**. The claimant was awarded an interest in the property and was compensated by way of a lump sum payment.

[18] In **Karen Cameron v Andrew Ray Thomas** [2018] JMSC Civ. 164 the property was inherited by the respondent and although it was not deemed to be the family home by virtue of the fact that it was inherited property, Morrison J. adopted the position taken by Straw J. in **West Brown** and applying **S.14 of PROSA** conferred a share of the property on the claimant. The claimant was awarded a twenty percent **(20%)** interest in the property. He made the point, with which I agree, that **PROSA**

*in its wisdom did not give a restricted sense to the concept of property which it defines as “any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or*

*other chose in action, or any right or interest whether in possession or not to which the spouses or either of them is entitled<sup>4</sup>.*

[19] In **Hugh Sam**, the appellant, Suzette Hugh Sam, had applied pursuant to the **PROSA**, for a declaration that she was entitled to a one-half interest in several properties which she alleged that the respondent, Quentin Ching Chong Hugh Sam, her former husband, owned or had an interest in. The property which the parties had at one time shared as their matrimonial home, was owned by Mr Hugh Sam and his father. The Court of Appeal determined that the property could have been divided as other property by virtue of **S.14 of PROSA**, despite the court noting that as joint tenants, none had an identifiable share of the property. The co-owner, not having been a party to the proceedings, would have been denied his right to be heard on the issue and the court could not in those circumstances make a declaration adverse to his interest. The court declined to return the matter to the Supreme Court as it was of the view that based on the evidence accepted at the trial court, no useful purpose would have been served.

[20] **Hugh Sam**, is to be contrasted with the **Greenland** case where the co-owners were parties to the action. In **Greenland** an order was made awarding a share of the property to Mrs. Greenland.

[21] In this case all co-owners are parties and have been served the relevant documents and thus had the opportunity to answer the claim. Ms Sanderson has failed to avail herself of this opportunity. Park Avenue therefore falls to be considered as property other than the family home.

### (3) Whether the Claimant is to be awarded any Interest in Park Avenue

[22] The next step is to determine whether any interest should be awarded to Nicola in Park Avenue. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants contend that as the share of each co-owner

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<sup>4</sup> **Karen Cameron v Andrew Ray Thomas [2018] JMSC Civ. 164 para. 27**

has not been identified, the court is not in a position to make any award. This, it was submitted, could only be done where there is an action brought by one of the co-owners under the Partition Act to make such a determination. Further, no evidence was adduced by the parties from which such determination could be ascertained. The court could not therefore attribute a specific share of Park Avenue to Collie. Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted further that **Greenland** is distinguishable from this case on the basis that the husband in **Greenland** had arrogated unto himself a one-third share. Nicola's share, it was contended, would be limited to a share of Collie's interest in the property, were it known. For Nicola, it was submitted that by her and Collie's exclusive occupation of the smaller house, the property had already been divided.

[23] With respect to the submissions on behalf of the defendants, **S.23 (1)(e) of PROSA** provides for just such an eventuality and states:

*23. (1) Without prejudice to any other provisions of this Act, the Court may make any of the following orders—*

*(e) for the partition or vesting of any property*

[24] The court has in the past made such orders. Examples are in cases such as **Greenland** and **West-Brown**. The court may therefore make a determination of Collie's interest in Park Avenue and consequently of Nicola's interest.

#### **(4) Determination of First Defendant's Interest**

[25] Nicola is of the view that by virtue of there being three names on the Certificate of Title, Collie is entitled to a one third interest in Park Avenue which was manifested in their exclusive occupation of the smaller of the two houses. The evidence of both Collie and Catchita is that his interest would have to be in direct proportion to his contribution, and is less than one third. There was no real contest to this admission though Nicola continued to assert a one third interest in Collie's favour. As will be seen below, Nicola was not a party to the agreement between the co-owners. I therefore find that Collie's interest is in direct proportion to his financial contribution in Park Avenue.

[26] More difficult is determining the actual contribution by Collie and this exercised the court in different directions. To determine the contribution as a percentage of the whole, the court would have to take into account the following factors: the respective shares of deposit and closing costs, share of the mortgage payments, duration of the mortgage, value of improvements done by Collie and Nicola and the value of improvements done by Catchita.

[27] The purchase price was Six Million Five Hundred Thousand Dollars **(\$6,500,000.00)**. The amount of Five Million Six Hundred and Seventy-Five Thousand Dollars **(\$5,675,000.00)** was secured by two mortgages. The amount of Two Million Dollars **(\$2,000,000.00)** spent by Catchita on improvements and repairs was not disputed despite Nicola's assertion that she could not say how much was spent on renovations and repairs on Catchita's side. Rough calculations show Collie's contribution to the deposit and closing costs to be about twenty-six percent **(26%)**, and his shares of the mortgage payments to be about twenty-nine and one half percent **(29.5%)**. The smaller dwelling is just under one-third of the total building size **(see valuation report)**. It is also noted that the main renovations /repairs were done to the larger dwelling.

[28] While perhaps mathematically possible, I find it is not necessary for the court to engage further in such convolutions. All the evidence points to the most useful and just determining factor as being that of the sole and exclusive occupation of the smaller house by Collie. In the end, I have determined the share of Collie in Park Avenue for these purposes to be equal to the value of the dwelling house occupied by him. This position also addresses the possibility of imposing on the interests of the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

#### **(5) Determination of Claimant's Interest**

[29] The next step is to determine the share if any to be given to Nicola. **S.14 of PROSA** entitles the court to award her a share as it thinks fit, taking into account the factors listed in **S.14(2)**. Nicola claims a fifty percent share which has been roundly refuted by Collie. This also generated the main disputed evidence between the parties.

## **Common Intention**

### **(a) Claimant's Evidence**

**[30]** Nicola's claim to an equal share was based firstly on the common intention which she said she shared with Collie that they share in the fruits of the marriage equally. To that end, she gave evidence that they started living together prior to their marriage and from then pooled their resources. They shared a number of joint accounts and shared payment of the household expenses. The electricity and cable were placed in her name, which she paid. She held full time employment and was initially earning about the same as Collie, and both their salaries were pooled. By virtue of further educational opportunities, Collie began earning more and contributed more to the household expenses until he lost his job in 2009. She maintains that she had an agreement with her husband even though not a formal agreement, that they did everything together. She stated that in their marriage it was not a "me or I" situation, but it was "we or us". They even shared passwords for a bank account.

**[31]** In cross-examination, she agreed she did not add Collie's name to any of her accounts and that there were three and not five joint accounts between them. Of the three joint accounts, one of which was the bridal registry account, two were opened together and he added her name to an account he had previously. There was also an account that her salary was transferred to. She stated that the decision to participate in the purchase of Park Avenue was made together where she even offered her NHT benefits.

### **(b) First Defendant's Evidence**

**[32]** Collie's evidence is that the joint accounts were opened to facilitate Nicola's access to his funds in the case of an emergency or to conduct transactions on his behalf, and for investment purposes. Funds were moved to the joint account from his other accounts as necessary for this purpose. However, there was no account in which their salaries were pooled as their salaries were kept in separate accounts. There was equal access to funds in the joint accounts, but he did not intend to give Nicola any rights to it. He was always responsible for the household expenses which he undertook as Nicola was unable to



contribute to the same degree. The utilities were placed in her name for ease of transactions, if necessary, in Kingston, as he often worked out of town. They were however paid from his resources. Even when no longer employed to Sandals, he contributed to the household expenses from his savings and from earnings from contract work. He had also received a substantial pay-out upon his separation from Sandals from which he made his contribution. Nicola's funds were used to service her car loan and for her personal expenses.

**[33]** He did agree that during the marriage, it was his intention to share equally whatever they owned between them. This did not include Park Avenue, which was an arrangement with his sister and mother. He did however intend for her to acquire his interest in Park Avenue in the event of his passing before her, as evidenced by his Will. He stated that they both agreed that they would live at Park Avenue and had plans to purchase a matrimonial home in both their names.

(c) *Analysis of Evidence*

**[34]** There is no evidence of Nicola using any of the funds from the joint accounts for her sole purpose and benefit. She has in fact said that money went into the account depending on what they were doing. It seems to me this would not be the case if her salary regularly went to a joint account. Taking into account my general view as to the credibility of the witnesses, further expounded later, I find that the amounts in the joint accounts came from Collie's resources. I find access to the joint accounts, save for the bridal registry account, which was used for general household purposes, was to facilitate Nicola using the funds for the family and to do transactions for Collie when he worked out of town, and was not intended to give her control over the funds. I find support for this view in the evidence of Catchita who said she shared a joint account with Collie for this very purpose, but her name was removed and Nicola's substituted after their marriage. From Nicola's own account, Collie was careful and prudent about financial matters, to the extent of putting their expenses out on a spreadsheet. Nevertheless, it is clear that they intended to share in the fruits of their union equally as evidenced by Collie's evidence that given Nicola's comparatively small income, he knew he had to save to advance the

family's interest. The evidence of both Collie and Nicola leads to the inescapable finding of fact that both considered their contribution to the marriage equal, and that they would share equally in the fruits of the marriage acquired through their joint efforts, despite Collie's greater financial resources.

[35] The next question is whether Park Avenue was acquired through their joint efforts. This is connected to the next basis for Nicola's claim to fifty percent of Collie's 'one third' of Park Avenue which is her financial contribution to its acquisition renovation and upkeep.

### **Contribution**

#### *(a) Claimant's Evidence*

[36] Nicola's evidence is that in the first place, she contributed to the payment of the deposit. The first deposit was paid by Catchita and the second by Collie in 2001. It was also the intention between her and Collie that she would be entitled to a portion of the property as the funds for the deposit came from their joint account, an account to which she had contributed. She also expended sums in repairs and renovation of the house before they moved in as the house was not fit to live in. In particular, she took a loan from her employers to purchase paint. They both spent approximately One Million Dollars **(\$1,000,000.00)** to build a perimeter fence to the property. In addition to their pooled funds, Nicola's evidence is that when Collie became unemployed she then assumed full responsibility for all household expenses, as well as other expenses some of which were for his direct benefit, particularly to support his educational pursuits. She also sold her motor car during the period of his unemployment, the proceeds of which were used to take care of the family. Collie remained unemployed until sometime in 2011 and during that time he had no income. She was also responsible for the payment of Collie's share of the mortgage payments during this time. These contributions were reflective of their common intention that she would be entitled to a share of Park Avenue.

[37] In cross-examination she stated firstly that she made a payment of Two Hundred Thousand Dollars **(\$200,000.00)** towards the deposit which was Nine Hundred Thousand

Dollars **(\$900,000.00)**. She later agreed that the deposit was Nine Hundred and Twenty-Five Thousand Dollars **(\$925,000.00)** but that she was told Nine Hundred Thousand Dollars **(\$900,000.00)**. This was paid after her marriage as it was only then that they were able to accumulate the funds. She also agreed the deposit was paid one time and that based on the receipt that would have been before her marriage to Collie. She agreed that the discussions for the purchase of Park Avenue were spearheaded by Catchita. With respect to the mortgage amounts, she could not recall the amount borrowed from either of the two institutions. She and Collie had the common intention from the start that she was to be entitled to a portion of Park Avenue as the deposit was coming from their joint account. She later said however that the reason she was claiming a share was that the deposit came from their joint account. She also said she indirectly advised Collie against participating in the sale. Their intention was to live at Park Avenue and later purchase a home in both their names. She later said that purchase of other property would be for investment purposes. She agreed in cross-examination that she did not foot all the household bills for the two and a half years Collie was unemployed as stated in her affidavit evidence. She explained that when she said Collie “always” paid the bills in her affidavit evidence she did not use the word correctly as he did not do so when he was unemployed. She agreed she had produced no supporting document for the loan she took from her employers.

(b) *First Defendant's evidence*

[38] Nicola's evidence as to her financial contribution to the household expenses was denied by Collie who said he bore all expenses relating to the dwelling occupied by them. Collie's evidence is that in the year 2000 he became aware of his sister's interest in purchasing Park Avenue. She invited him to participate but he declined as he did not have sufficient funds at the time. Nonetheless she proceeded to include his name and he also contributed his NHT benefits. He also paid the closing costs of One Hundred and Fifty Thousand Dollars **(\$150,000.00)** which he secured from a loan that was serviced by salary deductions. Nicola was not a party to the discussions, nor did she, or he, contribute to the deposit. He indicated he did not desire to live at Park Avenue as he and the other co-owners intended that the unit, subsequently occupied by himself and Nicola, was to

be rented. He agreed to move back to Park Avenue at Nicola's urging, and in the interest of peaceful relations between them. No extensive renovations were done to the unit occupied by them save for replacing a toilet and face basin in the bathroom, and kitchen cupboards and sink. Nicola took no loan to paint the house. He undertook regular maintenance. He and Nicola always intended to purchase their own home.

[39] Collie also asserts that despite being laid off, he received as a pay-out his regular pay and one month's severance pay in addition to his pension. All of this totalled over One Million and Forty-Five Thousand Seven Hundred and Eighty Dollars and Sixty-Three Cents (**\$1,045,780.63**). From these funds he continues to be responsible for the household expenses. Additionally, though Collie was not fully employed, he solicited and got jobs from persons known to him in his industry and which he did from home. The company PADCO was formed as the vehicle through which these jobs were channelled. With these resources he was able to continue to support his family. Nicola did not contribute to his educational expenses. He paid these expenses from his own resources and was also supported by his mother. He exhibited documents in support of his mother's payments towards his educational expenses.

[40] A lot of the cross-examination concerned the joint accounts and acquisition of the motor vehicles. In cross-examination he said when he learnt of the plans to purchase Park Avenue they were well advanced. He agrees that he signed the sale agreement before his marriage despite saying he was unable to participate in the sale due to his upcoming marriage.

(c) *Second Defendant's Evidence*

[41] The evidence given by Catchita relates to the acquisition and improvements to Park Avenue. Her evidence is that on learning that Park Avenue, rented by her and where Collie and herself were then living, would be offered for sale she approached the owners to purchase same. She started negotiations in 1998. An agreement was reached the deposit paid in 2000. Up to this time, Collie was not a part of the negotiations with the vendor. In cross-examination she agreed he was referred to in correspondence with the

vendor's agent but said this was because he knew Collie also occupied the premises. Her mother also assisted her financially and with her NHT benefits. Her mother insisted Collie be involved in the purchase. Though she claims she included Collie's name on the documents for sentimental reason, she used his NHT benefits to secure a loan.

[42] By this token I believe his name had to be included on the title to the premises. It is clear from her cross-examination that there were discussions with Collie concerning the purchase as she said he indicated that he did not have the funds to contribute to the deposit as he was getting married. Due to the death of one of the vendors, the sale was not completed until 2003. The closing costs were paid by Collie. During this time, she had no discussions with Nicola concerning the purchase of the property. She agreed to Collie moving to the property with Nicola, he in the meantime having married and moved from Park Avenue.

[43] In cross-examination she said the plans initially was to rent this unit as she was going to be the only one living there. Collie living elsewhere in rented premises after his marriage seems to support this. The unit occupied by her was extensively renovated by her. She also added a remote gate, a fence and painted the unit to be occupied by Nicola and Collie. This expenditure was to the tune of Two Million Dollars (**\$2,000,000**). In cross-examination she clarified that she only painted the exterior of the building occupied by Collie as she painted the entire premises. She further stated that the building occupied by Collie and Nicola was in good condition. She does not dispute that Collie has an interest in the property but that it was never defined between them. At this point in her view, it would be limited to the contribution he made to the acquisition.

(d) *Analysis of Evidence*

[44] In assessing the evidence given by the parties I found Catchita in general to be consistent and earnest and I believed her to be witness of truth. Both Collie and Nicola agree that she spearheaded the acquisition of Park Avenue. Nicola's inconsistent evidence concerning the details of the transaction as well as the discrepancies with the supporting documents (e.g. amount of deposit and when made) suggest she was not

integral to the discussions. Specifically, I find that there were no discussions between Catchita and Nicola concerning the purchase of Park Avenue. Being the more truthful witness, I also accept Cachita's evidence as to the state of habitation of the smaller dwelling.

**[45]** As between Collie and Nicola, I find the evidence of Collie to be preferable. There were many inconsistencies in Nicola's evidence which cumulatively made her less credible. For example, whether she had a car loan and the amount she was paying on her car loan; the extent of her contributions to the purchase price; the amount she paid as mortgage payments; whether she paid all or some of the bills for two and a half years whether Collie always contributed to the household expenses. She maintained she was a part of the company PADCO from inception providing services to the company. Collie maintained that though shares were issued to her she was never a part of the running of the company, that being done by himself as Director and Catchita as company secretary from the company was formed. The company documents exhibited by Nicola bear this out. In her affidavit she states she had no idea why Collie's address was given as 8 Park Avenue on the marriage certificate. It was however suggested to him that he had a discussion with Nicola where he agreed to use his Park Avenue address so as not to scandalize his mother in law who held a responsible position in the church that they got married. These inconsistencies I find were as a result of a deliberate intention to exaggerate her connection and contribution to Park Avenue which she was unable to keep consistent in cross-examination.

**[46]** Nicola also by her demeanour came across as evasive and insincere. For example, when asked about her stance on the acquisition at the outset she tried to avoid saying she was against it, and her long hesitation before being able to say how much she paid when she made the mortgage payments, which she said she made for a year and a half.

**[47]** In general Nicola's answers seemed calculated and she could be observed calculating her answers to fit her narrative. I reject Nicola's evidence that she was party to the discussions to acquire Park Avenue. This was evident from the many

inconsistencies in her evidence and lack of knowledge in relation to the details of those discussions for e.g. the amount of the deposit and closing costs and when each was paid. It is clear that this was Catchita's initiative which Collie was invited to join as her brother and to support its financing. I find that Collie paid no portion of the deposit but paid the closing costs. Nicola was unable to show any supporting documentation for the payment of Two Hundred and Fifty Thousand Dollars (**\$250,000.00**) towards the deposit. I accept that the deposit of Nine Hundred and Twenty-Five Thousand Dollars (**\$925,000.000**) was made in one payment by Catchita before the marriage of Collie and Nicola. This is consistent with the evidence given by both Nicola and Collie that they would not then have been in a position to financially contribute to the purchase of Park Avenue at that time.

**[48]** I find there was no common intention at the outset that Nicola would have a share in Park Avenue. Her evidence in cross-examination as to her reason for claiming a share I believe belies her first position. I also find that there was no intention between the parties at the outset that Park Avenue would be their matrimonial home. Nicola conceded she did not wish Collie to participate in this venture and discouraged it. Their actual intention was to purchase a property together. This would seem to be why Nicola was not a party to the negotiations. They also resided elsewhere at the start of their marriage. There is no evidence that there was any impediment to Nicola and Collie occupying the smaller dwelling before completion of the sale. This especially as Collie had lived there prior to their marriage.

**[49]** I am of the view that despite Nicola's strenuous efforts to convince the court otherwise, she made no financial contribution to the acquisition of the Park Avenue. The closing costs and mortgage payments were made from Collie's own resources. Payments made by Nicola, if any, were made from Collie's resources and on his behalf. I note the mortgage payments of Twenty-Eight Thousand Dollars (**\$28,000.00**) which she said she paid, was actually Nineteen Thousand Five Hundred Dollars (**\$19,500.00**) as she agreed she discovered after these proceedings began. I find that the financial outlay in relation to the property, being utility payments, mortgage payments and repairs to the property

was Collie's. Nicola's financial contribution to the "acquisition, conservation or improvement" of Park Avenue was therefore minimal.

[50] There was also no intention that this property would belong to them as spouses. I find information concerning the purchase was given to her in the ordinary course of communication between spouses, and them residing there was convenient until they would jointly acquire their own property.

### **Other Considerations**

[51] Not contested however, was Nicola's contribution to the responsibility for child care and the running of the home, more so when Collie worked away in Montego Bay, St James, only returning to the family home for weekends. Collie's evidence that in this she was assisted by a housekeeper was not disputed. **S.14(4) of PROSA** states that "*for the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.*"

[52] I also take into account the following undisputed matters in Nicola's favour.

- (a) The duration of the marriage which was 15 years.
- (b) The fact that there was no family home.
- (c) That Nicola has primary responsibility for their son though it is not disputed that Collie continues to bear financial responsibility for his maintenance.

I take into account too that the property was secured by two mortgages which are subsisting over the property.

[53] Against her favour, in addition to her making only a slight, if any, financial contribution to the Purchase of Park Avenue and the household generally, I take into account that since their separation in 2015, Nicola would have made no contribution, direct or indirect, to payment of the mortgages, improvement or maintenance of the property.



## The Determination

[54] A review of the cases<sup>5</sup> already referred to show a zero to twenty percent **(20%)** share given to the non-owner spouses. The factors taken into account include being a homemaker, number of children, payment of utility bills and financial contribution to the acquisition and improvement of the property, that there was no family home and the intention of the parties. The spouse bearing the greater financial responsibility was awarded the greater share and the share of the non-owner spouse was increased for longer duration marriages.

[55] To highlight the approaches taken by the court, In **Greenland** the court found Mrs Greenland had acquiesced to the position that this house would be for Mr Greenland's children but had made a not insubstantial contribution, though not financial, to the marriage responsibilities. She was awarded a twenty percent **(20%)** interest despite the twenty-five **(25)** years she resided on the property. This is contrasted in **Hugh Sam** where the wife had not lived at the property in question for a very long period and during which time the marriage was already unravelling, and had not contributed to its acquisition financially. She was the primary caregiver to the children as the husband travelled frequently but she had household help to assist her. Her contribution to the acquisition and construction of the house was *de minimis*. She was not awarded any interest. In both cases there was no family home.

[56] Taking all the foregoing into account, I find it fit in this case to award Nicola a thirty percent **(30%)** share of the smaller dwelling house at Park Avenue which was the matrimonial home.

[57] In **Greenland** it was noted that that the interest given to Mrs Greenland did not require that she be registered as a proprietor. Brooks J (as he then was) was of the view

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<sup>5</sup> **Hugh Sam – 0%**  
**Karen Cameron – 20%**  
**West-Brown – 20%**  
**Camille Greenland – 20%**

that the relationship between the parties should be brought to finality as soon as possible and could be satisfied by a lump sum payment. I propose to adopt the same course in this case. Section 12 gives further guidance as to how this is to be done.

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

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

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

**[58]** There is no reason for the court to decide otherwise.

#### B. *MOTOR VEHICLE*

**[59]** Collie admitted that the proceeds of sale of the vehicle owned by Nicola was used for the benefit of the family. Thereafter they utilized the one vehicle owned by him. The decision to sell Nicola's vehicle was taken as the sale would have realized a bigger return to them. This is consistent with the Collie's evidence that during the marriage they shared equally. Nicola subsequently acquired another motor car, the purchase of which was funded by an aunt. Collie's evidence is that he spent significant sums on its maintenance and care. Nicola left the marriage with that vehicle. She agrees that since their separation she has sold the vehicle and has not accounted to him for any of the proceeds. This was an older vehicle (1997 Mitsubishi Galant) and a less expensive vehicle than the Montero Sport. The Montero was acquired at three times the cost of the Galant. Collie said he spent more than it cost on its repairs and upgrade. It could therefore reasonably be taken to be at least half the value of the Montero. Taking that into account I find that Nicola is entitled to a twenty-five percent **(25%)** share of the Montero Sport motor vehicle.

#### C. *PADCO JAMAICA LIMITED*

[60] Nicola makes a claim to forty percent of the company. It is a well-established principle from **Salomon v Salomon**<sup>6</sup> that a company has a separate legal identity distinct from its officers and shareholders, and was solely responsible for its debts and obligations, even though its actions were carried out by officers and directors of the company acting as its agent.

[61] As the company is not a party to the action no order can be made against it. The court finds no need, and there were no submissions, to that effect, to pierce the corporate veil. No further submissions were made in respect of PADCO, an indication I take as the Claimant's acceptance that the orders sought in relation to the company were not viable. Collie's shares could be treated as other property (**Hugh Sam**), but no claim is made in that regard.

#### D. *PERSONAL PROPERTY*

[62] A claim for division of personal property within the home was not pursued in submission or cross-examination.

#### **ORDERS**

1. Mr Collie Smith shall pay to Mrs Nicola Smith the equivalent of thirty percent **(30%)** of the value of the smaller of the two houses including the land on which it sits exclusively occupied by the Claimant and First Defendant located at 8 Park Avenue, Kingston 19, in the parish of Saint Andrew registered at Volume 1366 Folio 91 pursuant to **S.14 of the Property (Rights of Spouses) Act**.

- i. The value of the said house is to be ascertained by a valuator who shall be agreed upon by the parties and failing agreement by a

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<sup>6</sup> [1897] AC 22

valuator who shall be appointed by the Registrar of the Supreme Court.

- ii. The value to be used is the value of the said house as at the date of the judgement.
- iii. Payment of the appraised value shall be made within ninety **(90)** days of the date of the valuation report being provided to Mr Smith.
- iv. Interest at the rate of six percent **(6%)** per annum shall begin to accrue on the appraised sum as at the date stipulated for payment in order Number 3 above and shall continue until payment of the sum.
- v. The cost of the valuator shall be borne by Mr Smith as to seventy percent **(70%)** and Mrs Smith as to thirty percent **(30%)**.

2. Mrs Nicola Smith is declared to be entitled to twenty-five **(25%)** interest in 2003 Mitsubishi Montero Sport Station Wagon Motor Vehicle bearing registration no. 2578EV, Chassis No. JMYORK 9603J0011, Engine No. 6G720K6779.

- i. That the motor vehicle be valued by a reputable valuator agreed upon between the parties and the said valuation to be carried out within five **(5)** days of the date of the Order. The cost of the valuation is to be borne equally by the Claimant and the 1<sup>st</sup> Defendant.
- ii. That in the event that the parties cannot agree on a valuator within the time specified, the vehicle shall be valued by MSC McKay Limited.
- iii. Mr Collie Smith shall have the first option to purchase Mrs Smith's interest in the said motor vehicle and this option is to

be exercised within thirty **(30)** days of the receipt of the valuation report by the payment to Mrs Smith of the one-half of the sum stated to be the value of the said motor vehicle in the valuation report.

- iv. That in the event that Mr Smith fails to purchase Mrs Smith's 25% interest in the motor vehicle, the said motor vehicle shall be sold by public auction or private treaty and the net proceeds of the sale divided between the parties as to seventy-five percent **(75%)** and twenty-five **(25%)** percent to Mrs Smith.
  - v. The Attorney-at-Law for Mrs. Smith shall have conduct of the sale of the said motor vehicle.
  - vi. The Registrar of the Supreme Court is empowered and authorized to execute any and all documents necessary to effect any sale and transfer of the said 2003 Mitsubishi Montero Sport Station Wagon motor vehicle bearing registration No. 2578 EV, Chassis No. JMYORK9603J0011, Engine No. 6G720K6779, if any party fails or is unwilling to do so.
3. The Claimant is to have thirty percent **(30%)** of her costs against the 1<sup>st</sup> Defendant.