

and defendant are each entitled to 50% interest in Edgehill. Consequential orders are also being sought.

- [2] The defendant in response has disputed the 50% interest claimed and has asked the court not to declare more than a 30% interest in the property for the claimant.

BACKGROUND

- [3] The claimant is a retired teacher and operates a business as a cosmetologist. The defendant is a commissioned land surveyor whose employment is somewhat alleged to be affected by his visual challenges. It is not disputed that the parties were married on July 10, 1999 and that the marriage irretrievably broke down about February 2017. Neither party has filed for dissolution of the marriage up to the date of the trial and as such are still married. The union produced no children but there were three children of the family, the defendant's twin sons and the claimant's daughter. The claimant also had another young girl in her care, whom she considered her ward.

- [4] Prior to the marriage, Edgehill was purchased by the defendant and was registered in his sole name in about the late 1990's. He commenced construction of a five-bedroom house on this property prior to the marriage and began to reside at the premises. After the marriage, the claimant also began residing at Edgehill and this was the parties' only family residence before their separation. At the time of filing this claim, the parties continued to reside there.

The Claimant's Affidavit

- [5] The claimant's affidavit filed August 29, 2018, stood as her evidence-in-chief. In this affidavit, Mrs. Shirley indicated that at the time the parties got married the house was still incomplete. She stated that there were two bedrooms and bathrooms that were habitable, but one of the bedrooms located downstairs was

being temporarily used as a kitchen while the area allotted for the kitchen was under construction. The staircase was also only rough cast with no railings, the ceiling was half done and the kitchen, bedrooms, washroom, bathroom and family room were not tiled. She also stated that landscaping of the yard was also not done.

[6] The claimant indicated that she suggested to the defendant that since the house was not completed, they should temporarily move into her house, but he is alleged to have said that as a man, he was not going to live in her house, and that it was his intention for them to live in his house as a married couple. The claimant moved in once the parties were married.

[7] The claimant stated further, that the construction of the house was completed approximately five (5) years after the parties were married through both their financial contribution, labour and time.

[8] She further stated that during the marriage her role as the wife required her to perform duties relating to the household such as cooking three meals per day for the defendant, washing and cleaning. She accepted that there were times they had to hire a helper to provide assistance when she had work commitment, but the helper was never responsible for cooking the meals.

The Defendant's Affidavit and Cross- Examination

[9] The defendant, on the other hand, in his affidavit filed November 30, 2020, which stood as his evidence in chief, asserted that the house was completed prior to the marriage, but admitted that no landscaping was done to the yard and the house was not painted. He stated that the roof was completed since 1994 and that all the rooms were outfitted with doors and windows prior to the marriage. Immediately before the marriage, two bedrooms upstairs, the helper's quarters and two bathrooms were also tiled and outfitted. The other two bedrooms

upstairs were not tiled, but his twin sons did this when they were all preparing to move into the house.

- [10]** He also asserted that the claimant did not assist financially nor physically in doing the work. He claimed that her only contribution was her assistance in the installation of the rails for the staircase and the purchase of paint for the exterior walls of the house, which his twin boys painted. In every other respect, the finishing work for the house was completed with his sole financial input.
- [11]** He further stated that in his productive working years and prior to his ill-health which seriously deteriorated his income, he assumed the primary financial responsibility for the provision and maintenance of their children and the running of the household. He solely paid the utility bills, did the grocery shopping, provided for his boys and assisted in the care of the claimant's daughter up to the completion of her tertiary education. He also asserted having purchased and solely maintained every car operated by the claimant since their marriage.
- [12]** He denied that the claimant cooked every day for him as he was always cooking. He indicated that she cooked for her mentally challenged brother and on some occasions she would leave a meal for him.
- [13]** He further stated that initially they had a live-in helper for about two years and thereafter a helper who came in five days for the week. This continued up to February 2017 when the helper was dismissed.
- [14]** He asserted that because of his major financial obligations throughout the marriage, the claimant has been able to save. He further asserted that the claimant owns several properties and that he contributed towards their improvement. However, he has never been given an account of the monies made from the sale or rental of these properties, nor has he asked for an interest, despite his contribution. The defendant contended further, that Edgehill is the sole real estate owned by him. He also explained being at a stage where his profession and income have suffered greatly due to challenges with his eyesight

and that his savings have been largely depleted due to the expenses associated with the cost of surgery to save his eyesight. He said he is now considered legally blind and is also suffering from other illnesses such as hypertension and diabetes.

- [15] In cross-examination, the defendant said that it took him approximately five years to complete his house. He explained that being self-employed, his income was unsteady and with his responsibilities as a single parent and in taking care of his retired parents, he had to take on each task *“little by little”*.
- [16] He highlighted that in addition to the painting and the installation of the railings spoken to in his examination-in-chief, there was also some tiling and the installation of minor fixtures to be completed. He further explained that the cupboards for the kitchen and the light fixtures needed to be put in place. The closets for the bedroom were also only partially installed. The family room upstairs was also not tiled or painted nor was the washroom tiled. The staircase was also not tiled, but it was carpeted. Further, the master bedroom was also not done, this being the last room to be completed.
- [17] The defendant accepted that he had not presented any evidence of his contribution to the property, but still maintained that the claimant’s contribution was negligible.
- [18] In relation to the individual contribution towards the household expenses, the defendant indicated that he paid all the household bills. When asked if he still paid the bills during times when he had no income due to the unsteady nature of his job, he maintained that he did, out of his savings. He stated that occasionally the claimant would assist when there was a problem and when it was urgent.
- [19] The defendant was adamant that even after his health worsened around 2013 resulting in the deterioration of his income and the depletion of his savings, he ran the household without much assistance from the claimant and also continued to pay his staff.

[20] In relation to the claimant's contribution to other household expenses, he indicated that the claimant decorated the house and assisted for a short period with the finances of all the children of the family including their transportation, food and education. He also stated that he too assisted with the upbringing of the claimant's daughter.

Claimant's Affidavit in Response and Cross- Examination

[21] In her affidavit in response filed June 30, 2020, which also stood as her evidence-in-chief, the claimant indicated that when she moved into Edgehill, the roof was completed and that all the rooms had doors and windows. She also reiterated that the master bedroom and the defendant's sons' bedroom were not complete. The family room upstairs was also not tiled and the staircase was plain concrete with no handrails in place. The kitchen was also not tiled and no cupboards were in place. The washroom had a washtub, but it too was not yet tiled, nor was the verandah. She also stated that the house was not painted, no fence was erected, the driveway was not completed and there was no landscaping. This is somewhat in line with defendant's position as highlighted from his cross-examination.

[22] With respect to the completion of the bedroom, the claimant states that the bedroom occupied by the defendant that was not the master bedroom, along with a bathroom was completed prior to the marriage. However, the second bedroom was not completed until at the time of the marriage to accommodate her daughter and ward. She also stated that a small room formerly used as the kitchen was converted into the helper's quarters along with a bathroom located across from this room. Further, another bedroom was not completed until the defendant's boys were going to move in.

[23] The claimant admitted that she did not keep records of her spending in the matrimonial home, but stated that she contributed financially to the completion of

the home. She recalled her first financial contribution being the installation of the water heater and staircase rails. She also secured the commissioning of a landscaper to do the landscaping of the property. She also averred assisting with the initial painting of the exterior of the house and the repainting a few years later.

[24] She further stated that the weekly payments of the helper and gardener were done by her until late 2017. She also averred assisting with the purchasing of the groceries and the payment of the utility bills. She also indicated that in pursuit of her goal to make the house a home she also bought and/or made draperies, bed linen, toiletry among other things, while financing all other needs pertaining to the everyday family routine.

[25] As it relates to the cooking, the claimant admitted that the defendant loved to cook when he could see properly, especially at Christmas time. However, she stated that on a regular basis she had to get up at 4 o'clock each morning and prepare two separate meals, breakfast and lunch and after she finished teaching, she would have to rush home to prepare supper.

[26] In relation to the children, the claimant admitted that the defendant had provided food and shelter for her daughter who was around 14 years at the time of the marriage and that he had treated her as his own child. However, her every day needs were covered by her. As far as her daughter's upkeep whilst pursuing her tertiary education is concerned, the claimant indicated that she covered this. However, her tuition and boarding were covered by student loan and the Ministry of Finance respectively for two years and thereafter, in her third year, having not received student loan, she was offered assistance by the defendant. However, because she failed one of her exams, she no longer received assistance from the defendant and the claimant had to seek a loan to finance the remainder of her daughter's studies. She indicated that she used her house owned prior to the marriage as security for the loan.

- [27]** In the same manner, the claimant indicated she had treated the defendant's children as her own. She highlighted an occasion where she said the twins had failed their CXC exams and the defendant having resolved to stop wasting money on them, she took it upon herself to get them into another school for them to repeat Grades 10 and 11. She further indicated that having got them into the school, the starting expenses were financed by her and this covered school fees, books, rentals, uniform and shoes.
- [28]** As far as the defendant's allegation in relation to the purchasing and maintaining the claimant's vehicle is concerned, the claimant accepted that the defendant had purchased two vehicles for her throughout the marriage including the one she currently drives, but did not agree that he maintained the vehicles.
- [29]** Concerning the properties the defendant says she owns, the claimant indicated that the property where she resided prior to the marriage was rented, and later sold after the marriage. She also stated that the only other property owned by her is the one from which she operates her salon, which is jointly owned with her daughter's father. She attached a copy of the title as proof. She indicated that the defendant had never made any improvements to either property, as he had no need to. Further, she explained that the other two properties mentioned were not owned by her, one being the inheritance of the twin of her mentally ill brother and the other where she currently resides is her daughter's.
- [30]** In cross-examination, the claimant admitted that the physical structure of the house was completed when she moved in, but that the finishing work was yet to be done.
- [31]** On to their joint finances, the claimant indicated that she and the defendant did share a joint account, but after the first month the defendant decided to no longer put any funds in the account after the statement showed the claimant's name first. She further indicated that the rent she received from her house owned prior to the marriage did not go into this joint account, but instead was used to pay her mortgage and in financing herself. Further, when that property was sold, she

admitted to not giving an account of the proceeds to the defendant, and that he did not benefit from it being sold.

Claimant's Submissions

[32] The claimant submissions were contained in the claimant's skeleton submissions filed on September 21, 2020 and the claimant's supplemental submissions filed on October 23, 2020.

[33] Ms. Speid on behalf of the claimant, submitted that it is not contested that the parties separated in or about February 2017, or that the application for relief under PROSA was made outside of the twelve-months' period after the parties separated. However, counsel argued that the defendant did not specifically plead the limitation defence. Instead, he merely made an oral submission at the end of the trial of the matter which it is submitted was not sufficient to invoke the defence of limitation. In supporting her assertion for the need to plead the limitation defence, counsel relied on the cases of ***Deidre Anne Hart Chang v Leslie Chang*** Claim No 2010 HCV 03675, para 95 and ***Fay Veronica Wint-Smith v Donald Anthony Smith*** [2018] JMSC Civ 2, para 6.

[34] In ***Wint-Smith v Smith***, the learned judge stated at paragraph 6 as follows:

“The precipitating event giving rise to this claim is the separation of the parties. In this particular case, the undisputed evidence is that the parties were separated in or around April 2011. The claim was filed on the 22nd of September 2015. There is in fact no evidence as to whether a decree of dissolution of marriage has been granted in relation to the parties. No issue has been taken with the timing of the filing of the claim. Given that the limitation defence has not been pleaded, the court has not concerned itself with that matter. I came to the conclusion that the court did not need to address that issue because a limitation defence is procedural in nature and is to

be raised by a defendant in his/her defence. If a defendant chooses not to or fails to plead such a defence, what would otherwise be a claim which is statute barred, could proceed to trial. I do not think that a court should of its own motion, raise the issue of a claim being statute barred. It is a point for a defendant to raise.”

- [35] As such, it was argued that in the absence of compliance with the established requirement for the limitation defence to be specifically pleaded, the defendant could not seek to rely on it now and the claim is entitled to proceed to trial. In fact, Ms Speid highlighted that when the defendant was provided with the opportunity to respond to the claim, instead of raising the defence the defendant counter-offered the claimant’s proposal for a 50% share in the matrimonial home with an offer of 30%.
- [36] Counsel further submitted that based on the conduct of counter-offering the claimant’s proposal, the several discussions in attempts to settle the claim and the presumption that it was conducted in good faith, it can be inferred that the defendant had no objections to the claim being filed out of time. Upon these facts, counsel argued it would not be in the interest of justice to dispose of the claimant’s right to proceed under PROSA especially in circumstances where the parties had been in court for almost two years, had the matter adjourned to facilitate the settlement discussions, proceeded to trial and evidence taken. She also argued that the fact that the marriage had not been dissolved the claim could be revived when there is dissolution and further that the claimant also has the option to save the claim under section 11 using the same claim form if the claim fails under section 13. In those circumstances she submitted that it would not be in furtherance of the overriding objective to have the matter withdrawn and refiled with the same information and requests.
- [37] Counsel made the argument that unlike the defendant, the claimant specifically pleaded on paper her request for an extension of time for the claim to proceed under PROSA and though the extension has not been granted, she argued that it

has also not been denied, thereby giving the court the authority to regularize the defect of not obtaining a formal order for extension of time to file the claim.

- [38] Counsel further submitted, that if the claim does not stand as being filed in time, the principles of common law is the next option. She argued that the principles of equity should only be considered as a last resort if the rules of common law fail as the application of the strict rules of equity will result in many spouses being unable to prove their contribution to the family home in financial terms as there was no dollar amount attached to the work of raising children and maintaining the family home.
- [39] Finally, Ms. Speid submitted in the alternative, that if the claim is allowed to proceed under PROSA, the claimant is entitled to 50% interest in the matrimonial home under the equal share rule. Further, she submitted, that though the family home was acquired by the defendant prior to the marriage and there is a dispute as to the financial contribution of the parties to both the matrimonial home and the household expenses, this is not sufficient premise on which to vary the equal share rule. Counsel continued that the section 7 requirement under PROSA illustrate that for a court to vary the equal share rule, it has to be shown that it is unjust and unreasonable for there to be equal entitlement to the property.
- [40] Nevertheless, she pointed out that the authorities have shown the reluctance of the courts to vary the equal share rule based on one spouse making substantially greater financial contribution. In support of her point Ms. Speid relied on ***Graham v Graham*** Claim No. 2006 HCV 03158, ***Yvette Marshall Bryan v Donovan Bryan*** [2017] JMSC Civ 84 and ***Wint-Smith v Smith***.
- [41] In concluding, counsel submitted that based on the foregoing and on the fact that the parties had a subsisting marriage for approximately eighteen years, raised each other's children, acted in a joint enterprise regarding the completion, maintenance and upkeep of the family home and the children of the marriage, the equal share rule ought to be declared.

Defendant's Submissions

- [42] Ms. Shaw submitted that the application for the division of the property under PROSA having being made outside the timeframe of twelve months, the claim cannot proceed without an extension of time from the court to make the application.
- [43] She conceded that the application need not be made prior to filing the claim and that the claim itself would not be invalidated by being filed in the absence of the extension, or being filed out of time, but emphasized that the extension from the court is required to proceed. She cited the consolidated appeal of **Saddler v Saddler** and **Hoilette v Hoilette & Hoilette** [2013] JMCA Civ. 11 in support of this.
- [44] She also noted that in this consolidated appeal the court had dispelled the previous assumption that in cases under PROSA there need to be both the leave and the extension from the court before a matter could be commenced or continued. This case articulated the new approach that only an application for an extension is required.
- [45] There being no longer a requirement to obtain the leave of the court, only to apply for the necessary extension of time, Ms. Shaw contended that in the instant case no application was made seeking this extension, nor could one be inferred from the affidavit, for the court to consider. She further contended, that even if there were an application, there was no evidence before the Court upon which the application could be considered.
- [46] Counsel highlighted that in the consolidated appeal cited above, the factors that ought to be taken into account by the court in an application for extension, were discussed at paragraph 46, where Phillips JA stated as follows:

“Of course it must be taken as a given that in order for the application for extension to be successful and to obtain the exercise of the discretion of the court in favour of the applicant, the applicant

must set out the length of the delay, the reasons for the delay, whether the claim is worthy of the grant of extension and whether there is prejudice to the other party (Allen v Mesquita).”

- [47] Counsel argued that though the period of delay between the parties' separation and the filing of the claim was minimal, there was no evidence by way of an explanation for the reasons for the delay. She concluded therefore that the extension should not be granted and consequently section 6 and 7 of PROSA will be inapplicable to the case at bar.
- [48] Furthermore, as regards the timing of the defendant's objection, Ms. Shaw accepted that the objection was not raised as a preliminary point, but only raised after the trial of the matter. However, she submitted that the time at which the objection was raised is moot. She argued that whether the objection was raised before or after the trial, the provisions of PROSA could not be considered by the court in the absence of the granting of an extension of time. Accordingly, she submitted that the claim under PROSA in the instant case is defeated.
- [49] Counsel, however, submitted that in the event the claim is allowed to proceed under PROSA, there is evidence supporting a variation of the equal share rule. Counsel indicated that the gateway for the variation is the property being owned by the defendant prior to the marriage.
- [50] She further submitted, that in considering all the circumstances of the case, it is unreasonable or unjust for there to be equal entitlement to the property. She indicated that though the parties were married for a long period, the disparity in the resources of the parties as well as the hardship the defendant would suffer if the claimant is given equal entitlement, warrants a variation. In particular, the claimant should not receive an interest in the family home.
- [51] Finally, counsel contended, that if the claim does not proceed under PROSA, the court is empowered to examine the claim under equitable/common law principles. However, Ms. Shaw submitted that there was insufficient material

contained in this claim to ground an equitable entitlement in favour of the claimant. The claimant would be required to establish that there was a trust held on her behalf in order to obtain an interest in the defendant's property. She indicated that the claimant, however, failed to prove the requirements of a trust. She has not alluded to a common intention upon which she relied nor has she shown any acting to her detriment in relying on that intention. The claim therefore should fail in this regard.

ANALYSIS OF LAW

Extension of Time

[52] The claimant has brought her claim for division of matrimonial property under section 13(2) of PROSA. Section 13 reads as follows:

[53] A spouse shall be entitled to apply to the Court for a division of property--

on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

on the grant of a decree of nullity of marriage; or

where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

...

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.

[54] Applications under section 13 are subject to a twelve months' timeline, following a triggering event. In this particular case, the triggering event giving rise to this claim is the separation of the parties. The undisputed evidence is that the parties

were separated in February 2017. Pursuant to section 13(2) of PROSA, the claimant would have had to file her application by February 2018. The claim was filed on August 29, 2018 and as such, the application for declaration as to the claimant's entitlement to the property was filed out of time.

[55] The defendant raised this objection in closing submissions and contended that the claim having not been filed within the time frame prescribed by PROSA, the application for division of the property could not be heard under that legislation. The defendant therefore has relied on the limitation defence.

[56] The claimant objected to the defendant invoking the limitation defence at such a late stage. Counsel argued that the limitation defence ought to have been specifically pleaded in the defence by the defendant and not raised at the end of the trial. She provided authorities in support of her argument, which I found to be useful. (*See: Deidre Anne Hart Chang v Leslie Chang and Fay Veronica Wint-Smith v Donald Anthony Smith*). However, though raised late in these proceedings, the court is still duty bound to consider it. Notably, the limitation issue was nevertheless brought to the attention of the court by the defendant and not raised by this court on its own motion as was discouraged in **Wint-Smith v Smith**.

[57] It was indicated by the Court of Appeal in *Saddler v Saddler* and *Hoilette v Hoilette & Hoilette* that a claim time-barred cannot proceed without the court allowing the time/period to be extended. Therefore, the limitation defence is a point worthy of the court's consideration, since this claim is barred from proceeding under section 13(1)(c), no extension of time having been obtained from the court.

[58] With that said, it must be pointed out that the claimant's application to this court sought an order for the claim to stand as being filed in time. This would seem to be the claimant's intended request for extension of time to file the claim. However, it must be mentioned that this is not the prescribed manner to approach the court seeking its discretion to extend time. As such, the defendant

has contended that there is no application for an extension of time in which to file the claim. The first issue therefore, is whether there was an application before the court for an extension of time.

[59] Though there was not a direct application seeking an extension of time, I have interpreted the request for the claim to stand as filed as an application for extension of time to the date the claim was filed, so as to allow the claim to stand as filed in time.

[60] I am fortified in my approach by the dictum of Phillips JA in the consolidated appeal **Saddler v Saddler** and **Hoilette v Hoilette & Hoilette**, In the **Hoilette** claim, a similar approach was taken by the learned judge in the court below, and this was accepted by the Court of Appeal as appropriate. Phillips JA had this to say at paragraph 89:

“...the order made by P Williams J was appropriate in all the circumstances, as it recognized the amendment of the claim form to include the claim under PROSA, it ordered the claim as amended to stand, which in effect was also recognizing the power of the court to extend the time for the filing of the claim after the time allotted in section 13, and did so nunc pro tunc.”

[61] As such, I do not accept the contention of the defendant that no application for extension of time was made.

[62] I will now address whether the claimant has met the requirements for a grant of an extension of time allowing the claim to proceed under section 13(1)(c).

[63] Section 13(2) confers a discretionary power on the court to extend the time within which the claim could be brought. The section does not require that the application for extension of time precede the filing of the Fixed Date Claim Form. This is well settled in the consolidated appeals of **Saddler v Saddler** and **Hoilette v Hoilette** where the Court of Appeal found that all that was required was the application for extension, which could be filed after the claim and the

order granted *nunc pro tunc*. It is not required, nor is it necessary to seek the leave of the court before making this application for extension. It is also settled that the claim though commencing without such extension, is still valid but is irregular and could not proceed if the order to extend time is not granted.

[64] In that case, the court relying on ***Allen v Mesquita*** also outlined some of the factors the court must take into consideration in such applications. Phillips JA said as follows at paragraph 46:

*“Of course it must be taken as a given that in order for the application for extension to be successful and to obtain the exercise of the discretion of the court in favour of the applicant, the applicant must set out the length of the delay, the reasons for the delay, whether the claim is worthy of the grant of extension and whether there is prejudice to the other party (***Allen v Mesquita***).”*

[65] In ***Brown v Brown*** [2010] JMCA Civ. 12, Morrison JA (as he then was) also mentioned the factors to consider in an application for extension. He said at paragraph 77:

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

[66] The guiding principle that can be extracted is that in considering whether to exercise the discretion to extend time, I must give effect to the overriding

objective in considering all the factors outlined in *Allen v Mesquita*. Therefore, each of these factors will be considered.

[67] As can be observed, there is a five months' delay in bringing the claim, which I would not describe as inordinate or egregious. However, I have also observed, that there is absolute silence in the affidavit and any other documents filed by the claimant, as to the reasons for the delay in bringing the claim. Though its absence is significant, the question is whether this is fatal. I recognize however that this is just one of the factors, the court must consider in exercising its discretion for an extension.

[68] On the question of the merits of the case, I am of the view that the claimant has shown that she has a prima facie case to an interest in the property. There is no dispute that the parties were married in 1999 and separated in February 2017. There is also no dispute that the property the subject of the claim, was registered solely in the name of the defendant and that this was where the parties lived together and raised the children of their family, until separation. This would therefore, based on the definition in the PROSA, be the family home. This also was accepted by the defendant.

[69] The defendant had solely acquired this property prior to the marriage and had done the majority of the construction works on the property. However, he admitted that the claimant assisted in the finishing works on the house but the overall extent of the claimant's contribution to this is disputed. Despite this, the fact that the extent of the claimant's contribution to the completion of the matrimonial home is disputed by the defendant, demonstrates that there are serious issues that need to be determined. Further, the evidence before this court shows that the claimant was involved in the upbringing of the children of the family and in the performance of household duties.

[70] In addition to this, the defendant has given credence to the merit of the claim by indicating that the court ought to give the claimant no more than 30% interest in the property instead of a 50% entitlement as a spouse, where the family home is

concerned. This shows that the defendant is of the opinion that the claimant is entitled to a share in the property, which interest can only be determined by the court.

[71] I have also considered the issue of prejudice. I take note that if the claimant succeeds in her application the defendant would be deprived of his defence of limitation. However, there is no evidence that the defendant would be prejudiced in any other way.

[72] It can be argued that the possible prejudice would be far greater to the claimant if the application for extension were not granted. As submitted by Ms. Speid, the proceedings have been lingering in the court for approximately two years. The parties have gone through case management, pre-trial review and is now at the final stage of a trial where evidence was taken. During that period, the matter was adjourned to allow settlement discussions. The claimant would have operated for these two years under the presumption that the defendant would not take issue with the timing of the claim.

[73] I have also noted the claimant's arguments, that she has two windows of opportunity to come before the court as the application may be brought back after the grant of a decree absolute. Therefore, if the extension were not granted, though the claim would be withdrawn, it can still start afresh with the same documents, same information and requests and would go through the same process as in the present claim, after the grant of the decree.

[74] In such a situation, both parties would be affected, not just the claimant. The parties will then be devoting additional time, expense and resources in having the same dispute between the same parties dealt with on a second occasion before the court, denying them the advantage of limiting time and expense by having the matter determined now.

[75] Furthermore, I bear in mind as the claimant argued, that by not granting the extension, the defendant being the sole registered owner of the property, will be

given the opportunity to dispose of it before the claimant's interest can be determined by the court, especially now that he has notice of the claimant's intention to claim her share in the property.

[76] It seems to me, therefore, that in pursuing the overriding objective to act in a manner which will save expense and ensure cases are dealt with justly, expeditiously and fairly, there is less prejudice in granting the extension in the circumstances of this case, despite no reasons being provided for the short delay.

[77] I take comfort in my decision by the approach taken by McDonald-Bishop, J (as she then was) in the case of ***Thelma May Whilby-Cunningham v Leroy Augustus Cunningham Claim No 2009HCV02358***, in which the learned judge had to consider whether to grant an extension of time based upon a preliminary objection taken at the commencement of trial by the defendant, that the claim was filed out of time and should not be allowed to proceed and that PROSA did not apply as the separation of the parties had occurred more than twelve months before the commencement of the proceedings. Notably, the claim was filed some two years after the separation of the parties. The learned judge had this to say:

[21] "In considering whether an extension of time should be granted to allow the claim to proceed by virtue of section 13 (1), I have formed the view that it is rather imprudent to subject separated spouses, in the circumstances specified, to a twelve month window within which to bring the claim given that the question as to whether there is possibility of reconciliation might not readily be answered, even by the parties themselves, within that period of time. Some allowance must be made for counseling and reasoned reflection and, in any event, whether there is reasonable likelihood of reconciliation is, ultimately, a question of fact for objective assessment by the Court.

...

[23] What makes the time limit imposed on separated spouses under section 13 even more incomprehensible is the fact that upon dissolution of the marriage, a spouse may still bring the claim for division of property under section 13 and even has the right to do so up to twelve months after the dissolution of the marriage. What we have then is that a person, who is a divorcee, who brings the

action within twelve months after the dissolution of the marriage can enjoy the benefits of the Act conferred by section 13 and other related sections, but a separated spouse without reasonable likelihood of reconciliation, who has been separated for over twelve months, cannot. But yet, if that spouse were to proceed to obtain a decree for dissolution of the marriage, which would come later in time, he would be in a position to enjoy the benefit of the Act up to twelve months after the dissolution of the marriage.

[24] Having considered all the circumstances against the background of the relevant provisions of the Act, it seemed to me that it would be somewhat unreasonable to deprive the claimant of the right to proceed by virtue of the Act because she had been separated over twelve months before bringing the claim. If she had waited until the grant of a decree absolute of dissolution of the marriage, she could have properly brought the claim up to twelve months thereafter. The claimant would thus be qualified to apply at a time subsequent to the filing of her application. I find that I could not agree with Mr. Forsythe's argument that the Act should not apply because the application is out of time under section 13.

[25] Having examined the nature of the claim and having heard the claimant, I ruled that the claim is one that ought properly to have been brought under section 13 and that I would extend the time within which the application may be brought under section 13. In the result, I have allowed the claim to proceed as having been filed within time under section 13 and so the defendant's objection that the Act does not apply because the claim was filed two years after the parties had separated, is not sustained."

[78] For the reasons mentioned, I find that this case is fit for the exercise by the court of its discretion in favour of the claimant to grant the extension. As such, time is extended for the claim to proceed under section 13(1)(c) of the PROSA and there is no need to revert to the rules and presumptions of common law and equity to determine the parties' entitlement to the property.

Applicability of Section 11

[79] I will now deal briefly with a point raised by Ms. Speid in her submissions. Counsel contended that if extension were not granted, the claimant may still proceed under section 11, where there is no limitation period, as there is a

subsisting marriage. I will set out here what section 11 says, in so far as is relevant to this proceedings:

11.- (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 ...may apply by summons or otherwise in a summary way to a Judge of the Supreme Court...

(2) The Judge of the Supreme Court ...may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.

- [80] Section 11 gives parties in a subsisting marriage or a legally recognized union outside of marriage the right to approach the court to determine property disputes between them.
- [81] In ***Whilby-Cunningham v Cunningham***, McDonald J (as she then was) reasoned that where the parties are still married but separated, in order for the claimant to go under section 11, there must be separation as well as the possibility of reconciliation or there is uncertainty as to reconciliation.
- [82] When I examine the evidence of the parties, it seems that it is not reasonably likely that there will be reconciliation. Although the defendant is undecided if he wants to end the marriage and have indicated praying about whether to initiate divorce proceedings, the claimant has shown by her conduct that her intention is to sever the marital bond. She has not filed for dissolution of the marriage, but she has not only moved out of the family home and has taken up residence with her daughter, but she has also initiated these proceedings to divide the family home. Further, in her affidavit in support of the Fixed Date Claim Form, the claimant indicated seeking a “*fresh start*”. This I have interpreted to mean a fresh start outside of the marriage.
- [83] Therefore, there being separation with no reasonable likelihood of reconciliation, the claimant could not properly proceed under section 11 for the determination of

their respective interest in the property. The claim ought properly to be dealt with under section 13.

Division of Property

[84] Time having been extended, the applicable law in determining the parties' share in the property is that provided by PROSA under sections 6 and 7.

[85] Section 6 (1) of the Act states:

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 husband and wife have separated and there is no likelihood of reconciliation.

[86] The claimant is accepted by this court as the spouse of the defendant and it is not disputed that the property in question is the family home as defined by section 2 of the Act. Therefore, by virtue of the provisions of section 6 the claimant would, without more be entitled to her 50% share in the family home as claimed.

[87] Section 7, however, authorizes the court to vary the equal share rule upon the application of an interested party where, in the circumstances of the case, the court is of the opinion that applying the rule would be unjust or unreasonable. In making the determination to displace the statutory rule, the court is enjoined by section 7 to take into account three factors listed in the subsection. These factors are: (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. It must be noted that the presence of any one of the three factors is sufficient for the court

to embark on its task to consider the displacement of the rule. All three need not exist.

[88] Of the above, evident in this claim is that the family home was previously owned by one spouse that is the defendant, at the time of the marriage. I am mindful that the presence of this factor, though it creates an avenue for the departure from the equal share rule, does not inevitably lead to a variation. In ***Carol Stewart v Lauriston Stewart*** [2013] JMCA Civ. 47 the Court of Appeal noted that the three factors were only a gateway for the court to consider other elements of the relationship between the parties in order to decide whether adjustment of the equal share rule should be allowed. The elements recognized in ***Stewart v Stewart*** as relevant for consideration are the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings. The category of factors however is not closed and the court is entitled to have regard to other factors which may arise in the circumstances of each case. It is important to note however, that the overarching consideration in deciding whether to depart from the equal share rule, is fairness.

[89] In the case of ***Stewart v Stewart***, it was made clear that the equal share rule should not be lightly varied. The court must be satisfied that the application of the rule would be unjust or unreasonable to consider a variation. Consequently, the evidence required to displace the equal share rule must be very cogent. With that in mind, I will now examine the nature of the parties' relationship in coming to a decision on this issue.

[90] The main plank of the defendant's claim for 100% beneficial share of the family home is based on three limbs. First, the fact of the purchase before marriage, secondly, his sole financial input in the construction of the home and its overall completion and thirdly, being the chief financial provider of the household and in the provision and maintenance of the children of the family.

[91] No issue is taken that the family home was obtained by the defendant before the parties' marriage and that construction of the structure of the house was done

solely with the defendant's input. However, there is some controversy concerning each parties' contribution towards the completion of the house and their contribution to the household and the family.

[92] There is no documentary proof of the parties' individual financial contribution to the family home. This was admitted to by the parties. However, the affidavit evidence and evidence elicited from cross- examination is able to shed light on each parties' contribution.

[93] In relation to the completion of the home, the defendant indicated that only the finishing works were left to be done on the house when the claimant moved in, the construction of the structure being completed before the marriage. This I accept. In cross- examination, he elaborated on the tasks that were remaining, which I will not repeat here for the sake of brevity. Of these, he stated that the claimant's only contribution was towards the installation of the rails for the staircase, the installation of the kitchen cupboards and the purchase of paint for the exterior walls of the house. In every other respect, he stated that the finishing works was done with his financial input.

[94] The claimant agreed with the defendant that her only contribution was in the finishing works or the "*completed works*" as referred to by her, namely the installation of the rails for the staircase, the installation of the kitchen cupboards and the purchase of paint for the exterior walls of the house. I take note of the fact that the finishing works undertaken by the claimant was not structural in nature. Further, the claimant said she commissioned persons to prepare and do the landscaping of the property and to install the water heater. This I also accept. The defendant however alleged that the water heater was purchased using his own funds and has indicated that he recalled the money being withdrawn from his bank account.

[95] What is apparent here, is that in comparison to the defendant, the claimant's contribution to the completion of the home was negligible. Likewise, her financial contribution to the household was not substantial.

- [96]** The defendant indicated that the household expenses, such as the groceries and utility bills, were solely borne by him. He maintained this position even when confronted in cross-examination about the unsteady nature of his job and indicated that he paid the bills out of his savings. However, he later on admitted that on occasions the claimant would assist. He even maintained his position that he ran the household without much assistance even after he said that with his ill-health his income had deteriorated and his savings depleted.
- [97]** The claimant in her affidavit evidence has supported the defendant's contention that he bore most of the financial responsibility in the household. She emphasized that her role was in assisting the defendant with the purchasing of groceries and paying the utility bills. She also indicated that she financed the family's everyday needs, clothing, the materials and the personnel to clean the inside and outside of the house.
- [98]** I accept that the defendant had the primary financial obligations in the household. However, I do not accept that the claimant did not assist the defendant by taking on some of the household expenses during slow periods at work and even when his health deteriorated. However, the evidence of the parties has shown that the substantial financial contribution towards the completion of the family home and in the household was on the defendant. The defendant's role as the bread winner seemed to be characteristic of the parties' relationship during the eighteen years of marriage. That is evidenced by the fact that even though the claimant had two jobs as a teacher and a cosmetologist, he continued in his role as the breadwinner.
- [99]** Where the claimant seems to have majored was in the area of non-financial contribution. While the union produced no children, there were three children of the family. I find that the claimant was responsible for their care and upbringing. In addition to this, I find that she assisted with the finances of the children, their transportation, food and education.

[100] I find also, that the claimant performed household duties such as cooking and cleaning and assisted in the management of the home. I accept that the parties had obtained the services of a helper to do certain household tasks (cleaning, washing etc.) and that the helper did the majority of this work. However, it is noted as well, that someone must be responsible for managing and overseeing the work of the helper and as such, I find that the claimant was the homemaker and therefore was responsible for this.

[101] The evidence has also shown as well, that the defendant assisted in the care and upbringing of the children and in cooking for the family. The evidence indicates that the defendant treated the claimant's daughter as his own child and provided food and shelter for her. It is for that reason I do not accept that the claimant solely covered her daughter's everyday needs without the assistance of the defendant. The defendant also was responsible for providing for his twin boys. As such I accept he also played a vital role in the children's life.

[102] Though the defendant has made substantial financial contributions to the family, it is clear from the cases that superior financial contribution cannot by itself result in a variation of the equal share rule. This was underscored in **Stewart v Stewart** where the Brooks JA said at paragraph 77 :

“ In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution.”

[103] I will at this time consider the other elements of the relationship. In relation to the parties' other property holdings, it is fair to say that during the marriage the claimant had interests in other property, in particular, the property where her house was located and the commercial property where she operated her salon. The evidence from the claimant is that the property where her house was located was sold during the marriage, and that the defendant did not derive any benefit from the sale. The family home, on the other hand, is the defendant's sole

property holding. The evidence of the claimant however, is that the commercial property is jointly owned with her daughter's father. As to the other properties mentioned by the defendant, no evidence has been provided by him to show the claimant's interest in any of these properties. The claimant has not admitted to having owned any other properties. Consequently, not much weight can be given to the defendant's allegations of the claimant's other property holdings.

[104] The evidence has shown as well, that the parties are both seniors in age. At the time of the trial both were in their 60's, the defendant being only 3 years the claimant's senior and as such, the defendant could not be said to be significantly more disadvantaged in relation to age, than the claimant. However, the defendant seems to be in a worse health condition than the claimant, he being considered legally blind as well as being plagued with other illnesses such as hypertension and diabetes.

[105] In addition to this, the defendant has indicated that because of his ill-health his saving has been severely depleted, particularly in a bid to save his eyesight and further, that he has been unable to work as he once did, deteriorating his income. It is apparent that as a result of his failing health and the fact that he is legally blind, the defendant will not be able to maintain himself in the manner he was accustomed to. There is no indication that he has any other source of income. On the other hand, the claimant is still able to earn from her business as a cosmetologist and from the rental of her commercial property, which she has indicated in her evidence has been rented in the past.

[106] In deciding the entitlement of the parties, I have given serious consideration to the factors I have outlined above, in particular the fact that the defendant acquired the property in question before the marriage by his sole financial input, that the construction of the family home was undertaken solely by him, with minimal assistance by to claimant to the finishing works and the fact that he bore the brunt of the financial obligations in the household and the family. Further, I have considered the fact of the defendant's failing health and that he is legally

blind and unable to work as he used to in order to maintain himself. I have also taken into account that the claimant has other property holding from which she is able to earn an income.

[107] I have given serious consideration as well to the claimant's input in the completion and beautification of the family home, her contribution to the general operation of the family home and her role in nurturing and caring for the children, as well as the length of the marriage.

[108] Having considered all these factors and the relevant law, I am of the opinion, given the circumstances of this case, that it would be unreasonable and unjust for there to be an application of the equal share rule. Fairness dictates that there be a departure from the equal share rule in favour of the defendant. Therefore, the parties' entitlement to the family home is apportioned as follows: forty percent (40%) to the claimant and sixty percent (60%) to the defendant.

Disposition

[109] I therefore make the following orders:

1. The claimant is granted an extension of time to make an application under PROSA.
2. The Fixed Date Claim Form and Affidavit in Support filed on August 29, 2018 are to stand as filed.
3. The property situated at 192A Edgehill Boulevard, Hellshire in the parish of St. Catherine, registered at Volume 1427 Folio 928 of the Register Book of Titles is the family home.
4. The claimant is entitled to forty percent (40%) interest and the defendant sixty percent (60%) interest in the family home.

5. The family home is to be valued by a valuator agreed upon by the parties within thirty (30) days of this order. The cost of the valuation is to be borne equally by the parties.
6. If the parties are unable to agree a valuator within fourteen (14) days of the date of this order, the Registrar of the Supreme Court shall appoint a valuator.
7. The defendant is to be given first option to purchase the interest of the claimant. The defendant shall advise the claimant's attorney-at-law within fourteen (14) days of receipt of the valuation report whether he intends to exercise the option to purchase. The said option is to be exercised by payment to the claimant's attorney-at-law of a 10% deposit of the market value of the family home within ninety (90) days of receipt of the valuation report.
8. If the defendant chooses not to exercise the option to purchase, the family home is to be sold on the open market by public auction or private treaty with the valuation being the reserve price.
9. The Registrar of the Supreme Court is empowered to sign any and all documents necessary for the sale of the property if either party is unable or refuses to do so.
10. Each party to bear its own costs.
11. Liberty to apply.

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Henry McKenzie, J