[2021] JMCA Civ 7

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

SUPREME COURT CIVIL APPEAL NO 28/2016

BETWEEN	**CLAUDETTE CROOKS-COLLIE**	**APPELLANT**
AND	**CHARLTON COLLIE**	**RESPONDENT**

Mrs Denise Kitson QC and Ms Anna Kaye Brown instructed by Grant, Stewart, Phillips & Co for the appellant

Mrs Sashawah Newby for the respondent

21 September 2020 and 4 March 2022

BROOKS JA

[1] I have had the privilege of reading, in draft, the judgment that my learned sister, Edwards JA, will set out below. Whereas I agree with her reasoning in respect of the issues of law raised by this unusual appeal, and agree with her conclusion that the appeal should be allowed and the counter-notice of appeal should be dismissed, I have a different view from her in respect of the assessment of the evidence by which the learned judge below came to his decision. Accordingly, I will briefly set out my own reasons in the areas in which I hold a different view from my learned sister.

The background to the appeal

[2] My learned sister's judgment fully sets out the background that has led to this appeal. It is, therefore, only necessary to set out the essence of that background.

[3] The appellant, Mrs Claudette Crooks-Collie (nee Crooks), and the respondent, Dr Charlton Collie, had a relationship lasting many years before they were eventually married. For most of that time, Dr Collie was married to someone else. He was divorced just a few months before he and Mrs Crooks-Collie tied the knot in March 2012. The union quickly unravelled, however, and by August of 2013, they were sleeping in separate bedrooms. In November of that year, a judge of the Parish Court for the parish of Saint Andrew, after allegations against Dr Collie of physical abuse, ordered him to leave the house, which is the subject of this litigation.

[4] That house, located at Plymouth Avenue ('the Plymouth property') in the parish of Saint Andrew, was acquired by Mrs Crooks-Collie almost nine years before the parties married. She purchased the Plymouth property and carried out needed major refurbishing, without any input from Dr Collie, who was living outside of the island at the time. Between the purchase price and the refurbishing cost, Mrs Crooks-Collie had spent over $30,000,000.00 on the Plymouth property, by, or about the time, she occupied it.

[5] Dr Collie was still married to someone else when, upon agreement with Mrs Crooks-Collie, he moved into the Plymouth property in 2008 to live with her and their daughter. By the time they got married, he had paid to carry out some improvement work on the Plymouth property. He estimated that, by the time of the wedding, he had spent approximately $1,300,000.00 on various cosmetic, but permanent, improvements to the Plymouth property. In 2010, the Plymouth property was valued in the region of $85,000,000.00.

[6] Before he had even left the Plymouth property, Dr Collie filed a claim in the Supreme Court for a declaration that it was the family home and that he owned a one-

half interest in it, pursuant to section 6 of the Property (Rights of Spouses) Act (hereinafter referred to as 'PROSA'). That section creates a presumption that the spouses are each entitled to a one-half share of the family home, as long as it is wholly owned by one or both of them. Mrs Crooks-Collie resisted the claim on the bases that:

a. The Plymouth property was not the family home because some vacant land elsewhere ('Cherry Hill') was intended to have been used to house the family home;

b. Dr Collie was not entitled to any interest in the Plymouth property because she owned it before the marriage; and

c. the marriage was one of short duration.

The latter two bases have their foundation in section 7 of the PROSA, which allows a court to set aside the presumption, created by section 6, if the court is of the view that it would be unreasonable or unjust for each spouse to be entitled to a one-half interest in the family home.

[7] A judge of the Supreme Court heard Dr Collie's claim and ruled that the Plymouth property was the family home and that Dr Collie was entitled to 20% of the value of the property. The learned judge also made other consequential orders, including an order for costs in Dr Collie's favour.

The appeal

[8] Mrs Crooks-Collie has appealed that decision. She has asserted that the learned judge erred in a number of ways. It is unnecessary for me to set out the numerous grounds of appeal which she has filed, as Edwards JA has set them out in full, and I am happy to adopt the consolidation of the issues emanating therefrom, which Edwards JA has formulated. These are:

"1) whether the learned judge incorrectly identified the issues for his determination (ground a);

2) whether the learned judge misinterpreted sections 6 and 7 of PROSA (grounds b, c and d);

3) whether the learned judge erred in his assessment of the section 7 factors and as a result failed to take them into account as required by section 7 (1)(c) (grounds f and h);

4) whether the learned judge erred in considering the parties' common intention to be relevant in a case brought under PROSA (ground k);

5) whether the learned judge erred in considering the pre-marriage period of the parties' relationship as relevant to his assessment of the intentions of the parties in light of the definition of 'spouse' in section 2 of PROSA, and as a result made erroneous findings of law and fact (grounds i, j, l, r, and m);

6) whether the learned judge erred in his treatment and rejection of the unexecuted draft deed of arrangement and the evidence of Reverend Bosworth Mullings, and failed to recognize the significance of that evidence (grounds n, o, and q);

7) whether the learned judge erred in his treatment of the evidence of the parties' relationship and the respondent's contributions to the household and the family home, and as a result, erred in apportioning a 20% interest in the Plymouth property to the respondent, as it was unjust and unreasonable to do so (grounds c, e, g and p);

8) whether the learned judge erred in ordering costs in full to the respondent in circumstances where the appellant was successful in her application for the equal share rule to be varied (ground s);

9) whether the learned judge erred in failing to order that both parties pay the costs of the valuation of the Plymouth property in the ratio of the entitlement he had ordered, in circumstances where the appellant was successful in her application for the equal share rule to be varied (ground t)."

[9] In addition to those issues, Edwards JA considered the counter-notice of appeal that Dr Collie filed. By that counter-notice, he claimed that he was entitled to 20% of the value of the Plymouth property by virtue of the principle of proprietary estoppel.

The analysis

Issues 1-5

[10] I broadly agree with my learned sister, for the reasons that she has given, that the grounds of appeal comprised under issues 1-5, set out above, should be dismissed as being without merit. I do have a different view on the analysis, but not the conclusion, on the issue of the common intention, as discussed in issue 4. Regrettably, I am not in agreement in respect of issue 5, which also deals with the issue of common intention. That difference flows from my understanding of the learned judge's approach to the case.

[11] It is my understanding that the learned judge, after setting out the contending cases advanced by the respective parties, made three significant findings:

a. he determined that the Plymouth property was the family home by applying the definition of "family home" as contained in the PROSA;
b. he determined that the Plymouth property was the family home based on his analysis of the competing cases and having rejected Mrs Crooks-Collie's case that Cherry Hill was to have been the family home; and
c. he decided the appropriate division of the beneficial ownership, having considered the contributions that he accepted that Dr Collie had made to the family and the Plymouth property.

[12] Although the learned judge used a heading of "PRESUMPTION OF EQUAL SHARES: TO VARY OR NOT TO VARY", his discussion of common intention under that

heading, in my view, was in the context of which property was intended to have been the family home, and not, as Mrs Crooks-Collie has advanced in this appeal, concerned with the intention as to beneficial ownership. Although the learned judge started the discussion under that heading with a consideration of the issue of contribution, he quickly turned, at paragraph [55], to addressing the search for a family home. At paragraph [56], he continued the theme of a search for a family home and asserted that "from at least 2008 [Dr Collie and Mrs Crooks-Collie] were displaying their intentions to treat Plymouth as their home". He continued that theme at paragraph [57] saying that although the pre-marriage period was not relevant for determining the length of time that the Plymouth property could be considered the family home for the purposes of PROSA, it was "relevant in determining the intention of the parties as to how Plymouth was to be viewed once they were married". He made a more definitive statement along those lines at paragraph [58]. He said, in part:

> "…If one were to look at the actions of the parties, one would say that Dr. Collie's actions leading up to the time of their marriage is [sic] consistent with his assertion that the mutual intention at the time of their marriage was that Plymouth would become the family home after the wedding."

[13] Immediately after making that statement, the learned judge outlined Mrs Crooks-Collie's contending case. He said, in part, at paragraph [59]:

> "Juxtapose this against the contrary intention asserted by Mrs. Crooks Collie; that Plymouth was never to be the matrimonial or family home and that among the purposes of the Deed of Arrangements was to solemnise this intention…."

[14] The learned judge then went on to discuss the deed of arrangements, Reverend Mullings' evidence and the financial and other contributions Dr Collie claimed that he had made. Having done so, the learned judge concluded that discussion with a finding that the Plymouth property was the family home. He said at paragraph [65]:

> "In the circumstances I accept that Plymouth is a family home for the purposes of PROSA and that in the circumstances it is suitable that the equal share principle be varied for the reasons already stated. Despite that finding, I do not accept [Mrs Crooks-Collie's] position that [Dr Collie's] share should be varied to give him a zero share in Plymouth. In view of the degree of investment made by Mrs Crooks-Collie, both of time and expense, I believe Dr. Collie's share should be varied to 20% of the value of the family home."

[15] That reasoning supports the view that the learned judge was considering whether there was a common intention as to whether the Plymouth property was to be the family home, and not the intention as to the beneficial share in the property.

[16] It is for that reason that it would have been unnecessary for the learned judge to have made an explicit finding of fact on the dispute between the evidence of Reverend Mullings, Mrs Crooks-Collie's pastor, and Dr Collie. I accept that the learned judge did give a different reason for rejecting Reverend Mullings' testimony. That reason, I agree with Edwards JA, cannot be accepted, but that will be discussed during the consideration of issues 6 and 7.

Issues 6 and 7

[17] I also agree with Edwards JA, in respect of issue 6, that the learned judge was correct in refusing to admit into evidence the document, which was said to be a deed of arrangements between the parties. The document was plainly self-serving and of no probative value. There was no evidence to contradict Dr Collie's evidence, not only that he had not signed that document, but that he did not even know it existed.

[18] Where I have a different view from my learned sister, in respect of issues 6 and 7, is with the aspect of the significance of the learned judge's analysis of the pre-marriage discussions regarding the deed of arrangements. As mentioned above, the context of the learned judge's analysis of the issue of the pre-marriage discussions was

the determination of whether it was the Plymouth property or Cherry Hill that was intended to be the family home.

[19] Through that lens, it is not difficult to understand the learned judge's rejection of Mrs Crooks-Collie's case in this regard. The parties lived at the Plymouth property. They made improvements (at least one was a joint effort) to the Plymouth property, and Dr Collie's name was used for accounts for telephone and cable services provided to the property. Cherry Hill, on the other hand, was vacant land. It was intended for development, although the parties were at variance as to the aim and purpose of the development. The certificate of title for Cherry Hill shows that in July 2012, Mrs Crooks-Collie acquired the previous Mrs Collie's interest in Cherry Hill. The document also shows that, in April 2013, Cherry Hill was sold to a third party. Both transactions occurred while the parties were still married to each other. It is accepted, however, that they are at variance as to whether they were on amicable terms at the time of the latter event.

[20] The evidence of Reverend Mullings seemed to be addressing the issue of beneficial ownership, hence the learned judge was able to reject it, as unhelpful, without confronting it head-on. The learned judge was, however, in error in rejecting Reverend Mullings' evidence as unhelpful on the basis that the pastor had not given dates on which the discussions took place. As Edwards JA has so eloquently stated, despite the absence of actual dates, Reverend Mullings had put the discussions in context. Some of those discussions were prior to the wedding. At that time, he said, it was only upon Dr Collie's agreement to sign a deed of arrangements that he agreed to perform the wedding ceremony. Some discussions were after the wedding, and Reverend Mullings said that he was called to intervene when Dr Collie reneged on his undertaking to sign. There is no doubt as to the timeline concerning Reverend Mullings' involvement.

[21] That error on the part of the learned judge, in my view, was not fatal to his judgment.

Issue 7 – the share

[22] Although I agree with my learned sister's conclusion that the learned judge erred in granting Dr Collie a share in the Plymouth property, I do not share all of her reasoning in arriving at that conclusion. I am concerned that the close analysis that my learned sister has applied to this issue runs a significant risk of overturning the learned judge's findings of fact on matters of evidence when this court has not had the benefit of seeing and hearing the witnesses.

[23] In my view, a simpler approach is appropriate. It is that the learned judge did not demonstrate his basis for selecting a figure of 20% and, therefore, this court may re-consider whether there should be a variation of the equal share presumption and, if so, to what extent. Even if it can be said that his analysis of Dr Collie's contribution to the Plymouth property and the household allowed the learned judge to select 20% as the appropriate quantification of that contribution, it seems to me, plain, that that figure is inappropriate in the circumstances of this case.

[24] As Edwards JA has indicated, section 7 provides the gateway for varying the equal-share presumption. This case has two reasons for considering a variation of that presumption. The first is that the Plymouth property was solely owned by Mrs Crooks-Collie before the marriage. The second is that the marriage was of short duration.

[25] In this context, the figures speak volumes. This property was worth $85,000,000.00 almost three years before the parties wed. The largest sums that Dr Collie deposed that he spent on the Plymouth property were set out in paragraph 13 of his first affidavit filed in the court below:

> "a. Installation of A C [sic] Units – Four Hundred Thousand Dollars ($400,000.00)
>
> b. Tiling of back patio – Four Hundred Thousand Dollars ($400,00.00)
>
> c. Paving the yard – Four Hundred Thousand Dollars ($400,00.00)

d, Painting the property – One Hundred Thousand Dollars ($100,00.00).”

[26] He also deposed that he paid some utility bills and other household expenses. He also, he said, provided care for their daughter and a presence in the household when Mrs Crooks-Collie was away from home due to her busy lifestyle. Dr Collie deposed that he would also do household chores that the man of the house would be expected to do. Even if, as he testified, Dr Collie's bill payment performance was greater than the few bills that he exhibited to his affidavit, it is plain that, given the short time that he was at the premises, his financial contribution was miniscule in the scheme of things. Although non-financial contributions (with the caution properly invoked by Edwards JA, that section 14(4) of PROSA is not strictly applicable to family home considerations) may properly be considered, Dr Collie's contribution does not warrant a 20% share, or indeed any share, in the Plymouth property.

Issues 8 and 9

[27] These issues need not be discussed in light of the finding that Dr Collie ought not to be awarded an interest in the Plymouth property. Were it otherwise, however, there could have been no proper objection to Dr Collie being awarded the costs of the claim. He would have been entitled to bring the claim and, therefore, entitled to his costs, given the main issue that was before the learned judge. The ground of appeal comprised in issue 9 seems to be misplaced. The learned judge's equal allocation of the costs of the valuation, and other associated costs, after awarding Mrs Crooks-Collie 80% of the beneficial interest, was more in favour of Mrs Crooks-Collie. It is, therefore, puzzling that it should have been challenged.

The counter-notice of appeal

[28] I also agree with the reasoning that Edwards JA has applied to the issue of the counter-notice of appeal and concur with her conclusion thereon, with nothing to add.

Conclusion

[29] In my view, as indicated above, Dr Collie does not deserve to be awarded any interest in the Plymouth property. I would grant the orders proposed by Edwards JA.

EDWARDS JA

Introduction

[30] This appeal involves the division of matrimonial property, specifically the family home. The parties are Mrs Claudette Crooks-Collie ('the appellant'), and Dr Charlton Collie ('the respondent'), who are now estranged. On 3 October 2013, following the irretrievable breakdown of their marriage and inevitable separation, the respondent, whilst still residing in the family home, filed a fixed date claim form in the Supreme Court, pursuant to section 6 of the Property Rights of Spouses Act ('PROSA'). He later filed an amended fixed date claim form on 9 January 2015 seeking, among other orders, a declaration that he was entitled to a 50% beneficial ownership in the family home ('the Plymouth property') pursuant to PROSA, and alternatively, pursuant to an equity created by estoppel.

[31] It is useful to set out in full the orders sought:

> "1. **A DECLARATION** that the [Respondent] is entitled to 50% share of all that parcel of land part of Barbican…comprised in the Certificate of Title registered at Volume 1170 Folio 106 ('the family home') pursuant to the Property Rights of Spouses Act.
>
> 2. **ALTERNATIVELY, A DECLARATION** that the [respondent] is entitled to 50% share of all that parcel of land part of Barbican…comprised in the Certificate of Title registered at Volume 1170 Folio 106 ('the property') pursuant to the equity created by estoppel.
>
> 3. **AN ORDER that** the said property be appraised by DC TAVARES FINSEN [sic] LTD in order to ascertain its

current market value no later than thirty (30 days) after the granting of these orders; [sic]

4. **AN ORDER** that the appraisal report be delivered to the [appellant] within fourteen (14) days after its completion whereupon the [appellant] will have thirty (30) days in which to exercise her right of first option and pay the deposit of ten (10) percentage of half of the appraised value.

5. **AN ORDER** that the said property be sold at its appraised market value on the open market, if the [appellant] fails to exercise her right of first option, and the net proceeds of the sale divided equally between the [appellant] and the [respondent]; [sic]

6. **AN ORDER** that the Attorney-at-Law with carriage of sale be **TAMEKA JORDAN**, of **MCDONALD, JORDAN AND CO** Attorney-at-law for the [respondent] herein; [sic]

7. **AN ORDER** [that] the parties co-operate in all actions to facilitate the sale of the premises including but not limited to the advertisement of the property for sale.

8. **AN ORDER** [that] all reasonable costs attendant upon sale including but not limited to advertisement in the newspapers, realtors' commission, cost of transfer and discharge of any existing mortgage be borne by the parties equally.

9. **AN ORDER** [that] the Registrar of the Court is empowered to sign all documents necessary to effectuate the court's order herein in the [event] that either party refuses or neglects to do so within fourteen days (14) of being requested to do so by the relevant Attorney-at-Law.

10. **AN ORDER** [that the] cost of this valuation to [sic] be borne equally by the parties; [sic]

11. Costs; [sic]

12. Such further or other order as this Honourable Court deems just." (Underlining removed)

[32] The appellant resisted the claim by applying under section 7 of PROSA, for a variation of the "half-share" rule in section 6, on the basis that the property was solely owned by her, was not intended to be the family home and that the marriage was of short duration.

[33] The respondent's claim was heard by a judge of the Supreme Court ('the learned judge') who found that the Plymouth property was the family home in accordance with section 2 of PROSA. He also found that the appellant had successfully invoked section 7 of PROSA and, therefore, rather than dividing the Plymouth property equally between the parties, the learned judge awarded the respondent a 20% share. The appellant, aggrieved by this decision, filed this appeal on 26 February 2016.

[34] The orders made orally by the learned judge on 15 January 2016, that were reduced into writing in his draft written reasons and delivered on 26 January 2016, are as follows:

> "(1) Judgement [sic] for the [respondent] in terms of paragraph a of his amended Fixed date Claim form [sic], granting the [respondent] an interest in the family home but varying it to a 20% interest.
>
> (2) Judgment is also given in terms of paragraphs b and c of the amended [sic] Fixed Date Claim, regarding valuation of Plymouth.
>
> (3) Orders are made in terms of paragraphs d to j of the Fixed Date Claim form [sic], subject to the right of the [Appellant] to compensate the [Respondent] to the equivalent of his 20% share.
>
> (4) Costs are awarded to the [Respondent] to be taxed if not agreed.
>
> (5) Leave to appeal is granted."

[35] On 21 December 2016, Sinclair-Haynes JA, upon hearing a notice of application for court orders filed by the appellant, granted a stay of execution of the judgment of

the learned judge pending the hearing and determination of the appeal. The stay was granted on conditions that allowed for the discharge of a caveat lodged against the title to the Plymouth property. Following an application by the respondent, that order was varied by this court on 20 December 2017, which ordered that the stay remain in place but removed the conditions attached thereon. The court also imposed an order preventing the appellant and/or her agents from selling, mortgaging, transferring or otherwise alienating her interest in the property.

Background

[36] The appellant is a successful businesswoman. The respondent is a successful medical doctor, university lecturer, and proprietor of a private undergraduate school. They met in the early 1980s, became friends, and entered into a romantic relationship sometime thereafter. It was an extra-marital affair because the respondent had been married to someone else from 2 June 1984 until 5 October 2011. In 1999, the appellant and the respondent had a child together. He, however, remained with his then wife until 2003, when she removed from their matrimonial home, and they separated. His relationship with the appellant continued and was described by the appellant as "on again and off again" in its nature. The appellant purchased the Plymouth property in 2003 and the respondent moved into that property to join her in 2008. He did not file for divorce from his first wife until 24 August 2010. The divorce became final when the decree absolute was granted on 5 October 2011. The respondent moved out of the Plymouth property for six months in 2011 after a quarrel with the appellant. He returned in 2012 and they were married in March of that same year. Their wedding reception was held at the Plymouth property.

[37] By August 2013, the marriage irretrievably broke down, the respondent having left the marital bed in August and the home in November 2013.

[38] The respondent claimed to be entitled to a one-half share in the property because, although it was bought and renovated solely by the appellant, it was always

intended to be the family home and he had made substantial improvements to the value of the home.

The respondent's contentions in the court below

[39] The learned judge accepted the respondent's account of events for the most part. The respondent's evidence was that he and his first wife, and their children, lived together for most of his extramarital affair with the appellant and that they moved between Jamaica and the United States on account of his medical residencies and fellowships. During that period, he continued his relationship with the appellant, and in 1999 they had a child together. According to the respondent, he had formed the intention to make a home with the appellant and their daughter at the Plymouth property, even before he had divorced his first wife. He claimed that, to that end, in 2003, whilst he was still married to his first wife, the appellant purchased the Plymouth property after they both agreed that it would be a good idea for her to purchase a property that would be their family home once he was divorced. However, he agreed that the Plymouth property was purchased and renovated solely by the appellant, without any financial contribution from him. According to him, however, the only reason his name was not put on the title was to avoid confusion of assets in his divorce proceedings with his first wife. Between 2004 and 2005, the respondent took up a further fellowship in the United States. Upon his return, he lived partially at the Plymouth property and partially at his former home in Long Mountain. The renovations to the Plymouth property were already complete when he returned from the United States.

[40] The respondent also claimed that he had moved into the Plymouth property in 2008 with some of his furniture, the intention being to treat it as the family home. He supported his claim that he made substantial improvements to the value of the home by particularising those improvements as the: installation of air conditioning units; tiling of the back patio; paving of the yard; painting the entire house; construction of a dog house and installation of decorative globe lights. He claimed that he and the appellant

had lived together at Plymouth as man and wife since 2008 and described it as a "*de facto* family home", even though they were not married and he was still married to his first wife.

[41] He also claimed that he was integrally involved in running the household and paid several bills, some of which were in his name. He claimed, too, that to ensure that the appellant was able to pay the mortgage, they had agreed to share the financial obligations. In the result, he said he paid all the expenses, except the mortgage and their daughter's tuition, including the telephone bills which had been changed into his name.

[42] The respondent agreed that the appellant purchased his first wife's half-share in a property he had held jointly with her, referred to as the "Cherry Hill property", but denied that this was because that property was earmarked to become their family home. He claimed that the appellant had purchased his first wife's share in the Cherry Hill property so that the proceeds could be invested in the school he and his first wife owned together. The school, he said, had been in financial trouble at the time and needed an injection of funds. He said the agreement with the appellant was that she would later sell the half-share she had purchased from the first wife to him. The plan, he said, was to turn the Cherry Hill property into a multi-family complex as an investment for the benefit of the children he shared with his first wife. However, the respondent later said that the plan was to build a "family settings" which would include the appellant and their daughter.

The appellant's contentions in the court below

[43] In her defence in the court below, the appellant contended that she was the sole owner of the Plymouth property, having bought and renovated the property nine years prior to the marriage, with no contribution from the respondent, who, at the time, was still married to his first wife. She spent $17,000,000.00 to purchase the property, and later $13,000,000.00 to renovate it.

[44] The appellant denied that there had ever been any common intention to treat the Plymouth property as the family home. She said the Cherry Hill property was the property intended by the respondent and herself to be the family home. For that reason, she purchased the respondent's first wife's half interest in the Cherry Hill property with her own money. That property, she said, was sold because their marriage broke down.

[45] The appellant asserted that the Plymouth property was purchased to provide adequate housing for her daughter and her ageing mother, who subsequently died in 2007. According to the appellant, although the parties had met in 1982, they did not become romantically involved until the respondent separated from his first wife in 1998. By that time, she said, she was already an independent and successful businesswoman who had acquired a substantial amount of assets, including her own investment firm. She became pregnant with their daughter in January of 1999, but the respondent reunited with his first wife in April of 1999, before their daughter was born. She averred that when she purchased the Plymouth property, she was not in a relationship with the respondent and had received no help from him, financially or otherwise, during the purchase or renovation. She asserted that the respondent was in a serious relationship with someone else during that period.

[46] The appellant also claimed that, although the respondent moved into the Plymouth property in January of 2008, their relationship was still "on and off". She asserted that it was after he divorced his first wife in 2011 that they had decided to get married, and only after they were married in 2012 did they start cohabiting in the Plymouth property, as man and wife, notwithstanding that he had stayed there from time to time prior to that. She also claimed that they had had an understanding that, in the event of separation or divorce, they would each retain the assets they had brought into the marriage. To this end, prior to the marriage, the appellant said she had her attorney prepare an agreement (a "deed of arrangements") to that effect, which the respondent, in the presence of their marriage counsellor Reverend Bosworth Mullings, agreed he would sign, but only after the wedding. According to the appellant, the

execution of this agreement was a condition precedent to the marriage taking place, although the respondent, admittedly, never signed it. It was his refusal to sign the agreement after the wedding took place, she said, that caused the marriage to break down irretrievably.

[47] The appellant admitted that the respondent had made a few improvements to the property but asserted that these were not substantial and mainly were for his own benefit. She denied that he regularly paid the bills and averred that he intermittently paid the light bill and gardener fees, and he only contributed to bills, now and then, when he was forced to. The house was already fully furnished when he moved in, and in addition to the mortgage, for the most part she paid for groceries, water, telephone service, house maintenance and care, and all fees for her daughter. She asserted that the parties did not share finances, and being a financial expert, she would not have agreed to do so because of the respondent's gambling addiction, the associated risks to her designation as a fit and proper person by the Financial Services Commission, and the renewal of her licence with the Bank of Jamaica.

[48] The appellant said she asked the respondent to leave the Plymouth property in March of 2013, after he had become abusive towards her. He had asked for six months to find a place, but near the end of those six months, he told her he would not leave until "he got what his lawyer told him he was entitled to". He was subsequently restrained by a court order from entering the premises based on his abusive behaviour towards her.

[49] The appellant denied that the respondent had any entitlement to an interest in the Plymouth property under PROSA or by way of equity.

The learned judge's reasons for his decision

[50] The learned judge made several critical findings in coming to his decision. He found that the Plymouth property was the family home pursuant to section 2 of PROSA, the parties having lived there continuously with their daughter as their principal place of

residence from the date of marriage in March 2012, up until November 2013, when the respondent left. He found that there was no applicable provision that prevented him from finding that the Plymouth property was the family home. He considered, however, that, in accordance with section 7 of PROSA, owing to the fact that the marriage was of short duration and the property was solely owned by the respondent prior to the marriage, the equal share rule in section 6 of PROSA, which entitled each spouse to a one-half interest in the family home, should be varied.

[51] Notwithstanding this, the learned judge rejected the appellant's contention that the respondent had no interest in the Plymouth property and found that the respondent's share should be varied from 50% to 20% of the value of the property, taking into account the following:

> (a) that there was a mutual intention of the parties to treat the Plymouth property as the family home;
>
> (b) the respondent had made "significant" contributions to the improvement of the property, the running of the household, and the payment of bills; and
>
> (c) the time and expense the appellant put into the property.

[52] In coming to that decision, the learned judge also considered sections 13 and 14 of PROSA. He took account of the fact that the parties had been involved in a relationship that had spanned decades and had produced a child, even though the period of their marriage was short. Since the respondent had only filed for divorce in 2010, the learned judge found that this cast doubt on the respondent's claim that a common intention to share in the Plymouth property had existed since 2003. He, nevertheless, found that the common intention to treat the Plymouth property as the family home existed from 2008 when the respondent had moved there, and that

although the intention may have been expressed in 2003, it was not treated seriously until 2008.

[53] The learned judge considered that this premarriage period was "relevant in determining the parties' intention as to how Plymouth was to be viewed once [the parties] were married". He determined that the evidence before the court showed that the parties and their daughter lived at the Plymouth property as a family since 2008 and that the respondent's actions were consistent with a mutual intention that the Plymouth property would become the family home once the parties were married. In addition, he considered the following facts to be useful as a guide to the common intention of the parties:

> (a) their living arrangements prior to the marriage;
>
> (b) their living arrangements after the wedding and up to the time of their separation;
>
> (c) the substantial improvements done by the respondent; and
>
> (d) how the parties had ordered their affairs and household, including the sharing of the bills and the placing of bills in the respondent's name.

[54] The learned judge found that the improvements to the property, although cosmetic rather than structural, were substantial and not of a temporary nature. The conduct of the parties in how they ordered their affairs, he said, made it "evident" that the respondent was "integrally and heavily involved in the running of the household" (paragraphs [61] & [62]). He also found that the respondent participated in his daughter's life and ran the household.

[55] The learned judge rejected the draft deed of arrangements produced by the appellant as proof of any agreement between the parties because it was unsigned. He

seemed to have been of the view that it was not logical that the appellant would have proceeded with the wedding if the deed was a precondition to the marriage, as she had asserted. Similarly, the learned judge found the evidence of the appellant's witness, Reverend Mullings, unhelpful, on the basis that there was no evidence of the dates that the counselling sessions in which it was alleged the deed of arrangements was discussed took place.

[56] Overall, the learned judge viewed the respondent as the more credible witness.

The appeal

[57] The appellant's notice and grounds of appeal filed 26 February 2016 (drafted in an unusually copious and verbose fashion, in contravention of rule 2.2(5) of the Court of Appeal Rules), challenged the learned judge's decision. It is impossible to do justice to the grounds of appeal filed without setting them out in full, even though they are quite lengthy. They are as follows:

> "(a) The Learned Trial Judge erred as a matter of law when at para. **[4]** he incorrectly identified that the sole issues '…*are as to whether a declaration ought to be made, whether under the Property (Rights of Spouses) Act ('PROSA') or in equity, for a share of the property at Plymouth, and if so, in what proportion.'* To the contrary, the Learned Trial Judge ought to have applied the arguments advanced on behalf of the Appellant in identifying the core issues as,
>
> (i) whether to award the Respondent, his claim for 50% interest in the subject property at Plymouth Avenue (hereinafter referred to as the 'Plymouth property');
>
> (ii) whether the extent and/or scope of the purported improvements asserted and relied on by the Respondent were to be accepted as credible and substantial by the Trial Judge; and,

(iii) what, if any legal significance, was to be given to those purported improvements having regard to the statutory criteria under s. 14 of PROSA required to satisfy a finding that the Respondent's purported contribution to the Plymouth property vested him with an interest in the same.

(b) Although finding on the facts and on the law that the Plymouth property was the 'family home' within the meaning of the definition ascribed to it under s. 2 of PROSA, the Learned Trial Judge failed to properly construe and appreciate the interrelationship between the [sic] s.6 which creates a statutory presumption of an equal share rule in the family home, as against s.7(1) of the Act which empowers a court to deviate from the statutory equal share rule out where '*…**it is unreasonable or unjust***'.

(c) In so doing and in failing to understand the crucial distinction provided under Ss.6 & 7 of PROSA which was critical to his properly analysing the facts before him, the Learned Trial Judge failed to have sufficient regard to and/or appreciate and/or apply his mind to [sic] on the factual circumstances before him he ought properly to have concluded, on a balance of probabilities, that it was unreasonable and unjust to apply the equal share rule and instead, to find as a matter of fact and law that the Respondent was had [sic] failed to establish any entitlement to an interest in the subject property whether 50% or 20% or any other percentage that could have been permissible by variation under s.7 of PROSA.

(d) Further, this failure on the part of the Learned Trial Judge to appreciate and/or have regard to and/or pay sufficient regard to the proper construction of Ss. 6 & 7 of PROSA in his application of the law to the claim went against the weight of [sic] plethora of legal authorities presented in the legal submissions advanced on behalf of the Respondent.

(e) Although the Learned Trial Judge appreciated that s.7 of PROSA permitted him to vary the equal share principle which lead him to vary the rule to give the Respondent a 20% interest in the Plymouth property this finding of law and application of s.7 of PROSA cannot be substantiated as a matter of fact and of law having regard to all of the factual circumstances of the matter before him in which the Appellant, by way of her Affidavit and viva voce evidence provided a strong and substantial basis to vary the rule so as to deny the Respondent any share in the Plymouth property at all.

(f) The Learned Trial Judge failed to appreciate the Appellant's account of the chronology of the relationship between the parties which establishes that the marriage was a marriage of short duration and accordingly the court ought to have taken into consideration this fact as required under s.7(1)(c) of PROSA and therefore ought not to have given the Respondent any share at all in the disputed Plymouth property as a correct application of s.7(1) of PROSA ought properly to have led to a conclusion that the Respondent was not entitled to any share whatsoever in the Plymouth property.

(g) In varying the equal share rule but according the Respondent a 20% share interest in the Plymouth property the Learned Trial Judge failed to take into account the evidence before him, which on a proper consideration and application of the principles established in the legal authorities submitted on behalf of the Appellant provided ample grounds for him to hold that it would be unjust and unreasonable for the Respondent to be deemed entitled to any share at all in the Plymouth property having regard to the length of the marriage being 17 months and the fact that the Plymouth property was already owned by the Appellant some nine (9) years prior to the marriage in March 2012.

(h) The Learned Trial Judge failed to properly analyse the statutory criteria under s.7 of PROSA which, on an application to the facts and evidence before him, [sic] lead in the trial demonstrated that the court was entitled to find that not only one but two of the s.7 factors were present and ought to have been applied in considering the question of varying the equal share rule.

(i) The Learned Trial Judge erred as a matter of fact and law in preferring the evidence of the Respondent that the parties had at all material times displayed an intention to treat the Plymouth property as the 'family home' and in taking into account the period of time of the pre-marriage relationship between the parties and failed to take into account the significance in law of the fact that the Respondent, during the period prior to the marriage was married up until 2011 when his divorce was granted.

(j) The Learned Trial Judge erred as a matter of fact and law when he held that the alleged pre-marriage intentions shared between the parties were to be treated as relevant while he ought to have found to the contrary due to the requirements that as the [Respondent] was married at that time, he could therefore not be a spouse for the purposes of PROSA. See paragraphs **[55]**, **[56]**, **[57]** and **[58]** of the draft judgment.

(k) In considering the intention of the parties as an important factor, the Trial Judge made a material error in his findings of law by treating as important the question of common intention, a legal concept which, prior to the enactment of PROSA on April 1, 2006 amounted to a concept under the rules of equity as well as a principle employed by the courts under s.17 of the Married Women's Property Act now repealed. In doing so, he failed to heed that on the coming into force of PROSA, s.4 of that Act clearly stated that the rules of equity would no longer apply and that the provisions of PROSA are to have effect in place of

the rules and presumptions of the common law and of equity in relation to transactions between spouses relating to property and in other cases for which provisions have been made under PROSA between spouses and other third parties.

(l) The Trial Judge's [sic] erred in his application of the principle of common intention which when accepting the Respondent's argument that the period of the relationship and cohabitation prior to the marriage is to be treated in accessing [sic] whether they had a common intention to integrate their affairs.

(m) The Learned Trial Judge's findings of fact set out above went against the weight of legal authority cited on behalf of the Appellant which established that the definition of spouse under the provisions of PROSA refers to a single man and single woman which therefore prohibits a married person from falling within the definition of spouse under PROSA.

(n) The Learned Trial Judge ought to have accepted that evidence of the Appellant which emphasized that at no time was her home at Plymouth intended to be the family home or matrimonial home and that it was the reason and purpose for the Deed of Arrangement which she had insisted was to be a precondition of marriage although the [Respondent] failed to sign it as promised. In rejecting the Appellant's evidence in this regard the Learned Trial Judge asked and answered the wrong question which he posed at paragraph **[59]** to the effect that the Appellant's requirement that the Respondent sign the Deed of Arrangement as a precondition of the marriage was not credible as she could not answer why after waiting for so long to marry the Respondent, she would not proceed with the marriage notwithstanding the fact the Deed of Arrangement was never signed.

(o) The Trial Judge wrongly answered this question at paragraph **[60]** when he refused to permit to be tendered in evidence the unsigned Deed of

Arrangement and in so doing he cast doubt on the Appellant's insistence that there was a term in the Deed of Arrangement which the Respondent demanded be changed and this together with his finding lead him to come to the wrong conclusion in refusing to accept the Deed of Arrangement, albeit unsigned, as being evidence that established the Appellant's consistent and unwavering intention that the Plymouth property was never intended to be property shared between the parties. In this regard, the Learned Trial Judge was wrong in concluding that the court was being asked to speculate and thus implied that the Appellant was dishonest in proceeding with the marriage in any event notwithstanding that failure on the part of the [Respondent] to execute the Deed.

(p) The Trial Judge further fell into error in not accepting the Appellant's evidence in relation to her acquisition of the Plymouth property supported by the evidence that the Respondent had failed to demonstrate any significant and material contribution on his part or any shred of evidence that would have vested in him an interest in the Plymouth property pursuant to Ss.6 & 7 or s. 14 of PROSA. In these circumstances the Learned Trial Judge's refusal to reject the explanation tendered by the Respondent claiming that he had never seen the Deed of Arrangement caused him to fall into error in failing to take into account the significance of the pre-nuptial [sic] agreement, albeit unsigned, which demonstrated that the Appellant had the clear, unequivocal and unambiguous intention to preserve her sole interest in the Plymouth property.

(q) The Learned Trial Judge further fell into error in not accepting the evidence of the Rev Bosworth Mullings who gave Affidavit and viva voce evidence on behalf of the Appellant concerning the agreement arrived at between the parties prior to the marriage which provided evidence of the Appellant's insistence on a pre-nuptial [sic] agreement.

(r) The Learned Trial Judge erred in his findings of fact and law in accepting the Respondent's evidence as to the existence of his relationship with the Appellant in assessing the intention of the parties to integrate their affairs. In this regard the Learned Trial Judge made erroneous findings of law in treating with the actions of the parties when he incorrectly held that these actions were consistent with the assertion of the alleged mutual intention that Plymouth would become the family home after the wedding [paragraph **58**].

(s) Further, the Learned Trial Judge erred in ordering costs in full to the Respondent in circumstances where he held that the equal share rule under s.6 of PROSA be varied pursuant to S.7 (1) (b) and (c) of PROSA so as to entitle the Respondent to a 20% interest in the Plymouth home, without apportioning same on the basis of the same 80:20 ratio.

(t) The Learned Trial Judge erred in failing to order that for similar reasons, the costs of the valuation of the Plymouth property be borne by each party in proportion to the 80:20 ratio [w]hich he ordered."

The counter-notice of appeal

[58] On 21 April 2016, the respondent filed a counter-notice of appeal urging the court to affirm the decision of the learned judge based on the reasons he gave, as well as on the additional ground that the award of a 20% interest in the Plymouth property is further or alternatively supported by "the equitable principle of proprietary estoppel which was pleaded, relied on and argued by the [respondent] below and which was unchallenged by the [appellant]".

Issues

[59] Due to the fact that the appellant's grounds of appeal are not only numerous but contain material more suited to arguments and submissions, it is much more convenient

to deal with the issues arising from the appeal, and the counter-notice of appeal as follows:

1) whether the learned judge incorrectly identified the issues for his determination (ground a);

2) whether the learned judge misinterpreted sections 6 and 7 of PROSA (grounds b, c and d);

3) whether the learned judge erred in his assessment of the section 7 factors and as a result failed to take them into account as required by section 7 (1)(c) (grounds f and h);

4) whether the learned judge erred in considering the parties' common intention to be relevant in a case brought under PROSA (ground k);

5) whether the learned judge erred in considering the pre-marriage period of the parties' relationship as relevant to his assessment of the intentions of the parties in light of the definition of 'spouse' in section 2 of PROSA, and as a result made erroneous findings of law and fact (grounds i, j, l, r, and m);

6) whether the learned judge erred in his treatment and rejection of the unexecuted draft deed of arrangement and the evidence of Reverend Bosworth Mullings, and failed to recognize the significance of that evidence (grounds n, o, and q);

7) whether the learned judge erred in his treatment of the evidence of the parties' relationship and the

respondent's contributions to the household and the family home, and as a result, erred in apportioning a 20% interest in the Plymouth property to the respondent, as it was unjust and unreasonable to do so (grounds c, e, g and p);

8) whether the learned judge erred in ordering costs in full to the respondent in circumstances where the appellant was successful in her application for the equal share rule to be varied (ground s);

9) whether the learned judge erred in failing to order that both parties pay the costs of the valuation of the Plymouth property in the ratio of the entitlement he had ordered, in circumstances where the appellant was successful in her application for the equal share rule to be varied (ground t); and

10) whether the respondent is entitled to a 20% share in Plymouth by virtue of proprietary estoppel (counter-notice of appeal).

The role of this court

[60] It is well settled that this court will not lightly interfere with the findings of fact of a trial judge, which are entirely within his or her purview, and may only do so where it is satisfied that the judge's decision is not justified on the evidence and cannot be explained by any advantage he would have had from seeing and hearing the witnesses (see **Watt or Thomas v Thomas** [1947] AC 484 at pages 487 to 488; and **Green v Green** [2003] UKPC 39). The relevant question is, as was stated by the Privy Council in **Green v Green** at paragraph 18, "whether it has been shown that [the trial judge's] judgment on the facts was affected by material inconsistencies or inaccuracies or that

he failed to appreciate the weight of the evidence or otherwise went plainly wrong". In **Eurtis Morrison v Erald Wiggan and Another** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 56 of 2000, judgment delivered 3 November 2005, K Harrison JA summarized the relevant principles, at page 15, as follows:

> "The principles derived from the cases can therefore be summarized as follows: (a) Where the sole question is one of credibility of the witnesses, an appellate court will only interfere with the judge's findings of fact where the judge has misdirected himself or herself or if the conclusion arrived at by the learned judge is plainly wrong. (b) On the other hand, where the question does not concern one of credibility but rather the proper inferences that ought to have been drawn from the evidence, the appellate court may review that evidence and make the necessary inferences which the trial judge failed to make."

Whether the learned judge incorrectly identified the issues for his determination (ground a)

[61] At paragraph [4] of his judgment, the learned judge outlined what he found to be the sole issue to be determined as "whether a declaration ought to be made, whether under the Property Rights of Spouses Act (PROSA) or in equity, for a share of the property at Plymouth and if so, in what proportion".

[62] Mrs Kitson QC submitted on behalf of the appellant that the learned judge erred in identifying the above as the sole issue and that the correct issues were those argued on behalf of the appellant, which she identified as follows:

> "(i) whether to award the Respondent, his claim for 50% interest in the subject property at Plymouth Avenue…;
>
> (ii) whether the extent and/or scope of the purported improvements asserted and relied on by the Respondent were to be accepted as credible and substantial…; and
>
> (iii) what, if any legal significance, was to be given to those purported improvements having regard to the

> statutory criteria under s. 14 of PROSA required to satisfy a finding that the Respondent's purported contribution to the Plymouth property vested him with an interest in the same."

[63] This ground can be disposed of briefly. The respondent's claim (as amended) primarily sought a declaration that he was entitled to 50% beneficial ownership in the Plymouth property pursuant to PROSA, and alternatively, pursuant to an equity created by estoppel. The sole issue raised, on the respondent's claim, therefore, was whether he was so entitled. Bearing in mind the fact that the appellant had applied to displace the equal share rule under section 7, the issue could have also been stated as whether the equal share rule ought to be displaced and if so, what proportion ought to be applied, if any. The second and separate issue is whether equity plays any part in this application. Of course, in making that determination several factors would have to be considered.

[64] Therefore, although the issues identified by the learned judge were stated in broader terms than those set out by Mrs Kitson, it sufficiently captured what was required to be determined by him both on the respondent's claim and the appellant's defence to that claim. Issues (ii) and (iii) outlined by Mrs Kitson are simply factors which the learned judge was required to take into account, and which he did take into account, in determining that the equal share rule should be displaced, and in what proportion.

[65] This ground is without merit.

Whether the learned judge misinterpreted sections 6 and 7 of PROSA (grounds b, c and d)

[66] Pursuant to section 6 of PROSA, each spouse is entitled to a "one-half" share in the family home. That section provides as follows:

> "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 one-half share of the family home."

[67] Section 7 of PROSA presents an opportunity to have the half-share entitlement to the family home displaced or varied, in certain circumstances. That section provides as follows:

"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." (Emphasis added)

[68] Therefore, if a court is of the view that it would be unreasonable or unjust, in the circumstances of a particular case, to apply, what is often referred to as "the equal

share rule", it may, upon the application of an interested party, make an order in any terms it thinks reasonable, taking into account any factor it thinks relevant. The section sets out three relevant factors, but these are not exhaustive.

[69] In this case, following upon the application of the appellant to have the equal share rule displaced, the learned judge agreed that the respondent's entitlement to a one-half share in the Plymouth property ought to be displaced and varied. He determined that a share of 20% was the reasonable order to make in the circumstances. Mrs Kitson disagreed with this apportionment and how the learned judge arrived at it.

[70] Mrs Kitson complained that the learned judge failed to properly construe and appreciate the interrelationship between sections 6 and 7 of PROSA and failed to appreciate that the equal share rule must be departed from where it is unreasonable or unjust to apply it. Queen's Counsel argued that the learned judge erred, in that, instead of asking whether it was unreasonable or unjust to apply the equal share rule, he wrongly asked, at paragraph [52] of his judgment, "whether it is fair and just to preserve or vary it".

[71] Queen's Counsel maintained that it was only after the court first determines that it is unjust or unreasonable to apply the equal share rule, that it may then consider other factors, including the level of contribution, age, behaviour and other property holdings, in determining the proportion. This, she contended, the learned judge did not do. Queen's Counsel argued that in framing the question as he did, the learned judge directed his mind to the possible positive factors in respect of the retention of the equal share rule instead of the negative factors in respect of the unreasonable or unjust circumstances which could lead to its displacement. This approach, Queen's Counsel submitted, would have resulted in an unbalanced review of the evidence, which consequently led to an improper assessment of the percentage of the Plymouth property each party was entitled to. In that regard, it was said, the learned judge failed

to account for the unjust and unreasonable factors that showed that the respondent ought not to have any entitlement to the Plymouth property at all.

[72] Mrs Newby, however, submitted on behalf of the respondent, that the learned judge did not err in how he interpreted sections 6 and 7 of PROSA. She rejected Mrs Kitson's assertion that it is after the court determines that it is unjust or unreasonable to apply the equal share rule that the court may consider other factors including contribution, and submitted that, it is during the assessment that those factors should be considered.

[73] No complaint has been made by the appellant regarding the learned judge's finding of fact that the Plymouth property was the family home. The complaint is against the manner in which the learned judge apportioned the interests in the family home, having determined that the equal share rule should be varied. It is, therefore, necessary to consider how the learned judge did so and what he took into account in arriving at that decision.

[74] In coming to his decision, the learned judge, at paragraph [49], placed reliance on the decision of this court in **Stewart v Stewart** [2013] JMCA Civ 47. In that case, Brooks JA (as he then was) undertook a comprehensive analysis of how the variation of the equal share rule should be approached. Having thoroughly examined the wording, context and purpose of PROSA and the equal share rule, with the aid of legislation and authorities from various jurisdictions, Brooks JA at paras [50] and [51] said:

> "[50] Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is, beyond the ordinary imponderables of the trial process. The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists.
>
> [51] If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be

> displaced, should nonetheless, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure…Before the court makes any orders that displace the equal entitlement rule it should be careful to be satisfied that an application of that rule would be unjust or unreasonable."

[75] It is, therefore, axiomatic that the first step is to determine whether section 7 is applicable, that is, whether any of the factors listed in that section exists. In saying that the court should be reluctant to vary the rule even if a section 7 factor exists, Brooks JA was saying no more and no less than that the court still has to go on to determine whether in the light of those factors and any other relevant circumstances in the cases, it would be unreasonable or unjust to share the property equally between the parties.

[76] At paragraph [77] of the said judgment, Brooks JA said further:

> "If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule."

[77] Section 14 of PROSA expressly states that its provisions do not apply to the family home. The presumptions in that section, therefore, do not apply to the family home. However, in determining what factors it considers relevant to the question of whether it is unreasonable or unjust to order equal shares, the court may consider similar factors as those listed in section 14, but it cannot apply the presumptions therein to its assessment of the just division of the family home. So that where the marriage, as in this case, is of very short duration, the court would have to determine whether, in the circumstances of the case, non-financial contribution, such as household duties conducted in that short marriage, is of such a nature as would weigh equally with the fact that the property was owned prior to the marriage and that no or very little financial contribution was made to the property, during that short marriage. Therefore,

Brooks JA's further statement at paragraph [77] of **Stewart** v **Stewart** that, "…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…", should be considered in that light.

[78] There will be cases where the factors being considered deserve equal weight (such as a case where the parties were in a long marriage even though the property was owned by one before the marriage), but there will be others, as I have demonstrated above where, the very factors listed in section 7 contemplate that equal weight cannot be given to other factors such as financial or non-financial contributions, as it would be unreasonable or unjust to do so.

[79] This is essentially the task that the learned judge, in the instant case, was required to undertake and did undertake. Mrs Kitson's submissions to the contrary are, therefore, incorrect. The learned judge made reference to the cases of **Margaret Gardner v Rivington Gardner** [2012] JMSC Civ 54 and **Gregory George Duncan v Racquel Sidanie Duncan** [2015] JMSC Civ 75, which accepted that a marriage of under five years duration is deemed to be a marriage of short duration. Having recognized that equal share was the starting point, and having identified two section 7 factors, 7(b) and (c), as existing in this case, he acknowledged, relying on paragraph [32] of **Stewart v Stewart**, that this did not mean an automatic displacement of the rule. He said this, at paragraph [63]:

> "Applying this to the facts of this case, the marriage was of short duration within the meaning of PROSA. As stated earlier however, **a determination of either of these circumstances existing does not result in an automatic variation of the equal share principle but are factors that entitle the Court to determine whether it is fair and just to preserve or vary it**." (Emphasis added)

[80] He then went on to assess, in-depth, those factors in the light of the other circumstances of the case, whilst acknowledging that each factor provided a gateway

for the court to consider the other elements of the relationship. He again agreed with the appellant that they justified a variation of the equal share rule.

[81] The appellant is not challenging the learned judge's decision to vary the equal share rule. However, based on Queen's Counsel's submissions, she seems concerned that the language used by the learned judge, in considering "whether it was fair and just to preserve or vary" the equal share rule, may have caused him to discount the section 7 factors which existed in her favour and place a preponderance of weight on the parties' premarital relationship and the contributions made by the respondent.

[82] It is true that the learned judge did not use the language in the section but instead used the words "fair and just". The question is whether those words connote the same things. Section 7 says "[w]here 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…make such order as it thinks reasonable**…" (emphasis added). These words would, therefore, require that the learned judge, after determining that section 7 factors exist, go on to (1) examine the circumstances that would make the application of the equal share rule "unreasonable or unjust", and (2) decide what order would be reasonable.

[83] The Oxford English Dictionary, eleventh edition, defines 'unreasonable' as "not based on good sense", and as "beyond the limits of what is acceptable or achievable". The word 'unjust', in the said edition, is defined as "not fair", whilst the word 'fair' is defined as "treating people equally" and also as "just and reasonable in the circumstances". The word 'just' is defined as "right and fair" and as "deserved."

[84] It is my view that there is a subtle difference between the meaning of the words in the statute and those used by the learned judge. Whilst 'fair' and 'just' may be synonymous with each other, I am not convinced they are in turn synonymous with 'reasonable'. If the legislators had considered 'fair and just' to give rise to the same considerations as 'unreasonable' or 'unjust', it hardly makes sense for them to have

inserted the conjunction 'or'. One also has to assume that the legislators, in their wisdom, chose one form of words over another for a reason. It is, therefore, important, in my view, for those who are tasked with interpreting and applying the provisions in the statute to stick to the language used in the statute. That being said, however, even though the learned judge did use different language in stating the requirement of the section, based on his discussion of the issues, the parties' submissions and the applicable authorities, as well as the decision that he subsequently came to, it is abundantly evident that he appreciated what was required under the section.

[85] Although I do share the concern of Queen's Counsel Ms Kitson that the learned judge used the language of "fair and just" instead of "unreasonable or unjust", I cannot agree with her submission that the learned judge erred because "in framing the issue as he did, he directed his mind to the possible positive factors in respect of the retention of the equal share rule instead of the negative factors in respect of the unreasonable or unjust circumstances which could lead to the displacement of the rule".

[86] In relation to that submission, I say two things. Firstly, it cannot seriously be contended that the learned judge failed to direct his mind to the negative factors in respect of the unreasonable or unjust circumstances which could lead to the displacement of the rule, when, in fact, he accepted that two of those very factors justified a displacement of the rule. Secondly, in coming to a decision as to the order that he thought reasonable, as required by section 7, it would have been incumbent on the learned judge to consider and weigh all the factors he thought relevant, including factors which he thought were "positively" in favour of retaining the equal share rule. It is clear that the learned judge, in determining to what extent to vary the rule, did not undertake a one-sided review of the evidence. At the end of the day, what was required was an assessment of the section 7 factors, in light of all the evidence on both sides, to arrive at a fair division of the property between the spouses in their particular circumstances. There is no indication that the learned judge failed to do this. Whether the learned judge's conclusion, following his review of the evidence, was justified, is a separate issue to be dealt with later on in this judgment.

[87] This ground could not succeed.

Whether the learned judge erred in his assessment of the section 7 factors and as a result failed to take them into account, as required under s. 7 (1)(c) (grounds f and h)

[88] With regard to this issue, Mrs Kitson contended that the learned judge miscalculated the exact duration of the marriage, and in so doing, he mischaracterised the evidence and misapplied the law. She relied on the case of **Alva Melford Heron Muir v Maureen Veronica Heron Muir** (unreported), Supreme Court, Jamaica, Suit No FD00144 of 2004, judgment delivered 21 October 2005, with regard to how the learned judge ought to have calculated the time at which the marriage had irretrievably broken down. It was asserted that, contrary to his finding that the parties were separated after 16 or 17 months of marriage, the evidence showed that both parties had agreed that the marriage ended on or about 7 March 2013, which would mean that the marital relationship lasted only 12 to 13 months. Mrs Kitson argued that the respondent, having admitted under cross-examination that the relationship ended on 7 March 2013, when the appellant took him to court at Half-Way-Tree, and that they lived separately from August 2013 until he moved out in November 2013, the learned judge in finding otherwise erred and misapplied the evidence. Queen's Counsel maintained that it was important to point out the learned judge's miscalculation because the actual duration of the marriage was a factor that made it unreasonable and unjust for the respondent to have a share in the property. That period, Queen's Counsel said, should have also defined the relevant period in assessing the respondent's contribution to the Plymouth property.

[89] Counsel for the respondent rejected these assertions as being inconsistent with the evidence and argued that **Heron Muir v Heron Muir** shows that the concept of severing the "consortium vitae" requires "an intention to separate coupled with physical acts of separation". It was submitted that, in the case at bar, there was no evidence of an unequivocal change in consortium in March 2013, as notwithstanding the respondent's evidence that the marriage had broken down in March, the evidence that

the parties went on a family vacation with their daughter in April in "marital bliss", and that they only stopped sharing a room in August, was unchallenged by the appellant. Nor, she pointed out, did the appellant lead evidence of any action which was consistent with an intention to separate in March or April of 2013.

[90] Mrs Newby submitted, therefore, that having regard to the evidence as a whole, it was clear that there was material on which the learned judge could have found that the parties had been separated 16 to 17 months after marriage, and there was no error of calculation that could form a basis for this court to interfere with the judge's finding in that regard. In any event, it was argued, there was no dispute that the parties' marriage was of short duration and was a factor that the learned judge identified as influencing his decision to vary the equal share rule. Mrs Newby submitted that the assertion made by the appellant in this regard was, therefore, baseless.

[91] I do not agree with Mrs Newby that there was no evidence of any action consistent with an intention to separate. Both parties agreed that the marriage broke down in March 2013 and the appellant's action in taking the respondent to court for assault and a restraining order could well be viewed as an act consistent with an intention to separate. The respondent clearly took it as such. However, there was also material on which the learned judge could have come to a conclusion that the marriage had lasted 16 to 17 months.

[92] In any event, on this ground, it appears Mrs Kitson is splitting hairs, as, based on the date of marriage and the time at which the respondent moved out of the Plymouth property, the marriage would have been considered to be of short duration. This is a fact that was not disputed. The difference in the duration stated by the learned judge and that asserted by the appellant is a mere four months and would have made no discernible difference to the outcome of the proceedings. A marriage of short duration has been accepted in this jurisdiction to be a marriage under five years. In this case, the marriage, based on the account of both of the parties, lasted less than two years. The learned judge indicated that this was a marriage of short duration and took it into

account as a relevant factor under section 7, which would make it unreasonable or unjust for the equal share rule to be applied.

[93] Mrs Kitson's assertion that the learned judge's miscalculation would also have affected the relevant period of contribution is also unsupported. The evidence is that the appellant continued to pay some utility bills until he vacated the premises. This evidence would have been unaffected by any finding regarding the period of separation since the appellant did not leave the Plymouth property until November 2013.

[94] There is no merit in this ground.

Whether the learned judge erred in looking at common intention in a case brought under PROSA? (ground k)

[95] Mrs Kitson submitted that the learned judge was wrong to rely on the common intention of the parties regarding the ownership of the Plymouth property, whilst disregarding the individual intentions of the parties, in circumstances where common intention, which was a common law principle, did not apply to a case brought under PROSA. Mrs Kitson pointed to section 4 of PROSA and the authority of **Hugh Sam v Hugh Sam** [2018] JMCA Civ 15 (paragraphs [126] to [133]) in submitting that the rules or presumptions of common law and equity do not apply to a claim under PROSA. Although Queen's Counsel acknowledged that, based on this court's decision in **Hugh Sam v Hugh Sam** it may be permissible for the court to have regard to the intentions of the parties, she argued that the learned judge went too far by focusing on the intention of the parties as a determining factor, rather than simply a factor to be weighed in the circumstances.

[96] Mrs Newby contended that there is no basis for the appellant's assertions, and that the learned judge's consideration of the intention of the parties, in assessing whether the equal share rule should be varied, is something which this court has already decided is "perfectly permissible".

[97] Section 4 of PROSA categorically states that:

> "The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions are made by this Act, between spouses and each of them, and third parties."

[98] This court has made it clear in several decisions that, generally speaking, section 4 of PROSA means that, in relation to the division of property as between spouses, the common law and equitable rules and presumptions that obtained prior are no longer applicable, and regard must be had to the provisions of PROSA in their stead.

[99] In **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12**,** the import of section 4 was discussed in extenso. Cooke JA noted that section 4 provided for an "entirely new and different approach in deciding issues of property rights as between spouses" (paragraph [10]). Then, having set out and analysed the various case law and the provisions in sections 2, 6, and 7 of PROSA, that were vastly different from what had previously obtained, he stated, at paragraph [13]:

> "[13] …I have set out these sections in extenso to emphasize the dramatic break with the past as demanded by section 4 of the Act, which directs that it is the provisions of the Act that should guide the court and not, as before, 'presumptions of the common law and of equity'."

[100] Morrison JA (as he then was), also demonstrated this 'dramatic break' with the law that had previously obtained by painstakingly tracing the history of how PROSA came to be, including the inadequacies of that law to Jamaican society, and the ills that promoted results that were "unsatisfactory, unjust, and out of touch with social reality", which PROSA was promulgated to cure.

[101] In **Miller and another v Miller and another** [2017] UKPC 21, the Privy Council heard an appeal from the decision of this court awarding the parties equal share in matrimonial property. This court based its decision mainly on the fact that there was an agreement that the parties intended to share equally the beneficial interest in the property and the court saw no reason to depart from that shared

intention. The wife was awarded equal share in the relevant property. The husband appealed and his main complaint was that this court, in deciding as it did, had run counter to section 4. The Board, at paragraphs 22 to 25, considered the question raised by the husband, whether this court's analysis of the parties' intention towards shared property ran counter to section 4 of PROSA. The Board found, firstly, that this court, in that case, had no need to resort to the rules and presumptions of the common law or of equity as there was evidence from both parties that they had intended to own the property in equal shares. Secondly, in the opinion of the Board, to conclude that it was never appropriate for the court to begin its analysis of property disputes under section 13 and section 15 by reference to the existing proportions of beneficial interest was to misunderstand section 4. It concluded that an analysis of existing proportions of beneficial interest, taken broadly, can be a legitimate starting point. Therefore, in that case, the fact that the parties both intended that the property should be in their equal beneficial ownership was found by the Board to be a legitimate starting point. The Board, however, did so with the rider that it was not recommending that the courts should conduct any protracted analysis of the precise proportions, as they were required to prior to PROSA.

[102] This court in **Hugh Sam v Hugh Sam** accepted that section 4 bears the meaning and effect referred to in **Brown v Brown.** This court also indicated that it was permissible, in an appropriate case, for the court to consider as a relevant factor, the intentions of the parties, where evidence of such exists, as to what the beneficial interest in property is, as a starting point. This could be done when the court is determining what the respective interests of the parties should be, where section 7 or section 14 is being invoked. In that case, at paragraph [133], this court concluded that:

> "[133] …the intention of the parties in the ordering of their affairs is a relevant starting point whether it is being considered under PROSA or under the principles of equity or the common law presumptions. So, for example, if there is evidence of the parties' clear intention that one spouse should work outside the home and the other in the home and that the assets acquired during the marriage would belong equally to both spouses, it is difficult to see

> how the court would disregard that intention because the application was made under PROSA. So too, an agreement under section 14(2)(d) would be evidence as to the common intention of the spouses and any other evidence of intention can be taken into account under section 14(2)(e), if the justice of the case so requires."

[103] In coming to that conclusion, this court had regard to the dicta of the Privy Council in **Miller and another v Miller and another**.

[104] It seems to me, therefore, that a trial judge, in the circumstances of a particular case, in considering whether to vary the equal share rule in an application under section 7, is permitted, where appropriate, to consider the common intentions of the parties as to their beneficial interest, as a starting point. He or she must only do so insofar as it is relevant and necessary to meet the justice of the case, as long as the interests of the parties are not determined by any presumption and/or principle of common law and equity perceived to have arisen from those intentions. The mutual intentions of the parties must be considered in light of all the evidence in the case and is but one factor to be considered alongside all the other factors.

[105] I agree that the learned judge did use the common intention of the parties as a factor in apportioning the shares in the Plymouth property. It was in his consideration as to the extent to which the equal share rule should be varied that the learned judge considered the common intention of the parties, with regard to their beneficial interest in the Plymouth property. He assessed the evidence in light of the respondent's assertion that although the Plymouth property was solely owned by the appellant, it had been purchased pursuant to the parties' "mutually expressed intention" for it to be their family home once they were married. In apportioning the interest in the property, the learned judge found that the intentions of the parties, how they had ordered their affairs, along with the respondent's contribution to the property, made it 'reasonable', in all the circumstances, to award the respondent a 20% interest.

[106] Section 7 of PROSA empowers the court to "make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant", including those listed in the section. The learned judge could not be faulted for finding that the parties' common intention was a relevant factor, having found such an intention existed. Section 7, in my view, necessitates a consideration by the court of all the factors it considers relevant in determining whether it would be unreasonable or unjust for each spouse to be entitled to one-half of the family home. Having done so the court will be able to go on to make the order it thinks reasonable in the circumstances. This is what the learned judge purported to do.

[107] If support for this position is necessary, it may be found in the case of **Graham v Graham** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 03158, judgment delivered 8 April 2008. In that case McDonald-Bishop J (Ag) (as she then was), in dictum that was approved by this court in **Stewart v Stewart** (at paragraph [19]), said, at paragraph, 15 that:

> "15…It is recognized that the equal share rule (or 50/50 rule) is derived from the now well-established view that marriage is a partnership of equals (See R v. R [1992] 1 A.C. 5999, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in Miller v Miller; McFarlane v McFarlane [2006] 2 A.C. 618, 633."

[108] Then, at paragraph 27, she considered that, although section 7 expressly outlines three factors to be considered by the court, it does not provide a closed list of categories, and that this meant that:

> "27…the court may take into account other considerations that arise in the circumstances in determining whether the application of the 50/50 rule should be departed from. Under section 14(2) certain factors are listed as relevant when the

> issue concerns the division of property other than the family home. None of these factors are expressly stated as being applicable in respect of the family home when there is an application under section 7 to vary the rule. It stands to reason, therefore, that in considering an application under section 7, it is for the court, in its own discretion, to determine what considerations in the circumstances would be relevant in order to produce a fair and just result. I conclude that had the legislature sought to provide a closed statutory list of relevant considerations in respect of the family home then that might have resulted in a fetter on the exercise of judicial discretion in determining what is reasonable or just under section 7. The legislature, clearly, did not so intend."

[109] In that case, McDonald-Bishop J (Ag), in her assessment as to whether the equal share rule should be departed from, considered that the family home had been purchased solely by the defendant husband without input from his claimant wife months after he had jointly acquired another property with her, with the stated intention to provide for his mother and child from a previous relationship. The family home had been renovated, with the help of his uncle, to accommodate these persons whom the defendant had had a legal duty to maintain and had been maintaining prior to and during the marriage. McDonald-Bishop J (Ag) found that justice in that case, required the court to consider those circumstances. The uncle's contribution to the property for the benefit of the extended family was considered to be another special feature that McDonald-Bishop J (Ag) found she had to consider in the interests of justice. She determined that the uncle's contribution ought to be credited to the husband as added value to the property and a gift to him which was not intended for the wife to benefit.

[110] In this case, in looking at what he considered to be evidence of the common intention of the parties, the learned judge at no time resorted to the application of any common law or equitable presumptions, such as that of a resulting trust, constructive trust or presumption of advancement. It cannot, therefore, be said that the learned judge acted in contravention of sections 4 or 7 of PROSA. It also cannot be said that he

made his determination solely on the common intention of the parties, as he did consider the two existing factors in section 7, which caused him to displace the equal share rule, and he did consider the efforts and expense put into the Plymouth property by the appellant.

[111] There is no merit in this ground.

[112] Having found that the learned judge could not be faulted for considering the common intention of the parties as a relevant factor, it does not inescapably follow that he was correct in his assessment of the evidence. This is a separate issue that will be looked at further in this judgment.

Whether the learned judge erred in considering the premarriage period of the parties' relationship as relevant to his assessment of the intentions of the parties in light of the definition of spouse in section 2 of PROSA and as a result made erroneous findings of law and fact (grounds i, j, l, r, and m)

[113] Mrs Kitson complained that the learned judge erred when, in considering section 7, he considered the common intention of the parties with regards to the Plymouth property, during the period prior to the marriage when the respondent was still married to his first wife. She contended that the learned judge erred when he took account of the period during which the parties were not married, in so far as they could not have been considered spouses under PROSA during that period. She argued that since PROSA concerns the division of property between spouses, a period where the parties cannot be classified as such, ought not to have been considered in determining the entitlement to property, even where the parties have subsequently married. As such, she argued, a premarital relationship such as the one these parties were engaged in, is not recognized under PROSA, and the sharing of assets, in that kind of relationship is explicitly excluded.

[114] Accordingly, she argued, there could have been no common intention formed by the parties to live as man and wife in the Plymouth property, when the respondent was in fact married to someone else and did not file for divorce from his ex-wife until some

eight years after the property was purchased. Moreover, it was submitted, the premarital relationship between the parties was marred by several breaks and was not continuous.

[115] Mrs Kitson argued further that, although the learned judge acknowledged, at paragraph [57] of his judgment, that the premarriage period was not relevant in determining the period for which Plymouth was the family home, he incorrectly found that the period was relevant to his determination of the parties' intention for how the Plymouth property should be treated once they were married. As a result, she said, he fell into error by according greater importance to this period than the law prescribes, and in treating the period as a period of cohabitation under PROSA. He further erred, she contended, by considering contribution which occurred prior to the marriage and according greater weight to them, whilst discounting the section 7 factors which existed.

[116] Mrs Newby, however, argued that it was the respondent who placed the parties' intention regarding the property in dispute, thereby raising it as a live issue for the learned judge to address. She contended that the evidence of the premarriage activity and conduct which was considered by the learned judge, was only used by him as "a background and context for the judgment and the factual circumstances of the parties in this case". She argued that the evidence was relevant to the determination as to whether it was unreasonable or unjust for each party to be entitled to a 50% share in the property.

[117] Mrs Newby also submitted that the learned judge did not rely on the premarital conduct to ground the respondent's entitlement to a 20% share. He, therefore, did not accord greater importance to that period than the law prescribes. She submitted that, to the contrary, the learned judge correctly appreciated that the respondent was presumptively entitled to a 50% share, and considered the premarital period only in the context of assessing whether, in all the circumstances, it was unreasonable or unjust for the equal share rule to be applied. This, she contended, he was entitled to do.

[118] Section 2(1) of PROSA defines spouse to include:

> "(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
>
> (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years;
>
> immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be."

[119] The word 'spouse' therefore refers not only to parties that are married, but also couples in common law relationships of the specified nature and duration. It is clear from this definition that a married man, as the respondent was for most of the parties' relationship, could not be deemed the spouse of a woman other than his wife, as he would not have been a 'single man'. Since, by definition, only a spouse can be a beneficiary of the entitlement of a half-share of the family home under section 6, and the family home could only entail a dwelling house used by 'spouses', as was correctly found by the learned judge, it is clear that the period of the relationship during which the respondent was still married to his ex-wife could not have been used to determine what was the family home and any entitlement thereto. I agree with Mrs Newby that the learned judge did not do so.

[120] The learned judge expressly stated that the period prior to marriage was not relevant to his determination of the family home. He considered the period prior to marriage as relevant only to his assessment of apportionment under section 7 of PROSA. Therefore, Mrs Kitson's first complaint, in this regard, is not a valid one.

[121] [90] As already stated, in considering an application under section 7 of PROSA, a judge, in the circumstances of a particular case, may not be wrong in looking to see if the parties had any common intention regarding the beneficial ownership in the subject property. In the circumstances of this particular case, the question is whether the

learned judge erred in looking for evidence of a common intention during the period prior to the parties' marriage and when the respondent was still married to his first wife.

[122] In examining the evidence surrounding the parties' various contentions, the learned judge took into account the parties' conduct and how they had ordered their affairs over the entire course of their relationship, encompassing the time before their marriage when the respondent was still married to his ex-wife. He said, at paragraphs [55] to [61] of his decision:

> "[55] …the circumstance [sic] of this case are such that the parties have had a relationship that has spanned the decades and which resulted in the birth of a child. The Claimant says that Plymouth was purchased at the point at which he separated from his former wife in anticipation of the two finding a place for them to eventually have a family home...this was the mutually expressed intention at that time, as the Defendant waited for his divorce to come through.
>
> [56] …from at least 2008 the two were displaying their intentions to treat Plymouth as their home.
>
> [57] **The period from 2008 is relevant to the extent that Dr. Collie began to expend. He began to take on the roles of the man of the house though in law he was still married to someone else. The period cannot be relevant to determine the period during which Plymouth was the family home…but is relevant in determining the intention of the parties as to how Plymouth was to be viewed once they were married.**
>
> [58] **…If one were to look at the actions of the parties, one would say that Dr. Collie's actions leading up to the time of their marriage, is consistent with his assertion that the mutual intention at the time of their marriage, was that Plymouth would become the family home after the wedding.**
>
> …

> [61] **The living arrangements of the parties prior to the marriage and after the wedding, at least up to the time of their separation, are useful to guide as to their common intention…**". (Emphasis added)

[123] It is clear that the learned judge accepted the respondent's evidence that there was a mutual intention for both parties to have a beneficial interest in the Plymouth property from 2003 when the property was being bought, and at the very least from 2008 when he moved into the property. The learned judge actually identified three separate periods where, he said, the respondent had shown that a common intention to share beneficially interest in the Plymouth property, existed. The first was at the point of acquisition of the property, the second was at the point of cohabitation in 2008 and the third was at the time of their marriage.

[124] However, the appellant is aggrieved by the fact the learned judge not only used the premarital period to find what he considered to be a common intention, with regard to the ownership of the Plymouth property and also complains that he accorded greater weight to contributions made during the premarital period, than to the section 7 factors.

[125] In this regard, I am not in complete agreement with Mrs Kitson. It may, in a particular case, be appropriate for the court to consider the conduct of spouses during the pre-marriage or pre-cohabitation period, where a single man and a single woman, shortly before marriage or cohabitation, acted with respect to property with a settled common intention to share in the legal and or beneficial interest in that property and to make it their home. It may even be possible to regard the conduct of parties to an extra-marital affair, where one of them is not single at the time of the acquisition of property, as showing that there was such a settled intention to make that property their home, as spouses, at some time in the near future, and in which both would have a beneficial interest.

[126] However, where I do agree with Mrs Kitson, is that this is not such a case. The nature of the parties' premarital relationship, as will be discussed in more detail later on in this judgment, for the most part, did not lend itself to such a conclusion.

[127] The learned judge himself had difficulty identifying the exact time when the common intention of the parties with regard to the Plymouth property was supposed to have been formed. He found it was formed in 2003 but not acted upon until 2008. He also found it was formed at the time of the marriage. He found this to be so, based only on the respondent's mere assertions. This, no doubt, was the reason that the common intention the learned judge sought to find became such a moving target. However, in seeking to find a common intention with regard to shared beneficial interests, the intention to be gleaned is not that of the respondent only, but must be an expressed or implied intention common to both parties, either at the time of the acquisition or at some identifiable period thereafter. There must also be direct evidence of such a common intention or evidence of such a nature from which a common intention may be inferred. In that regard, there being no such evidence of an intention mutually expressed or by implication, the learned judge would have erred.

[128] On the facts of this case, the learned judge also erred in considering that the 'contributions' to the Plymouth property made by the respondent and the manner in which the parties "ordered their affairs" prior to their marriage, was referable to a common intention that the respondent should have had an interest in that property. The Plymouth property was bought eight years before the respondent's divorce was finalized, and five years before he moved in. Therefore, there could have been no finding of a settled, immediate intention to make it a marital home during that period. Accordingly, that period could not be viewed as "relevant to how Plymouth was to be viewed once they were married" as the learned judge found. It is also very difficult to see how the nature of the relationship between 2003 to 2008 and 2008 to 2011 was "consistent with [the respondent's assertions that the intention at the time of their marriage, was that Plymouth would become the family home after the wedding", as the learned judge found. For the most part, the relationship between the parties, despite

its length and despite producing a child, was neither settled nor committed. In 2011, just before the marriage, the respondent removed from the Plymouth property for six months and did not return until after the wedding.

[129] With respect to the 'contributions' made by the respondent to the structure of the Plymouth property, the evidence shows that those were made for his own personal benefit and were made prior to the respondent moving into the property in 2008 and prior to filing for divorce from his first wife. That is not disputed.

[130] Although the learned judge referred to the "way in which the parties ordered their lives" before they were married, as evidence of a common intention to share in the beneficial interest in the property, there was no evidence that the parties managed their affairs in such a way so as to indicate that their affairs were integrated. There is no evidence that the respondent shared any of his assets with the appellant before they were married or integrated any other aspect of his life with the appellant. Their only shared interest was the Cherry Hill property.

[131] Although, in a particular case, it may be proper to consider premarital conduct towards property as evidence of an implied common intention to share in the beneficial interest in that property, based on the evidence in this case the learned judge erred in doing so. The finding by the learned judge that the premarital contributions of the respondent in the years prior to the marriage were "relevant in determining the intention of the parties as to how Plymouth was to be viewed once they were married" (paragraph [57]), was inconsistent with the evidence acknowledged by him that, although the respondent spoke of an intention to treat the Plymouth property as the family home from 2003, once the parties were married, he did not actually file a petition for dissolution of his first marriage until August of 2010 (paragraph [56]). His marriage was not dissolved until October of 2011. The learned judge's finding was, therefore, incongruous.

[132] Faced with this incongruity, the learned judge found that the fact that the "property was bought some time prior to the actual marriage and…that he [the respondent] did not actually apply for dissolution of marriage until 2010, suggests that the intention may have been expressed in 2003 and perhaps persuaded Mrs. Crooks-Collie to buy Plymouth at that time" (paragraph [63]). The fact that the learned judge used terms such as "may" and "perhaps" and went on to find that "this intention was not treated with any seriousness until he moved in" demonstrates how baffling the finding of a common intention is and how inconsistent it is with the actual evidence. There is no such thing as a suspended common intention. Also, the fact that the learned judge found that the respondent may have formed a particular intention, such intention would not have translated to a common intention unless the appellant had formed the same intention. The case was totally lacking in any evidence of mutuality of intention.

[133] The fact that the respondent moved into Plymouth in 2008 could not signify that he had intention to live with the appellant in a relationship as man and wife and treat Plymouth as his home, in which he had a beneficial interest when, from the outset, his actions were contrary to such an intention. For notwithstanding that he said he was separated from his wife from 2003, he still had not filed for divorce until seven years later. Even after he had moved into the house, another two years elapsed before he filed the petition to divorce his first wife. This can hardly be seen as conduct tending to show an intention to live as man and wife with the appellant formed from 2003 or even 2008.

[134] Although the learned judge was permitted to consider whether a common intention existed with regard to the beneficial interest in the Plymouth property, I have to agree with Mrs Kitson that he gave undue regard to the mere assertions of an alleged intention made by the respondent and erroneously found that there was evidence of a common intention to share in the beneficial interest in the Plymouth property. The work done by the respondent on the property during the premarital period were admittedly done for his personal benefit and, as the judge found, were

cosmetic, even if not temporary. Therefore, it should not have been used as evidence of any common intention to share a beneficial interest in the property. The learned judge was wrong to so find. This error of fact and law in the learned judge's interpretation of the evidence cannot be explained by his having seen and heard the witnesses under cross-examination.

[135] I also agree that this error would have impacted the learned judge's determination of the amount of interest in the family home that he thought it reasonable to award the respondent.

[136] There is merit in these grounds.

Whether the learned judge erred in his treatment of and rejection of the unexecuted draft deed of arrangements and the evidence of Reverend Bosworth Mullings and failed to recognize the significance of that evidence (grounds n, o, and q)

(i) The learned judge's treatment of the draft deed of arrangements

[137] By virtue of section 10 of PROSA, spouses or parties contemplating marriage or cohabitation may make formal agreements to contract out of its provisions with respect to ownership and division of property. Where differences arise after marriage with respect to property, the parties may also make any agreement for the settlement of those differences. However, generally speaking, in order for such agreements to be enforceable, they must be executed in the manner set out in the provisions of section 10.

[138] Those types of arrangements are commonly referred to as premarital or prenuptial and postmarital or postnuptial agreements. By this means, parties can, by contractual agreement, opt out of the provisions of PROSA. The deed of arrangements presented by the appellant to the learned judge fell short of the requirements of section 10.

[139] Mrs Kitson submitted, however, that the learned judge erred in disregarding the draft deed of arrangements and in focusing on the requirements of section 10 as, notwithstanding that those requirements were not met, the deed was important evidence that was: (a) supportive of Reverend Mullings' evidence about its existence; (b) proof of the nature of the parties' discussions; and (c) indicative of the parties' intention that the property was not to be shared with the respondent before or after the marriage.

[140] Mrs Newby, on the other hand, submitted that the learned judge correctly treated with the draft deed since it was common ground that it was unsigned, did not comply with section 10 of PROSA, and was, therefore, unenforceable. She submitted that there was no legal basis upon which the learned judge could have relied on the draft deed as proof of any agreement or consensus of the parties, and the appellant's assertion that the learned judge failed to give credence to it had no merit. She maintained that the learned judge had rightly concluded that because there was no evidence as to when the document was prepared, by whom and pursuant to what instructions, it was of no relevance to the issues the court had to resolve. Mrs Newby further submitted that the draft deed was nothing more than an irrelevant self-serving document.

[141] Mrs Newby is, of course, correct that the learned judge could not have relied on the draft deed as proof of any arrangement or consensus by the parties. The respondent denied seeing or agreeing to the contents of the unsigned document. He was not the maker of it. In the hands of the appellant, the unsigned deed was little more than a self-serving document. The unenforceability of the draft deed, and the denial of its content by the respondent, was, therefore, a bar to its admissibility.

[142] However, in my view, to the extent that the learned judge was looking for evidence of a common intention and to the extent that any such intention must be held by both parties, the evidence of discussions regarding the drafting of a deed was

relevant to the assessment of the credibility of the respondent's assertions that there had been a common intention regarding the beneficial interest in Plymouth property.

[143] The learned judge (at paragraph [47] of his judgment) correctly acknowledged that the requirements set out in section 10 for a prenuptial or postnuptial agreement to be valid were not met and that the draft deed was not enforceable. However, where he fell into error was in not dealing with the impact of the evidence regarding the premarital discussions surrounding a prenuptial agreement.

[144] The learned judge considered the evidence regarding the draft deed and said at paragraph [59] of the judgment that:

> "[59] ...If the position was that the signing of the Deed of Arrangement was a precondition of the marriage such that it was a topical and controversial issue during counselling, why after waiting so many years to marry, would they proceed with the marriage anyway despite it not being signed?"

[145] Then at paragraph [60], he said:

> "[60] The Deed of arrangement could not be tendered in proof of any draft agreement so the Court is unable to determine what this mysterious 'term' was that the Claimant demanded be changed. Could it have been the condition regarding Plymouth? Did the agreement contain anything about Plymouth at all? The Court is not entitled to speculate but the fact that the marriage took place anyway, leads me to wonder if this was in fact the intention of the Deed of Arrangement. The evidence of Pastor Mullings does not help much in this regard…Though the parties discussed it at the sessions according to him, which is disputed by Dr. Collie, clearly it was still not signed and the marriage proceeded despite it not being signed."

[146] Having rejected the deed as proof of the arrangement between the parties, as he was bound to do, and as a precondition to the marriage as he was entitled to do, he failed to consider how the discussions between the parties and with Reverend Mullings about the drafting of such a document, affected his search for the parties' common

intention. Although the learned judge noted that the discussions regarding the draft deed at their counselling sessions were disputed by the respondent, the learned judge proceeded only on the basis that the marriage went ahead even though the document remained unsigned. He did not consider the appellant's explanation that she proceeded with the marriage because the respondent had agreed, in the presence of Reverend Mullings, to sign a deed after the marriage. This assertion was, in fact, supported by the evidence of Reverend Mullings. The learned judge did not consider that the evidence of the Reverend that such discussions took place, could corroborate the evidence of the appellant.

[147] Furthermore, the learned judge did not rule as to whether he believed the discussions actually took place, whether he believed the respondent had agreed to sign a document after the marriage nor on the overall credibility of Reverend Mullings' evidence in this respect. Neither did he reject Reverend Mullings evidence on the point. Given that the respondent admitted that the parties did have counselling sessions with the Reverend and that at some point they had discussed the possibility of a prenuptial agreement, as well as the inconsistency in his evidence in this regard, the learned judge was duty-bound to address these issues more directly. As previously noted, a common intention must be common to both parties. If only one party has the intention, there is no meeting of the minds and the intention cannot be said to be common or mutual. The evidence by the respondent that, in fact, there had been discussions regarding a prenuptial agreement could potentially fly in the face of his claim that there was a common intention towards the property. There is no other property in issue between the parties. Whilst the unsigned document itself was inadmissible, the evidence that there was a discussion regarding the execution of a prenuptial agreement and that the subject was raised at the parties premarital counselling sessions is clear evidence, if it had been properly considered by the learned judge, from which he could have concluded that there was no common intention between the parties, regarding the Plymouth property.

[148] I would, therefore, agree with Mrs Kitson, to the extent that the learned judge failed to properly treat with the evidence of the discussions surrounding a prenuptial agreement in his assessment of the common intention of the parties.

(ii) The learned judge's treatment of Reverend Mullings' evidence

[149] Mrs Kitson also argued that the respondent's evidence as to the intention of the parties in respect of the property was directly contradicted by the evidence of Reverend Mullings, which, she said, the learned judge unjustifiably dismissed and found not useful. She submitted that what was found by the learned judge at paragraph [60] of his judgment was not correct, as, although no specific dates were given as to when the discussions between the Reverend and the parties took place, Reverend Mullings did give a timeline, in his affidavit, and did indicate that the discussions took place regarding the draft deed right before he agreed to officiate their wedding. Mrs Kitson also pointed out that the Reverend did indicate that it was during premarital counselling that the parties discussed signing a prenuptial agreement, subject to changes requested by the respondent and that the respondent had agreed that the Plymouth property was not to be treated as the family home in which he would take a beneficial interest, as that home was to be built on the Cherry Hill property, instead.

[150] Further, she contended, Reverend Mullings had indicated that in postmarital counselling sessions, the respondent refused to honour his agreement to sign the deed and that this was a source of contention in the marriage and one of the reasons the parties broke up.

[151] I agree with Mrs Kitson that Reverend Mullings' evidence, if properly considered, could have had the effect of contradicting the respondent's assertion that there was a common intention between the parties to share the Plymouth property. The Reverend's evidence was not affected or negated by the fact of the draft deed being unexecuted. Whilst Reverend Mullings' evidence supported the appellant's account of the discussions surrounding the existence of a draft deed encompassing the alleged details of the parties' discussions, his evidence was also independent evidence of an eyewitness to

those discussions. I agree with Mrs Kitson's submission that the learned judge failed to account for the value of this evidence from the Reverend, in his search for a common intention. I, therefore, disagree with Mrs Newby, who argued that the learned judge "properly assessed and rightly determined" that Reverend Mullings' evidence was unhelpful and that it necessarily followed that "any witness who supported that version would also not be found by the tribunal to be credible".

[152] Whilst I agree with Mrs Newby that the learned judge's finding that the Plymouth property was the family home was based on section 2 of PROSA, and as such that finding is unimpeachable, his assessment of the common intention of the parties was done in the context of the departure from the equal share rule and whether the respondent should have a share in the property or not. It is accepted, as stated before, that the intention of the parties is not a factor determinative of what is the family home under PROSA. That is not the discussion here, for the learned judge did not use common intention to find Plymouth property as the family home but used it to determine whether it would be unreasonable or unjust to apply the equal share rule. He clearly took the view that, although there were factors existing, pursuant to section 7, which would cause a departure from the equal share rule, the respondent should get some share of the property because such a common intention had existed between the parties for this to be so. In taking this approach, the learned judge looked only to the respondent's assertions and turned a blind eye to the appellant's evidence to the contrary. The Reverend's evidence was intended to bolster the appellant's defence that there was no common intention regarding the Plymouth property.

[153] With regard to Reverend Mullings' evidence, the learned judge said, at paragraph [60]:

> "[60]…The evidence of Pastor Mullings does not help much in this regard as no date is given as to when many of the events he speaks of took place. Though the parties discussed it at the sessions according to him, which is disputed by Dr. Collie, clearly it was still not signed and the marriage proceeded despite it not being signed. The

> discussions the pastor speaks of seems to have been just prior to the parties finally separating, based on the final resolution of those meetings."

[154] Several things are apparent from the above conclusion by the learned judge. Firstly, although the learned judge had earlier outlined Reverend Mullings' evidence in full, he only assessed it in light of the validity of the deed of arrangements and did not specifically comment on the credibility of the Reverend himself or give a proper reason as to why he rejected that evidence. The only basis he gave for rejecting Reverend Mullings' evidence was that it did "not help much…as no date is given as to when many of the events he speaks of took place". The learned judge failed to account for the value of this evidence as an indication of the credibility of the respondent's evidence as to the common intention of the parties in relation to the Plymouth property.

[155] The learned judge's statement that the discussions referred to by the Reverend seemed to have been just prior to the parties finally separating is not consistent with the evidence that the learned judge himself had recounted at paragraphs [38] to [40]. The effect of that evidence was that Reverend Mullings had counselled the parties prior to their wedding and two main issues discussed involved the signing of a prenuptial agreement and a request that the Plymouth property not be treated as the family home. The Reverend also said that the respondent had agreed that the family home would be built on the land at Cherry Hill. He said further, that the respondent had agreed to sign the document after they got married, once certain provisions were adjusted. It was on that basis that he agreed to conduct the wedding ceremony.

[156] The Reverend also said he again counselled the couple after the wedding when they began to have marital problems, which he said surrounded the failure of the respondent to honour his agreement to sign the draft deed. Although, no exact dates were given in the Reverend's evidence, there is a clear indication of the timeframe in which the discussions were said to have occurred, that is, immediately before and after the wedding. These time frames are in accordance with the evidence of the appellant, and the respondent did not deny that those discussions took place, albeit he disavowed

any knowledge that the deed had been drafted. Since the parties' marriage lasted at most 17 months, as found by the learned judge, any discussion must have taken place just before the wedding in March of 2012, and after the wedding, but before August of 2013, when the parties separated.

[157] The respondent's initial denial and his later admission that there had been some discussion about a prenuptial agreement but that he had insisted that there would be no wedding if there was a prenuptial agreement, is clear evidence that the parties had no meeting of the minds regarding the property. That fact ought to have called his credibility into question. The credibility of the respondent should also have been called into question by the independent evidence of Reverend Mullings, and given that the Reverend's evidence itself does not appear to have been discredited in any way, the learned judge ought to have specifically addressed this evidence and made a ruling, giving reasons, as to whose evidence he believed in this respect. If he did not find the Reverend credible, he ought to have said so. But he did not, and the reasons he gave, in my view, provided no sufficient basis for him to reject Reverend Mullings' evidence.

[158] A judge is not duty-bound to give specific reasons for every single finding. However, it must be clear on the face of his decision why it is he came to the findings that he did. In respect of Reverend Mullings' evidence, it is not so clear. The learned judge, therefore, would have erred in that regard.

[159] These grounds have merit.

Whether the learned judge erred in his treatment of the evidence of the parties' relationship and the respondent's contributions to the household and the family home and, as a result, erred in apportioning a 20% interest in the Plymouth property to the respondent, as based on the evidence and in all the circumstances, it was unjust and unreasonable to do so (grounds c, e, g and p)

(iii) The learned judge's treatment of the evidence of the parties' relationship

[160] Mrs Kitson argued that the evidence of the nature of the relationship between the parties did not justify the learned judge's finding that the respondent was entitled to a share in the Plymouth property. Mrs Kitson highlighted the following as to the nature of the parties' relationship which she said the learned judge erroneously discounted:

i. From 1984 to 2011, during the relationship, the respondent was married to someone else;

ii. The relationship was on again, off again, and up to late 2003, there was no evidence that the respondent intended to separate from his wife;

iii. after 2003, the respondent went to the United States of America for a medical fellowship and the parties were not involved in a relationship;

iv. it is undisputed that the respondent was in a relationship with someone else during this period;

v. the respondent did not know when and how the property was bought and for how much nor was his name placed on the title;

vi. the appellant bought and renovated the property entirely by herself;

vii. the respondent only moved into the property five years after its purchase, during which time the appellant lived in the house with her mother and daughter;

viii. the respondent made only a minute contribution to the bills and this was made intermittently;

ix. the parties separated six months prior to the marriage;

x. the parties' short marriage was tumultuous in that they required post-nuptial counselling shortly after the wedding;

xi. the parties argued about cheating allegations;

xii. the appellant filed a complaint against the respondent for assault;

xiii. the respondent gambled two to three times per week;

xiv. the parties did not share their finances; and

xv. the parties discussed a prenuptial agreement which was drafted.

[161] This evidence, Mrs Kitson contended, did not point to a relationship in which the parties wanted to pool their resources and share finances, but rather, was one of distrust. The parties' intentions as to entitlement could not have changed during the short duration of the marriage, she further contended.

[162] Relying on the case of **Stewart v Stewart**, Mrs Kitson argued that the nature of the parties' relationship was crucial in assessing whether it was unreasonable or unjust to vary the equal share rule and by what percentage. She maintained that, in the circumstances outlined, it would be unreasonable and unjust for the respondent to take a share in the Plymouth property. She pointed to the fact that the respondent's evidence was contradictory as regards the nature of their relationship and how they ordered their affairs and, in other respects, supported the appellant's own evidence.

[163] Mrs Kitson argued that the learned judge's finding that the respondent was entitled to a 20% interest in the Plymouth property was as a result of his inappropriate treatment of the evidence, in that, he failed to give appropriate weight to crucial evidence, erroneously assessed parts of the evidence, and failed to account for portions of the evidence. She complained that the learned judge erred in his assessment of the credibility of the parties, and in deciding that the parties had shared a common intention. Further, she took issue with how the learned judge assessed the level of contribution alleged to have been made by the respondent and argued that the learned judge erred when he accepted, at paragraph [64], the respondent's evidence over that of the appellant.

[164] It was submitted that the picture painted by the respondent that the parties had lived as husband and wife for years, notwithstanding his marriage to his first wife, and that they had wanted to share in everything, including the Plymouth property, was not borne out by the evidence which the learned judge "failed to assess, account for or mischaracterized".

[165] In respect of this challenge, Mrs Newby submitted that the undisputed evidence clearly showed a longstanding relationship between the parties in which they were integrally involved in each other's lives, including sharing financial obligations, and that the learned judge's conclusions were in accordance with that evidence.

[166] Although there was evidence on which the learned judge could have found, as he did, that the parties had a longstanding relationship, it cannot be ignored that the respondent was married to someone else for the entire period up to just before the parties' marriage in 2012. The evidence shows that in 2003, when the Plymouth property was bought, not only was the respondent still married to his first wife, but he made no financial or non-financial contribution to its acquisition or renovation. The learned judge found it significant that the acquisition of the property coincided with the respondent's separation from his first wife. However, he failed to take account of the fact that the respondent left Jamaica before the acquisition of the property and only

returned in 2005. During that period, although the respondent said this information was irrelevant, the appellant's evidence is that he reconciled with his first wife and also had affairs with other persons, with whom he also had children. As said before, there was no evidence to support his claim that in 2003, the property was bought with the common intention for him to have a beneficial interest in it.

[167] The evidence from the appellant was that she bought the Plymouth property to provide a home for her child and her mother. The evidence is that her mother died in 2007. It was only after her mother's death that the respondent moved into the property.

[168] At the time of the purchase of the Plymouth property, not only was he married to his ex-wife, but he remained married to her for some eight years thereafter. For five of those nine years, the appellant lived alone at Plymouth with her mother and daughter. When the appellant moved into the house in 2008, he was still married to his ex-wife.

[169] Although the respondent stated he and the appellant had decided to buy a house together in 2003, with a common intention that he should share in the beneficial interest in it, that contention was belied by the facts. Although the learned judge found that there was such an intention, he eventually had to abandon any reliance on a common intention existing at that point.

[170] The respondent had no input in the purchase and renovation of the house and knew nothing of it at the time it was done. He provided no explanation for this. His explanation for why his name was not put on the title, that he did not wish to confuse assets in his divorce from his first marriage, does not explain his lack of contribution to its acquisition, nor does it explain why his divorce and distribution of those assets from his first marriage took place almost nine years after the acquisition of Plymouth.

[171] On the respondent's own evidence, he knew none of the details about the purchase and did not even know that the appellant had taken out a mortgage on the

property at the time of purchase. When the respondent returned to Jamaica after his fellowship abroad in 2005, he only had a visiting relationship with the appellant at the Plymouth property. He did not dispute the appellant's assertion that at the time, he was dating another woman with whom he came to the Plymouth property to pick up his daughter.

[172] Furthermore, on his own evidence, when he made the "structural changes" to the Plymouth property in 2007, he was not living at the property and made those improvements, which was to pave an area, for his own benefit, that is, having persuaded the appellant to allow him to hold a political event at the premises, in his bid to further his own political career.

[173] There is no evidence the parties shared in the acquisition of any assets, and it is apparent that the parties kept their financial interests separate. Interestingly, when the respondent was asked if he had property overseas, he refused to answer. The appellant bought his ex-wife's share in Cherry Hill with her own funds. The reason for her purchase was disputed, and the learned judge made no findings in that regard. It was clear the parties did not share finances. There was no evidence of any shared bank account or other shared assets. At no time did the respondent financially support the appellant. The appellant provided financial support to the respondent's business by way of official loans through her company, which were to be paid back. The respondent admitted he gambled two to three times per week, which was one of the reasons the appellant gave for not wanting to share finances or the house with him.

[174] The respondent did not deny the assertions made by the appellant in her affidavit evidence that not only was he "in a serious relationship" with another woman during the period the Plymouth property was bought and renovated, and whilst he was married to his ex-wife, but also that during that period he had children with other women, apart from her. Therefore, the fact that he had a child with the respondent during their affair did not, by itself, show any greater intention to have a settled family life with her than with the others before his divorce in 2011 and subsequent marriage

to the appellant. The learned judge did not deal with this evidence. However, in my view, it would have been relevant evidence to show that any intention the respondent said he had for a settled family life with the appellant, at the Plymouth property over the years, could not be taken seriously as being "referable to" any common intention by the parties for a shared beneficial interest in the Plymouth property "once they were married".

(iv) The evidence of the respondent's contribution to the Plymouth property and to the household

[175] Mrs Kitson argued that the respondent's evidence did not align with his assertions as to his contributions to the Plymouth property and how the parties had ordered their affairs. Particularly, it was submitted, his affidavit evidence directly contradicted his evidence upon cross-examination in respect of (a) the alleged arrangement of the parties for the paying of the mortgage; (b) the tiling and paving of the property; (c) the payment of utility bills; (d) the painting of the house; and (e) the other contributions he alleged he made. In those circumstances, she argued, the learned judge was plainly wrong in accepting the respondent's evidence over the appellant's, which was consistent and supported by plausible explanations.

[176] Queen's Counsel also submitted that the timing of the respondent's contributions to the property, having been in 2007 before the parties started living together, 2008 to 2011 before the parties were married, and August to October 2013 when the parties were separated, was not accorded the requisite significance. The contributions before the marriage, she said, should not have been considered by the learned judge based on the provisions in PROSA, which confines "contribution'" to that which was done during a marriage or cohabitation between spouses.

[177] In that regard, she said, the parties' relationship was not covered under PROSA for most of their relationship because during those periods, the respondent was still married to someone else and could not lawfully cohabit for the purposes of PROSA. Further, she says, in some instances, they were not cohabiting when the contributions

were made. Accordingly, she argued, the only contribution that should be counted was that made between the date of the marriage on 9 March 2012 and the separation in April 2013, which only included the respondent's periodic payment of bills, a fact, it was said, was acknowledged by the learned judge at paragraph [62] of his judgment.

[178] Moreover, it was submitted, even if the contributions before the marriage were to be considered, those were not for the benefit of the household and family, but for the respondent's own purposes, and as such would not qualify as contribution under PROSA. In any event, they were miniscule and structurally cosmetic. Consequently, she asserted, in those circumstances, it was "unconscionable and plainly wrong for the learned judge to find that the respondent was entitled to 20% interest in the property and that the appellant was not entitled to 100%". Mrs Kitson relied on the authority of **Gardner v Gardner**, in which the equal share rule was varied to give the defendant who purchased the property before marriage 100% interest, and argued that, by comparison, the circumstances of the instant case were far more unjust.

[179] Mrs Newby submitted that the respondent's entitlement to a share in the Plymouth property was not based on his contributions but rather on the presumption of an entitlement pursuant to section 6 of PROSA. She submitted further that the assertion that the learned judge erroneously assessed the respondent's contribution in the context of the issue of whether to vary the equal share rule was without merit and was not supported by the evidence.

[180] Counsel submitted that, regarding the mortgage, the respondent said he did not know about it at the time of purchase, not that he did not know about it at all. Regarding the tiling and paving that was done to the outside of the premises, she asserted that the respondent had consistently outlined the improvements that he made. She said the fact that he did not mention that the appellant had also contributed to the tiling and paving did not negate his contribution, which was admitted by the appellant. She submitted that the respondent had explained why he was unable to exhibit receipts

for all his contributions to the payment of bills, and that he was able to exhibit some receipts which showed he made payments, contrary to the assertions of the appellant

[181] In relation to the evidence of premarriage contributions, Mrs Newby contended that, as a matter of law, the learned judge was entitled to consider all the factual circumstances during the entire course of the parties' relationship, which included periods between 2005 to 2007 and 2008 to 2013. This evidence, it was contended, was useful in assessing "the intention of the parties to permanently integrate their affairs". The evidence in this case, she said, clearly showed that the parties had a joint enterprise in which they lived together with their child, shared expenses and supported each other's professional endeavours.

[182] Mrs Newby contended that, moreover, the submission that the respondent's contributions were not for the benefit of the household belied the evidence, as the evidence showed that the improvements were not of a temporary nature and remained on the property after the respondent had left; a fact, she said, was pointed out by the learned judge.

[183] Mrs Newby also argued that there was no evidential basis for the appellant's assertions that the respondent was not forthright about the assets he owned or his finances, generally, or that the appellant was unaware of the assets of the respondent. Thus, she concluded, the learned judge gave appropriate weight to and properly assessed the respondent's contributions, and his findings were supported by the evidence. The authority of **Gardner v Gardner** relied on by the appellant, she said, was distinguishable on its facts and was, therefore, inapplicable to the case at bar.

[184] Section 7 of PROSA does not speak to the 'contribution' made by a party to the family home as a factor to be considered but, as has already been found by this court, it is a factor that, undoubtedly, a judge may consider as relevant when determining whether it is unreasonable or unjust to apply the equal share rule.

[185] The only definition of 'contribution' in PROSA is that in section 14(3), which defines it, for the purposes of section 14(2), as:

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

Subsection (4) makes it clear that there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution.

[186] Section 14(1)(b) of PROSA clearly indicates that the factors in section 14(2), which includes financial and non-financial contribution, are factors to be considered in respect of property "other than the family home". Section 14(1)(b) states:

> "14. -(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-
>
> (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or
>
> (b) subject to section 17 (2), divide such property, **other than the family home**, as it thinks fit, taking into account the factors specified in subsection (2),
>
> or, where the circumstances so warrant, take action under both paragraphs (a) and (b)." (Emphasis added)

[187] The matters in section 14(3) relate directly to section 14(2). The definition of 'contribution' in section 14(3), however, relates to section 14(2)(a) of PROSA, which provides that the court, in dividing "such property other than the family home", may consider:

> "…contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them."

[188] As said earlier, by virtue of section 14(1)(b), the provisions in sections 14(2) and (3) are inapplicable to any division of the family home. The provisions relating to the absence of presumptions, with respect to the contributions of the spouses, in section 14(4), would, therefore, also not be applicable to any consideration having to do with the family home.

[189] Notwithstanding this, I am of the view that it would have been open to the learned judge to consider contributions made generally as a factor relevant to the exercise of his discretion pursuant to section 7 of PROSA in determining how to

apportion interest in the circumstances of the case, without resort to the provisions of section 14. In his judgment, the learned judge outlined the matters stated in that section and determined that he was entitled to consider them as to whether the equal share rule should be varied.

[190] The learned judge outlined and considered financial and non-financial contributions alleged to have been made by the respondent from 2007 up until the respondent left the Plymouth property in November of 2013. These included the installation of air conditioning units; the tiling of the patio; the paving of sections of the yard space and pool area; the installation of decorative globe lights and home appliances; construction of a doghouse; provision of gardening accessories; provision of a washing machine; painting of the house from "top to bottom" and the refinishing of the large front doors of the house. The judge also considered the respondent's evidence that he had made other improvements that he could not recall and did other repairs where necessary.

[191] The appellant accepted that the respondent had installed two removable air conditioning units, re-tiled the wash area of the patio, painted the windows, grill and front section of the house (*porte cochère)* one Christmas, and placed pavement stones by the fence leading to the back of the yard. However, she disputed that these were significant, in any way, and took the view that the respondent did them of his own will and for his own benefit. As to the other "improvements" asserted by the respondent, she denied that these were actually done.

[192] The learned judge accepted that the improvements were made as alleged by the respondent and concluded that they were "significant in improving the appearance of the Plymouth property, though they were more of a cosmetic nature than structural" (paragraph [64]). He considered that they were not temporary in nature. The learned judge also accepted that the respondent's name was placed on several utility bills after he moved into the Plymouth property in 2008 and found that the respondent had played an active role in paying them. He accepted the respondent's allegations that the

parties had an agreement that the appellant would pay the mortgage and fees relating to their daughter whilst he would pay all other bills. Whilst he accepted that the appellant paid the "lion's share" of the bills, placing bills in the respondent's name, he found, "conveyed an intention consistent with a full integration into the running of the family home" (paragraph [62]). The learned judge determined that this contribution, amongst other things, showed that it was the common intention of the parties to fully integrate their affairs.

[193] In respect of non-financial contributions, the learned judge accepted that the respondent, due to the 'busy lifestyle of Mrs Crooks-Collie', "essentially ran the household" (paragraph [62]).

[194] For the reasons expressed below, the learned judge was plainly wrong in his treatment of and conclusions on the evidence of the respondent's contribution.

[195] I agree with the appellant that many of the judge's findings are not supported by the evidence. There is no evidence to support the learned judge's finding that the respondent's contributions showed a common intention to integrate their affairs. Although the learned judge referred to the shared bills, in my view, this was insufficient for a definitive finding of fact that the parties intended to integrate their affairs and share property. For instance, there was no evidence the parties otherwise pooled their resources, had any joint family account into or from which funds were deposited or withdrawn for the benefit of the family, or conducted their business affairs in any way which suggested an intention to involve themselves in each other's affairs. Furthermore, the learned judge took into account contributions made by the respondent, which were made prior to his moving into Plymouth in 2008, that, on his own account, were done voluntarily for his sole personal benefit. Therefore, as an example, the work done paving an area at the back of the property, by the respondent in 2007, in order to "facilitate" his political function, was an irrelevant consideration. He did not live there, he had to ask permission to do it and it was clearly done voluntarily. The respondent accepted that the "improvements" made in 2007 (the paving of part of the back yard by

the washroom) were made for his own personal benefit to facilitate the hosting of a political event at the premises. Interestingly, the respondent also accepted, in his oral evidence that the appellant did not want to facilitate the political function in 2007, as her mother had just died. It was his evidence that her sister had to convince her to allow the function. This accords with the appellant's testimony that she did not particularly want that "improvement" to the house. That work was, admittedly, voluntarily undertaken by the respondent and the judge erred in taking it into account as relevant evidence of common intention.

[196] In respect of improvements made in 2010 (paving of the yard to the kitchen and back patio), this was also admittedly for the respondent's benefit, the purpose being for his 50th birthday party to be held on the premises. The respondent admitted in evidence that he did most of the spending on this "because it was his party". Again, this is evidence of voluntary contribution for personal gain and the learned judge erred in taking it into account.

[197] The expending of money or labour on another's property by a volunteer is a legal concept which was not considered by the learned judge. Generally speaking, the fact that a voluntary contribution to another's property enhances the curb appeal of that property, does not give the volunteer any claim to an interest solely by virtue of his voluntary expenditure or labour.

[198] In respect of the respondent's evidence as to the parties' arrangement for the payment of bills, inconsistencies arose. The respondent asserted, in his affidavits, that they had agreed that the appellant would pay the mortgage and he would pay all other bills. At trial, however, the respondent asserted, without even being asked, that the appellant had bought the house "cash with a cheque", that she is "a wealthy woman", and that she "has never taken a mortgage". When asked if he was aware that at the same time the property was purchased a mortgage was registered, he said "I wasn't aware. I thought she purchased it cash". The mortgage registered on the title was in the amount of $13,500,000.00, and noted on the same day the property was

transferred to the appellant. The respondent was later asked if he was aware that the appellant had spent $13,000,000.00 on the house after its purchase, he replied yes. When asked if the appellant had provided the entire $13,000,000.00 herself, he also said yes. This evidence would dispel any notion that the respondent knew about a mortgage, had had any discussion with the appellant about any mortgage or that he had any arrangement with her regarding the payment of the mortgage, as he alleged. This was a major inconsistency going against the credibility of the respondent that the learned judge failed to address. How could he have had an arrangement with the appellant about a subject matter he was not even aware of?

[199] The respondent's evidence in respect of his payment of the utility bills was also inconsistent and unsupported by documentary evidence. In his 1st affidavit, he said he paid all utility bills, household expenses, including light, water, cable, telephone, gardener's salary, all expenses for their child other than tuition, and all maintenance and upkeep of the family home. In his 2nd affidavit, he reiterated those things and added the expenses of pool servicing and other unforeseen home repairs. He also stated that the parties had agreed that the appellant would pay the major expenses, consisting of the mortgage and their daughter's tuition fees, since she made more money than him. The appellant's evidence, however, was that although he agreed with the choice of school for their daughter, he refused to contribute to the tuition fees. In his cross-examination, when asked about the appellant's assertion that she always paid for groceries, the respondent admitted that the appellant paid for groceries the "majority of the time". He later said that she would only buy groceries sometimes. He also admitted that it was the appellant, and not himself, as he had indicated before, that paid the water bill.

[200] So, on his evidence, the appellant paid not only the mortgage and high school tuition fees for their daughter, but she also paid the water bill and grocery bill sometimes, if not most of the time. He did not indicate what the other expenses were for his daughter that he paid. It should also be noted that the appellant did not deny that the respondent paid electricity bills and the gardener's salary, or that he

contributed to some of the other household bills. What she said was that he paid these intermittently. Particularly, she said, during the periods when his school was having financial trouble, he paid no bills. This financial trouble was admitted by the respondent and his witnesses, and also admitted was the fact that, on occasion, the appellant had to bail-out the school with loans from her company. Further, although the respondent first said he did not pay the utility bills during the six-month period after he had moved out of the house in 2011, he later said he did, but that he could not remember how many times.

[201] The respondent tendered eight legible receipts, which indicated as follows:

i. two payments for National Water Commission service - receipts dated 9 September 2013 for $14,176.76 and 4 October 2013 for $6,621.73;

ii. two payments for Flow service - receipts dated 04 December 2013 for $3,626.68 and 28 October 2013 for $10,589.02;

iii. three receipts for electricity service - receipts dated 5 September 2013 for $50,200.00; 4 October 2013 for $54,147.96; and 28 October 2013 for $57,572.55; and

iv. one receipt for gardening services dated July 2013 of $30,000.00.

[202] These were receipts for payments made during the marriage. Of those receipts, only three indicated that they were paid using the credit card number the respondent identified as his own. However, even if it is to be accepted that he paid them all, all that would be indicated is that he paid some of the water, light and cable bills during September to December of 2013, and that he paid for gardening services in July of 2013.

[203] This was the only documentary evidence provided by the respondent to show his financial contribution since he moved into the house in 2008, and since the house was purchased. He explained that he did not keep all his receipts for the improvements he made to the property and that some of the receipts for the bills he paid from 2008 were left at the property when he moved out. However, the documentary evidence accords with the appellant's evidence that he paid the bills intermittently, and that in June 2013 and for a brief period she had refused to pay all of what she normally paid, as well as that she insisted that he help to pay "for his existence". It could not suffice, in my view, for the respondent to, without more, simply say he paid these bills regularly, having regard to the other evidence as to his earnings, his business debt, and the inconsistencies in his evidence as to what he actually paid and what was agreed.

[204] It is not clear upon what basis the respondent's evidence was found to be more credible as it related to the contributions he made. The learned judge took account of a period of approximately six years, four of which were during the parties' premarital relationship, but the respondent could only provide proof of payments of bills for a part of a year after the marriage broke down. Even with regard to his own daughter's expenses, he was not able to relate or provide proof of one single expense he paid on her behalf.

[205] In my view, however, even if it were to be accepted that he paid the bills he alleged he paid, such contribution would have been miniscule in the grand scheme of things, and consistent with normal contributions that would be expected of a person to sustain themselves in a household for which they do not carry the heavy burden of maintaining.

[206] In respect of the tiling and painting of the house, again, I agree with the appellant's contentions. The respondent first asserted in his affidavit evidence that he tiled and paved the property around the pool and patio before the wedding, but upon cross-examination, he admitted that the appellant contributed to the tiling. The appellant denied he made any contribution to the paving. His oral evidence was that he

painted the entire house from "top to bottom" at a cost of $100,000.00, but even this was disputed, as the appellant's evidence was that he paid to paint a section at the front of the house only, which was by the "porte cochere". This evidence had to be considered in the context of the evidence that he had moved out of the property and only moved back in on their wedding day. In respect of other contributions that he said he made to the unidentified physical areas of the Plymouth property over the course of the parties' relationship, no evidence was adduced to substantiate same.

[207] In respect of his alleged non-financial contribution, the learned judge accepted the respondent's assertion that due to the "busy lifestyle of Mrs Crooks-Collie", he "essentially ran the household". There was, however, no evidence to support such an assertion. Whilst the appellant admitted that she worked long hours, it is clear that the respondent's obligations would have also kept him busy as a consultant pulmonologist, university lecturer and school coordinator. At no time was it indicated that he became an unemployed stay at home dad. It was undisputed that the household had the help of a gardener and a helper, so the respondent would not have been doing any household chores or gardening. There was also no evidence that the respondent spent any extra time caring for the parties' daughter than the appellant. Neither was there any evidence that the respondent did anything which enabled the appellant to better carry out her business. She was the one who was assisting him with his business that he owned with his ex-wife. The respondent said that he did whatever needed to be done by a man around the house, but it is unclear to what he was referring as he gave no examples.

[208] If we were to look only at the contributions made by the respondent during the marriage, taken at its highest, all there would be in this marriage of short duration, are: the intermittent payment of telephone, electricity and gardener bills for about 16 months, and the ordinary day to day assistance around the house that did not involve any 'heavy lifting'. With regard to the premarital contributions after 2008, those would be the payment of a few bills, the paving of the yard to the kitchen area for the birthday party, contribution to the tiling around the pool and patio for the wedding reception, the painting of the house or portions of it, construction of a dog house and

installation of air conditioning units in his bedroom. I cannot agree with the learned judge, who, having admitted that the "improvements" were cosmetic, found they were not insignificant. These were, indeed, insignificant when considered, as the learned judge did consider, the expense and time put into the property by the appellant before the parties were married and even before the respondent moved in 2008, as well as the value of the property. The respondent himself, admitted that he was not there when the house was bought or structurally renovated and he made no contribution to either. He also admitted that the renovations made by the appellant were extensive and that they brilliantly "transformed" the property from the way it was when it was purchased and that the transformation was "unbelievable". All this took place without his help and all occurred before 2008.

[209] Mrs Newby submitted that the authorities are pellucid that issues of credibility and weight are matters for the learned judge, and the question as to the reliability of the evidence is solely a matter for the court to assess. I agree with her on this point, as well as her submission that the appellant had to show that the learned judge's findings were plainly wrong or cannot reasonably be explained or justified by the evidence. However, in my view, the appellant has successfully shown, by clear evidence of the nature of their relationship, the circumstances surrounding the acquisition and renovation of the property, and the respondent's conduct before, during, and after that period, that the learned judge's findings cannot be supported.

(v) Was a share of 20% in the Plymouth property reasonable in all the circumstances?

[210] The appellant has relied on the authority of **Gardner v Gardner**, a first instance decision, in which the equal share rule was varied to give the claimant no interest in the family home, in circumstances where that home had been purchased decades before the short marriage and where the claimant wife had made no financial contribution to its acquisition or improvement, nor any other financial contribution to the household by paying any bills or otherwise. The wife, in that case, also made no discernible non-financial contribution to the home or marriage, as the husband paid for two helpers and

a gardener. The husband had also spent a considerable amount of time taking care of her children from previous relationships, and even personally bought groceries for the household. He took out considerable loans against the equity in the family home to help his wife set up her own business to become financially independent and he bore the burden of repaying those loans.

[211] Whilst **Gardner v Gardner** does have some distinguishing features from this case, particularly where in that case the wife made no direct or indirect financial contribution to the home, the contribution in this case made by the respondent, taken at its highest, was not so significant as to take his case out of the realm of apportionment that was ordered in **Gardner v Gardener**.

[212] I, therefore, find that the learned judge would have erred in how he treated with the evidence of the contributions made by the respondent. In so doing he gave those matters too much weight, as a result of which, as Mrs Kitson contended, he discounted the factors relied on by the appellant to have the equal share varied to apportion to her 100% interest in the Plymouth property. The learned judge took account of irrelevant factors, failed to assess the inconsistencies in the evidence of the respondent, failed to take account of relevant and corroborated evidence provided by the appellant, and as a result, arrived at a conclusion that cannot be said to have produced a reasonable and just outcome regarding the parties' interest in the property in dispute.

[213] The learned judge, therefore, erred in apportioning the interest in the Plymouth property to give the respondent a 20% share. Having examined the time and expense put into the property by the appellant, nine years before the marriage, and having acknowledged the cosmetic improvements made by the respondent to the physical structure, he, nevertheless, fell into error. He was also wrongly influenced by his finding of the existence of a common intention, which was not borne out by the evidence. In the result, the order he did make was not a reasonable or just one and the only reasonable and just order, in the circumstances of this case, ought to have been for the appellant to retain her 100% interest in the property.

[214] These grounds are, therefore, meritorious.

Whether the learned judge erred in ordering costs in full to the respondent in circumstances where the appellant was successful in her application for the equal share rule to be varied (ground s)

[215] In the light of the determination that this appeal is to be disposed of in the appellant's favour it would serve no purpose to deal with this ground other than to add to the length of an already regrettably long judgment. The issue is now moot.

Whether the learned judge erred in failing to order that both parties pay the costs of the valuation of the Plymouth property in the ratio of the entitlement he had ordered, where the appellant was successful in her application for the equal share rule to be varied (ground t)

[216] In the light of the manner in which it is proposed that this appeal is to be disposed of, it is also unnecessary to make any comments regarding this ground.

The counter notice of appeal

Whether the respondent is entitled to a 20% share in Plymouth by virtue of proprietary estoppel

[217] Although the respondent filed a counter-notice of appeal asking this court to affirm the judgment of the learned judge on the bases on which he decided the case, he posited an alternate ground that the 20% interest in the Plymouth property, declared by the learned judge, is further supported by the equitable principle of proprietary estoppel.

[218] Mrs Kitson asserted that such a claim in equity is ousted by PROSA. Mrs Newby, however, submitted that the ability to make such an alternate claim is supported by the first instance authority of **Paul Everton Campbell v Diahann Rose Campbell** (unreported), Supreme Court, Jamaica, Claim No 2000/E 528, Judgment delivered 4 April 2008 (at pages 9-10). Based on that case, she claimed that the jurisdiction of the court to hear an alternate cause of action in equity is retained in cases dealing with PROSA. Therefore, she submitted, since proprietary estoppel is available as an alternative cause of action, through which an alternative remedy is available to the

respondent in this case, and since this alternative cause of action was pleaded in the court below and was not challenged by the appellant, the respondent ought to succeed on this ground.

[219] Although the fixed date claim form filed by the respondent sought, at item 2, an alternative declaration that the respondent was entitled to 50% share in Plymouth "pursuant to equity created by estoppel, the learned judge did not deal with this aspect of the claim in his reasons and made no order with respect to it.

[220] The respondent having made an application under PROSA, and the learned judge having determined that PROSA's provisions were applicable, no question of proprietary estoppel can arise in this particular case. Section 4 of PROSA explicitly directs that its provisions are to replace the rules and presumptions of common law and equity in relation to property transactions between spouses, where provisions are made by it. The parties are spouses and the dispute relates to the family home for which provisions are made under PROSA. So, the respondent having made an application for a share in the family home under PROSA, and the learned judge having determined the claim pursuant to the provisions of PROSA, in my view, no claim in equity can properly be brought for the same property "in the alternative".

[221] The cases cited by the respondent do not assist. The case of **Paul Everton Campbell v Diahann Rose Campbell,** in particular, had nothing to do with PROSA or an alternate claim in equity, and related to an application for maintenance for a child under the Children (Guardianship and Custody) Act.

[222] In any event, even if I am wrong on that point, the cosmetic improvements to the property on which the respondent relies, on his own account, were voluntarily made for his own benefit. There is no evidence from the respondent that the appellant knowingly encouraged him to act to his detriment, on the appellant's assurances of expectation that he would gain an interest in the property. In those circumstances, that

being the minimum requirement for such an estoppel to exist, a claim for proprietary estoppel would not have been made out and could not succeed, in any event.

Conclusion

[223] In this claim for division of shares in the family home brought under section 6 of PROSA, the learned judge was correct to find that the Plymouth property was the family home, pursuant to section 2 of PROSA. He was also correct to find that, on the application of the appellant, under section 7 of PROSA, in the circumstances of this case, it would be unreasonable or unjust to apply the equal share rule to give the respondent a 50% share. In doing so, he correctly took account of the short duration of the marriage and the fact that the appellant owned the property for years prior to the marriage.

[224] Although this court is reluctant to depart from findings of fact made by a trial judge, and to interfere with an exercise of his discretion, in this case, the conclusion that the respondent is entitled to a 20% interest in the Plymouth property, taking into account relevant factors, is simply not supported by the evidence. The evidence points to the inevitable conclusion that it would be unreasonable or unjust, in all the circumstances, to award the respondent any share in the Plymouth property, having regard to the nature of the parties' relationship prior to marriage, the intention of the parties, and the minor contributions made by the respondent to the property and the union during the very short marriage.

[225] The learned judge's finding that there was a common intention for the parties to share in the beneficial interest in the Plymouth property formed at or after its acquisition and before the parties were married, whilst the respondent was married to someone else, is factually unsupportable. His finding that the respondent was integrally involved in the running of the family household, and that the respondent's contributions to the property were not insignificant were not borne out by the evidence. The learned judge also failed to properly treat with the evidence of Reverend Mullings, which

supported the appellant's assertions. He also failed to reconcile the inconsistencies in the respondent's evidence.

[226] As far as the respondent's alternative claim in equity is concerned, the court having determined that PROSA was applicable to the claim and learned judge having determined the case under the provisions of PROSA, no alternative claim based on the equitable principle of proprietary estoppel can properly be entertained. In any event, the respondent provided no evidence, here or in the court below, which could successfully support such an equitable claim.

[227] For those reasons, the appeal ought to be allowed and the orders of the learned judge set aside. The respondent's counter-notice of appeal should fail. The appellant should have her costs in this appeal as well as in the court below.

FOSTER-PUSEY JA

[228] While I agree with the decision that the appeal should be allowed, the counter-notice dismissed, and that a declaration be made that Dr Collie is not entitled to any share in the Plymouth property, I wish to add my perspective on some of the matters which have arisen for consideration in the appeal.

[229] The learned judge, at paragraph [42] of his judgment, found that it was clear on the evidence that the Plymouth property was the family home of the parties for the purposes of the Property Rights of Spouses Act ('PROSA'). This finding, which on the facts of this case was unavoidable, was not challenged by the appellant.

[230] In the following section of the judgment, under the heading "PRESUMPTION OF EQUAL SHARES", the learned judge examined section 6 of PROSA, which establishes the presumption that each spouse will be entitled to one-half share of the family home. He considered various exceptions to that presumption, concluded that they did not apply, and then proceeded to section 7 of PROSA (see paragraph [48] of the judgment). Thereafter the learned judge considered **Stewart v Stewart** [2013] JMCA

Civ 47, which discussed the application of section 7 of PROSA, and **Gardner v Gardner** [2012] JMSC Civ 54 and **Duncan v Duncan** [2015] JMSC Civ 75, both Supreme Court judgments, in which the court accepted five years as the upper limit for what constitutes a short marriage.

[231] Having established the principles flowing from section 7 of PROSA, the learned judge then considered how to resolve the question as to whether the equal share rule should be varied in the case at bar, under the segment of his judgment entitled "PRESUMPTION OF EQUAL SHARES: TO VARY OR NOT TO VARY". The learned judge stated that the marriage was of short duration and acknowledged that Mrs Crooks-Collie was the sole legal owner of the Plymouth property, which she bought in 2003 and extensively renovated, prior to the parties' marriage.

[232] The learned judge referred to Dr Collie's evidence that the Plymouth property was purchased at the point at which he had "separated from his former wife in anticipation of the two finding a place for them to eventually have a family home". He also noted that Dr Collie stated that it was the mutual intention of himself and Mrs Crooks-Collie that the Plymouth property would be the family home. At this point, in my view, the learned judge was examining the issue of the parties' common intention so as to assist him in his analysis as to whether to vary the equal share rule. I agree that it was permissible for the learned judge to take the parties' common intention into consideration in this regard. I do not believe that the learned judge was utilising the issue of common intention to determine whether the Plymouth property was the family home. He had already, earlier in the judgment, determined that the Plymouth property was the family home.

[233] Dr Collie's case emphasised the issue of common intention as to where the family home would be located. Since the location of the family home, in light of the statutory definition, can be determined without any reference to the intention of the parties, it is clear that Dr Collie was intently focusing on common intention as to the location of the family home, with a view to establishing an agreement between himself

and Mrs Crooks-Collie, to share the beneficial ownership of the Plymouth property. He supported this with his evidence that he expended funds on the property and assisted with the bills for the running of the household. The learned judge utilised a similar approach and, in my respectful view, fell into error. One of the challenges I have with this approach is that it was made to appear that an agreement for Dr Collie to live at the Plymouth property, or allowing him to do so, was equivalent to an agreement for him to share in the beneficial interest in the property. I will highlight a few other matters below.

[234] In exploring the question of the alleged common intention of the parties, the learned judge stated that Dr Collie moved his furnishings to the Plymouth property and began to treat it as his home from 2008. The learned judge opined that, even though Dr Collie was still married to his ex-wife, this showed that he and Mrs Crooks-Collie were displaying their intentions to treat the Plymouth property as their home. The learned judge noted that from 2008, Dr Collie began to take on the 'roles' of man of the house, though in law he was still married to someone else, and expressed the view that Dr Collie's actions leading up to the time of the marriage were "consistent with his assertion that the mutual intention at the time of their marriage was that the Plymouth property would become the family home after the wedding". Upon a review of the evidence led, however, it is apparent that although Dr Collie pursued a line of common intention, most of his evidence focused on himself - what he did and what he thought.

[235] The learned judge went on to juxtapose Mrs Crooks-Collie's assertion that the Plymouth property was never intended to be the matrimonial or family home, and that the deed of arrangements was to solemnise that intention. The learned judge queried why the parties would proceed with the marriage despite the deed of arrangements not being signed. However, he did not address the evidence of Reverend Mullings that Dr Collie had agreed to sign the document after the wedding.

[236] While I understand that this court should be constrained in its review of findings of fact made by judges at first instance, due to the advantage that they have, it is my

view that the learned judge erred in how he treated with the evidence of Reverend Mullings. Reverend Mullings provided pre-marital counselling to the parties and stated that two issues discussed between the parties concerned the signing of a pre-nuptial agreement or a deed of arrangements, which Mrs Crooks-Collie had requested, as well as her request that the Plymouth property not be considered as the family home. Dr Collie, in cross-examination, agreed that prior to the marriage, Mrs Crooks-Collie raised the issue of a pre-nuptial agreement. He, however, did not agree with the suggestion made to him that Mrs Crooks-Collie had said that the Plymouth property was to be hers and he testified that she had not said what was to be in the pre-nuptial agreement. In addition, he did not agree to the suggestion made to him that Mrs Crooks-Collie had stated that if the pre-nuptial were not signed, there would be no marriage (see pages 222 and 225 of the record of appeal).

[237] The learned judge stated that the evidence of Reverend Mullings did not assist in determining what was the intention of the deed of arrangements, as "no date was given as to when many of the events he speaks of took place". I agree with my colleagues that this was not a proper basis on which to dismiss the evidence of Reverend Mullings, as the timing of the discussions was clear on the evidence.

[238] In contrast with the position of my brother, Brooks JA, however, in my view, the learned judge ought to have made an explicit finding of fact on the dispute of the evidence between Reverend Mullings and Dr Collie. This is because that evidence was an important dimension in considering the issue of any alleged common intention between the parties as to the sharing of the beneficial ownership in the Plymouth property. Furthermore, Dr Collie's evidence that a pre-nuptial agreement was raised and discussed prior to the marriage, together with Reverend Mullings' evidence, if accepted, could reasonably bring into question the alleged common intention on which Dr Collie relied.

[239] The issue of the alleged common intention of the parties in respect of beneficial ownership of the Plymouth property was also to be weighed in the light of other

evidence. Mrs Crooks-Collie asserted that the common intention, which they had, was for a family home to be built on the property at Cherry Hill. Cherry Hill was, however, sold before any of the proposed townhouses were built on it. In cross-examination, Dr Collie stated that it was never the plan to sell Cherry Hill. The plan was to build several townhouses and, once he married Mrs Crooks-Collie, he would put her name on the townhouse that he was to get, and "build a family setting which would include Claudette and my daughter [C]". It was certainly open to the learned judge to accept the evidence of one party over the other as regards their alleged "common intention" as to where would be regarded as the family home. However, the learned judge ought to have indicated how he treated with this evidence, which Dr Collie gave, in deciding to prefer Dr Collie's account of the parties' common intention.

[240] There was much argument on the question as to how the court should treat with the contributions which Dr Collie made while he was still married to his former wife, that is, before he married Mrs Crooks-Collie. Respectfully, I do not believe that it would be correct to state that, as a general rule, contributions to and conduct towards property by parties in an extra-marital affair cannot be viewed as referable to any common intention to treat as and share ownership of the "family home". There may be instances in which such a common intention can be made out. It turns out, however, that in the case at bar, it is questionable whether there was any common intention for Dr Collie to have a beneficial interest in the Plymouth property. In addition, I agree that, at best, the contributions that Dr Collie made could only be described as miniscule.

[241] Bearing in mind the extremely short duration of the marriage, the fact that Mrs Crooks-Collie bought and substantially renovated the Plymouth property, without any assistance from Dr Collie, the doubtful nature of any common intention between the parties as regards the sharing of the beneficial interest in the Plymouth property, and the miniscule nature of Dr Collie's contributions to the "cosmetic" appearance of the Plymouth property, I agree with the conclusion of Brooks JA and Edwards JA that the learned judge erred in apportioning a 20% share of the property to Dr Collie. I also

agree that he should not have any share in the property and that the orders proposed by Edwards JA be made.

BROOKS JA

ORDER

1) The appeal is allowed and the counter-notice of appeal is dismissed.

2) The orders of the learned judge made on 15 January 2016 are set aside.

3) It is hereby declared that the respondent Dr Charlton Collie is not entitled to any share or interest in the property situated at Plymouth Avenue, comprised in the Certificate of Title registered at Volume 1170 Folio 106 of the Register Book of Titles.

4) The injunction granted herein on 21 December 2016 and varied on 20 December 2017 is hereby set aside.

5) Costs to the appellant Mrs Claudette Crooks-Collie here and in the court below.