[2015] JMCA Civ 42

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 23/2012

BEFORE: THE HON MR JUSTICE DUKHARAN JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE McDONALD-BISHOP JA (AG)

BETWEEN	**CARLENE MILLER**	**1ST APPELLANT**
AND	**OCEAN BREEZE SUITES AND INN LIMITED**	**2ND APPELLANT**
AND	**HAROLD MILLER**	**1ST RESPONDENT**
AND	**OCEAN BREEZE HOTEL LIMITED**	**2ND RESPONDENT**

26 March and 17 July 2015

Michael Hylton QC and Ms Melissa McLeod instructed by Hylton Powell for the appellants

Ms Marjorie Shaw and Miss Terry-Joy Stephenson instructed by Brown & Shaw for the respondents

DUKHARAN JA

[1] I have read, in draft, the judgment of my brother, Brooks JA. I agree with his reasoning and conclusion and have nothing that I can usefully add.

BROOKS JA

[2] Both Mr Hylton QC, for the appellants, and Ms Shaw, for the respondents, agreed on what constitutes the crux of this case. It is whether a judge, considering the

division of matrimonial property which is not included in an agreement between the spouses, is entitled to consider the allocation of the property dealt with in that agreement. Mr Hylton submitted that there is no such entitlement while Ms Shaw asserted that there is. Sections 10 and 14 of the Property (Rights of Spouses) Act ("the PROSA") are the main elements to be considered in assessing this issue. Before that assessment is done, however, it is necessary to introduce the parties and set out the background leading to their dispute.

The factual background

[3] The marriage between Mrs Carlene Miller and Mr Harold Miller disintegrated in or about 2008, after 15 years. They had been living in the United States of America ("the United States") where they met and married, having both previously emigrated from Jamaica. During their marriage they acquired four parcels of real estate in the United States and two in Jamaica.

[4] Among the final rites executed in bringing their marriage to an end, was a separation agreement entered into in Connecticut in the United States. It dealt with five of the six properties. They agreed that three of the four properties in the United States would be transferred to Mrs Miller and the remaining one to Mr Miller. By the agreement, a property situated at Top Hill in the parish of Saint Elizabeth was to be transferred to trustees on trust for the three children of the marriage. Nothing was said, in that agreement, of the second Jamaican property. It is now the subject of the appeal which is before this court.

[5] That property is located at Yardley Chase in the parish of Saint Elizabeth. It is part of a larger parcel of land with a registered title. It was land alone when it was purchased in 2004 and title thereto was taken by Mr and Mrs Miller, by a deed of indenture, in their joint names. The curious attempt at reversion to a common law method of holding title has not been raised as an issue in this appeal or in the court below. Nor has the issue of the interest, if any, of the registered proprietor been raised.

[6] Between 2004 and 2007 both parties participated in constructing a building on the land. They intended for the property to be used as a hotel and it was so used for some months, under the management of the second appellant, Ocean Breeze Inn and Suites Limited, hereafter called OBIS, in which they were the majority, if not the only, shareholders. OBIS has been inaccurately named in the notice of this appeal as "Ocean Breeze Suites and Inn Limited".

[7] It seems to be common ground that the hotel featured significantly in the marriage having been placed under stress. Mrs Miller was mainly based in the United States where she was employed to a bank, while Mr Miller would often travel to Jamaica to supervise the construction of the building and later, the management of the hotel. At some point they quarrelled over his reporting to her on the operation of the hotel and about his relationship with its female manager.

[8] Thereafter, things went downhill, and they separated in or about July 2007. Mrs Miller later accused him of preventing her from entering the hotel and she filed divorce

proceedings in the United States. Court proceedings included a stipulation being signed by them in November 2007, and the separation agreement, mentioned above, which was signed on 1 December 2008.

[9] The litigation in Jamaica commenced in March 2009 with two claims being filed in the Supreme Court. In the first, Mrs Miller and OBIS sued Mr Miller and Ocean Breeze Hotel Limited, which he had incorporated after their disagreement, to operate the hotel. The claim involved the operation of the hotel and the holding and use of its assets. That issue is not involved in this appeal.

[10] The second claim concerned the beneficial ownership of the real estate at Yardley Chase. In this claim, Mrs Miller primarily sought an order that she was solely entitled to the beneficial interest in the property. She asserted that it was she who had provided all the funds with which it was purchased, and the majority of the funds used to pay for the construction of the building. She accepted, however, that it was Mr Miller who had carried out the transaction for purchasing the land and who was mainly involved in the supervision of the construction. In the circumstances, she claimed, in the alternative, that if the court were minded to declare that Mr Miller had an interest in the property, that their interests should be severed and that she should have the first option to purchase Mr Miller's interest. Additionally, she claimed an order for Mr Miller to account for his sole use of the property. Mr Miller's response to the claim was that he was the sole source of the funds for the purchase of the land and provided the majority of the monies used to build and equip the building.

The findings by the learned trial judge

[11] The claim with these competing positions came on before the Supreme Court for trial. The learned trial judge heard evidence from Mrs Miller and her witnesses as well as from Mr Miller. On 27 January 2012 he dismissed both claims and ordered Mrs Miller to transfer her interest in the property to Mr Miller.

[12] The learned trial judge based his decision on three main factors, namely, the relative contribution of the parties to the development of the property, the fact that Mrs Miller "got all three properties in the United States of America absolutely and one property in Jamaica to be held in trust for the children" and the fact that Mr Miller did not have legal advice when he signed "away his interests" in the separation agreement. Based on these findings the learned judge concluded at paragraph [11] of his written judgment:

> "[11] In considering the effect the law would have on this property at Yardly [sic] Chase, this court is of the view that [Mr Miller's] contribution in terms of the four other properties, his procurement of the land, his efforts in the building of the hotel and management of same far outweighs [Mrs Miller's] contribution."

[13] It would have been noticed that the learned trial judge made reference to only five properties. Although it is not entirely clear from his judgment, it should be noted that one of the four properties in the United States was not in the joint names of the parties, but was in Mrs Miller's sole name. It had previously been in the joint names of her brother and herself but the brother had died by the time the separation agreement

was signed. She had, however, made it clear that the separation agreement included that property because of the attitude of the law in Connecticut to matrimonial property.

The appeal

[14] The learned trial judge's findings concerning the number of properties involved was only one of the findings of fact which were criticised by Mrs Miller on appeal. Mr Hylton submitted that the learned trial judge had made at least three other erroneous findings of fact, in stating:

(1) that there was no dispute that it was Mr Miller who purchased the property at Yardley Chase;

(2) that the evidence of a witness named Andrew Townsend suggested that Mr Miller's auto business in the United States "became vastly superior to that of [Mrs Miller's] uncle with whom [Mr Miller] had started working"; and,

(3) that it did not seem that Mr Miller had legal advice or representation when he signed the separation agreement, and that he seemed "to have complied with the orders of [Mrs Miller] in signing away his interests".

[15] These erroneous findings, learned Queen's counsel submitted, together with what, he argued, was an error by the learned trial judge in taking account of the contents of the separation agreement, constitute a basis for this court setting aside the

learned trial judge's decision, making findings of its own, based on the evidence, and coming to its own conclusion. Mr Hylton pointed out that the error in the learned trial judge's decision is demonstrated by the fact that it was never Mr Miller's case that Mrs Miller was not entitled to any interest in the property. He argued that the learned trial judge's finding that Mr Miller was solely entitled thereto was therefore wrong in law and in fact.

[16] Ms Shaw submitted that the errors of fact identified by Mrs Miller were more perceived than real. She submitted that it was clear from his judgment that the learned trial judge had rejected Mrs Miller's case. Learned counsel submitted that not only was the learned trial judge entitled to reject the exaggerated claims of contribution to the property by Mrs Miller, but when sections 10 and 14 of the PROSA were considered, as they ought to have been, it would be clear that the learned trial judge came to the right conclusion. Ms Shaw submitted that, having regard to the quality of the evidence, the learned trial judge was entitled to arrive at the conclusion that he did.

The analysis

[17] The analysis of this appeal requires a consideration of the treatment by this court of findings of fact by the learned trial judge and, as has already been mentioned, the recognition, if any, to be given to the contents of the separation agreement. The principles, once identified will be applied to the circumstances of this case.

A. The treatment of the findings of fact

[18] It has been stated repeatedly that this court will not disturb the findings of fact by the tribunal of first instance unless it is clear that that tribunal was "plainly wrong" in that regard. The point was re-emphasised in the fairly recent decision of the Privy Council in **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21. In its opinion the Board stated, in part, at paragraph [12]:

> "...It has often been said that the appeal court must be satisfied that the judge at first instance has gone "plainly wrong". See, for example, Lord Macmillan in *Thomas v Thomas* [[1947] AC 484] at p 491 and Lord Hope of Craighead in *Thomson v Kvaerner Govan Ltd* 2004 SC (HL) 1, paras 16-19. This phrase does not address the degree of certainty of the appellate judges that they would have reached a different conclusion on the facts: *Piggott Brothers & Co Ltd v Jackson* [1992] ICR 85, Lord Donaldson at p 92. **Rather it directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole.** That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. **The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions.** Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence: *Choo Kok Beng v Choo Kok Hoe* [1984] 2 MLJ 165, PC, Lord Roskill at pp 168-169." (Emphasis supplied)

[19] In applying the principles to be gleaned from their Lordships' opinion, it is necessary to determine whether it was permissible on the evidence for the learned trial judge to have made the findings that he did. If it is found that he did make an error in

his findings of fact, it is also necessary to determine whether that error was so material as to undermine his conclusions.

[20] It must also be noted that a trial judge must give reasons for his decision if the issue involves more than a straightforward factual dispute. In **Flannery and Another v Halifax Estate Agencies Ltd** [2000] 1 All ER 373, the Court of Appeal of England and Wales held that "[w]ithout such reasons, [the judge's] judgment was not transparent and it was impossible to tell whether the judge had adequate or inadequate reasons for his conclusion".

[21] There is merit to some of the complaints made by Mr Hylton about the learned trial judge's findings of fact. Mr Hylton's first complaint in this regard is that the learned trial judge made a grave error as to who had funded the purchase of Yardley Chase. That error, learned counsel submitted, undermined the learned trial judge's conclusions.

[22] The learned trial judge stated at paragraph [4] of the judgment:

> "...There is no dispute that it was [Mr Miller] who purchased the property at Yardly [sic] Chase, did the actual purchase and obtained title in both names and that he assisted in the actual construction of the hotel thereon."

[23] If it is that the learned trial judge meant that Mrs Miller accepted that it was Mr Miller who had funded the purchase, as the sentence seems to suggest, then the learned trial judge was in error in that regard. Each party claimed to have solely funded the purchase. There was, however, no dispute that it was Mr Miller who carried out the transaction, secured the indenture of conveyance and assisted in the

construction. In paragraph [5] the learned trial judge seems to have put the issue back in its correct perspective. He stated:

> "The source of the money needed to purchase the property and build the hotel is disputed...."

Although he seemed to have corrected himself, the learned trial judge made a finding at paragraph [11] which seems to suggest that he reverted to his original premise that this was an uncontested fact. Without stating that he had made a finding that resolved the dispute, the learned trial judge found that Mr Miller's contribution, in "his procurement of the land", contributed to the fact that Mr Miller's input outweighed Mrs Miller's. Based on that analysis it must be said that the learned trial judge did make a fundamental error of fact in this regard.

[24] The second finding complained about by Mrs Miller, is that the learned trial judge misinterpreted the evidence of her witness, Mr Andrew Townsend, as saying that Mr Miller's business "became vastly superior" to Mrs Miller's uncle, Mr Errol Townsend's, business. The importance of this finding is that it is an important part of Mrs Miller's case that a significant portion of the funding of the construction of the hotel was a loan of US$400,000.00 from Mr Errol Townsend. She said that Mr Errol Townsend operated a successful business and was very helpful to members of his family, as he also was to Mr Miller. Mr Errol Townsend is Mr Andrew Townsend's father.

[25] Mr Miller, on the other hand, denied any knowledge of that loan. It was his case that Mr Errol Townsend could not have afforded such a loan because he was a man of modest means. It was common ground that Mr Errol Townsend had employed Mr Miller

when the latter first went to the United States. It was Mr Miller's case, however, that he branched out on his own and, thereafter, operated a successful business. It was that success that allowed him to finance the construction along with the assistance of a loan of US$127,000.00 which was secured by a charge on one of the properties in the United States.

[26] The learned trial judge resolved this conflict in the evidence by referring to the evidence of Mr Andrew Townsend as being in support of Mr Miller's case. The learned trial judge said, at paragraph [6] of his judgment:

> "[Mr Miller] at first worked for [Mrs Miller's] uncle but soon built up his own business and the evidence of [Mrs Miller's] witness Andrew Townsend suggest [sic] that [Mr Miller's] auto business became vastly superior to that of [Mrs Miller's] uncle with whom he started working."

[27] A fair reading of Mr Andrew Townsend's evidence does not support the learned trial judge's interpretation. Mr Andrew Townsend said, at paragraph 12 of his witness statement:

> "To my knowledge my father Errol Townsend has 3 other children in addition to me. I have heard that he also has 2 other children but I have never met them. My father always maintained me while I was growing up.
>
> Even though I have never been to the United States even [Mr Miller] himself has told me that **he** operates a very large garage business and also has as used car dealership. Even [Mr Miller] himself used to tease me about how my father was one of the richest men in America but yet here I am in Jamaica suffering." (Emphasis supplied)

That extract seems to suggest, as Mr Hylton submitted, that it was Mr Errol Townsend's business that was prospering, according to Mr Andrew Townsend. The "he", in the

context, is a reference to Mr Errol Townsend and not to Mr Miller. It is recorded at page 15 of the notes of evidence that Mr Andrew Townsend testified to that effect.

[28] Despite that error, there was other evidence that supported the learned trial judge's conclusion on this point. For example, Mr Miller, at page 6 of his witness statement, said:

> "[Mrs Miller's] Uncle ERROL TOWNSEND [sic], is a body repair man of modest means who always alluded to having insufficient resources to meet his obligations"

He then went on to give examples of Mr Errol Townsend having been taken to court by two different women for child maintenance. Mr Miller, at page 4 of his witness statement, addressed the capacity of his own operation. He said:

> "…The construction of the hotel began in or about March, 2004 and was funded primarily from the income that I obtained from the operation of my garage and from the restoration and sale of damaged and used motor vehicles...."

He stated that Mrs Miller's financial contribution was no more than US$20,000.00 (page 5 of his witness statement).

[29] Based on that analysis, it cannot be said that there was no basis on which the learned trial judge could have arrived at that conclusion of fact.

[30] The third complaint concerning the learned trial judge's findings of fact was that Mr Miller did not have legal advice when he signed the separation agreement. The learned trial judge also seemed to have suggested that Mr Miller was not acting in accordance with his will at the time, but rather was bowing to Mrs Miller's will. The learned trial judge expressed himself this way, at paragraph [10] of his judgment:

> "It does not seem that [Mr Miller] had legal advice or representation when he signed the agreement in respect of the four properties jointly owned. He seems to have complied with the orders of [Mrs Miller] in signing away his interests."

The finding was important to the learned trial judge's conclusion. It was one of the bases on which he decided that the division of the other properties had been disproportionately allocated in favour of Mrs Miller and, therefore, a balance had to be re-established in the allocation of the interests in Yardley Chase.

[31] Mr Hylton submitted that the separation agreement and the record of the proceedings in the court in Connecticut showed that Mr Miller did have legal representation at each stage. An examination of those documents supports that submission.

[32] Ms Shaw accepted that Mr Miller did have legal representation. She, however, submitted that while Mrs Miller had an attorney-at-law from Jamaica, as part of her legal team in that exercise, the record did not show that Mr Miller had that benefit. Ms Shaw submitted that although the learned trial judge was in error on that point, the evidence shows that Mr Miller was at a disadvantage in terms of legal representation.

[33] Ms Shaw's qualification of the legal representation is not supportable. It is not surprising that she was unable to point to any disadvantage that Mr Miller would have suffered. This was an agreement made in the United States in respect of the dissolution of a marriage in that country and considering the various aspects of that exercise including the custody and maintenance of children, living in that country, and

the division of the properties which were, in the main, located in that country. A property located in Jamaica was, perhaps "neutrally", agreed to be placed in trust for the children of the marriage. The property located in Jamaica, which would have been controversial, was left to be dealt with under Jamaican law. There was no disadvantage to Mr Miller.

[34] Accordingly, this finding of fact by the learned trial judge, in respect of the third complaint, cannot be supported as it is "plainly wrong".

[35] Based on these errors in the findings of fact and the significance that they held in the learned trial judge's decision, it is necessary for this court, recognising its limitation in not having seen the witnesses, to make its own assessment of the manner in which the interest in Yardley Chase ought to be allocated. Before doing so, it is necessary to consider the law concerning the allocation of interests in respect of property other than the family home, including the circumstances where a separation agreement exists.

B. *The separation agreement and the other issues to be considered*

[36] In his comprehensive judgment in **Brown v Brown** [2010] JMCA Civ 12, Morrison JA traced the process by which the PROSA was devised and promulgated. It may be gleaned from each of the judgments cited in that important case that the object of the PROSA is to achieve fairness between the parties upon the breakdown of their marriage.

[37] By the PROSA, this country has adopted, what has been described as, the "composite approach" to the division of matrimonial property. In that approach the family home is presumed, in the absence of exceptional circumstances, to be equally owned by the spouses. There is no need to expand on that aspect of the statute as this case has nothing to do with the family home.

[38] There is no similar presumption in respect of other property owned by the spouses, or either of them. The court will deal with such other property in accordance with what is fair in the circumstances. Fairness, as contemplated by the PROSA, includes the right of spouses to make agreements concerning the allocation of their property. It is section 10 of the PROSA that grants that privilege which was, to some extent, previously deemed to be against public policy. The section not only contemplates pre-nuptial contracts, but also considers agreements that are devised for settling differences. The relevant part of section 10(1) states:

> "10.-(1) Subject to section 19**-**
>
> (a) …
>
> (b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit."

Section 19 has no relevance to the present appeal.

[39] Sections 14 and 15 of the PROSA give the court guidance in outlining the wide scope of the enquiry that the court may make with regard to the division of matrimonial

property. Section 14 is very important in the context of this dispute. Included in its provisions is an outline of the matters that a court, embarking on an exercise of allocating property interests, may consider. It 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).
>
> (2) The factors referred to in subsection (1) are -
>
> (a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;
>
> (b) that there is no family home;
>
> (c) the duration of the marriage or the period of cohabitation;
>
> (d) **that there is an agreement with respect to the ownership and division of property**;
>
> (e) **such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account**.
>
> (3) In subsection (2) (a), 'contribution' means –

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which –

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) **the payment of money to maintain or increase the value of the property or any part 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**.

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

[40] From section 14 it will be seen that the court is entitled to consider the contents of a separation agreement, authorised by section 10, in determining how to fairly

allocate matrimonial property between spouses. Section 14(2)(d) states expressly that, in allocating the interest in property, other than the matrimonial home, the court may take into account "that there is an agreement with respect to the ownership and division of property". Even if that were not expressly stated, section 14(2)(e), being framed as a broad "catch all" provision, would have allowed the court to consider an agreement dealing with property, as "such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account".

[41] Section 14 shares many features in common with section 25 of the Matrimonial Causes Act 1973 of England and Wales, which gives the courts of that country guidance as to the matters which may be considered in assessing the issue of property division in matrimonial matters. The impact of the section, as later revised, was described in **White v White** [2001] 1 All ER 1 by Lord Hoffman. He said at page 7 of the report:

> "Section 25 of the 1973 Act, as substituted by s 3 of the Matrimonial and Family Proceedings Act 1984, sets out the familiar list of matters to which the court is to have regard in deciding how to exercise these powers. **Section 25(1) of the 1973 Act provides that it is the duty of the court in deciding whether, and how, to exercise these powers to have regard to all the circumstances of the case**. First consideration is to be given to the welfare of any child of the family under the age of 18. Section 25(2) provides that, as regards the exercise of these powers in relation to a party to the marriage, the court shall in particular have regard to—
>
> > '(a) the income, earning capacity, property and other financial resources which each of the parties to the marriage has or is likely to have in the foreseeable future, including in the case of earning capacity any increase in that capacity which it would in the

> opinion of the court be reasonable to expect a party to the marriage to take steps to acquire;
>
> (b) the financial needs, obligations and responsibilities which each of the parties to the marriage has or is likely to have in the foreseeable future;
>
> (c) the standard of living enjoyed by the family before the breakdown of the marriage;
>
> (d) the age of each party to the marriage and the duration of the marriage;
>
> (e) any physical or mental disability of either of the parties to the marriage;
>
> (f) the contributions which each of the parties has made or is likely in the foreseeable future to make to the welfare of the family, including any contribution by looking after the home or caring for the family;
>
> (g) the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it;
>
> (h) [in the case of proceedings for divorce or nullity of marriage,] the value to each of the parties to the marriage of any benefit … which, by reason of the dissolution or annulment of the marriage, that party will lose the chance of acquiring.'"

It will have been noted that there is no specific mention of agreements between the parties, however section 25(1), as Lord Hoffman stated, required the court to have regard "to all the circumstances of the case". The effect of the provision is identical to that of section 14(2)(e) of the PROSA which requires the court to consider "such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account".

[42] Despite the absence of a specific provision concerning agreements, the United Kingdom Supreme Court held in **Radmacher (formerly Granatino) v Granatino** [2011] 1 All ER 373 that section 25 of the Matrimonial Causes Act allowed the court to consider and give "appropriate weight" to both ante or post nuptial agreements. The caveat was that such agreements could not oust the jurisdiction of the court. Based on the reasoning in that case, section 14(2)(e) would also allow the consideration of agreements made between the parties.

[43] Section 15 of the PROSA is also important in emphasising the legislation's stress on fairness. It authorises the court to alter the interests of the spouses in property if it is just and equitable to do so. It states:

> "15.-(1) In any proceedings in respect of the property of the spouses or of either spouse (other than the family home), the Court may make such order as it thinks fit **altering the interest of either spouse in the property** including-
>
> (a) an order for a settlement of property in substitution for any interest in the property;
>
> (b) an order requiring either or both spouses to make, for the benefit of either or both spouses, such settlement or transfer of property as the Court determines; or
>
> (c) an order requiring either or both spouses to make, for the benefit of a relevant child, such settlement or transfer of property as the Court determines.
>
> (2) The Court shall not make an order under subsection (1) unless it is satisfied that it is just and equitable to do so.
>
> (3) Where the Court makes an order under subsection (1), the Court shall have regard to-
>
> (a) **the effect of the proposed order upon the earning capacity of either spouse**;

(b) the matters referred to in section 14(2) in so far as they are relevant; and

(c) any other order that has been made under this Act in respect of a spouse." (Emphasis supplied)

[44] It is also important to bear in mind that section 12(2) of the PROSA stipulates that the respective interests of the parties shall be determined as at the date of their separation. The subsection states:

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

Section 9 is concerned with interests in the family home and does not affect this case.

[45] The respective interests of spouses at the time of separation or termination of the marriage was considered by Lord Nicholls of Birkenhead in **Miller v Miller; McFarlaine v McFarlaine** [2006] UKHL 24; [2006] 2 AC 618. In addressing certain elements or strands that comprise the principle of fairness in the division of matrimonial property, Lord Nicholls said at paragraph 16 of his judgment, that unless there is good reason to depart from it, fairness requires that when the partnership ends each is entitled to an equal share of the property. He said that the principle was applicable to both short and long marriages:

> "A third strand is sharing. This 'equal sharing' principle derives from the basic concept of equality permeating a marriage as understood today. Marriage, it is often said, is a partnership of equals. In 1992 Lord Keith of Kinkel approved Lord Emslie's observation that 'husband and wife are now for all practical purposes equal partners in marriage': *R v R* [1992] 1 AC 599, 617. This is now recognised widely, if not

> universally. The parties commit themselves to sharing their lives. They live and work together. **When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary**. Fairness requires no less. But I emphasise the qualifying phrase: 'unless there is good reason to the contrary'. The yardstick of equality is to be applied as an aid, not a rule." (Emphasis supplied)

[46] Bearing in mind the broad scope of authority given to the court by sections 14 and 15, it is now permissible to consider the circumstances of this case.

C. *Application to this case*

[47] The outline of the relevant law demonstrates that, contrary to Mr Hylton's submission, the court is entitled to consider the contents of the separation agreement, in determining how to fairly allocate the interest in Yardley Chase. Having decided that the learned trial judge made fundamental errors as to the findings of fact, it is open to this court to consider the relevant factors afresh. It is recognised in this context that this court would have the limitations of not having seen and heard the witnesses.

[48] The major factors in favour of equal division, which arise from the record, are:

(a) The parties, at the time of purchase, and during the construction, intended that the property would be a jointly owned income earning asset, and both of them made contributions to the venture on that basis. Mr Miller testified to that effect at page 4 of his witness statement, and despite Mrs Miller's insistence on solely

bearing the financial burden, that is the only reasonable explanation for Mr Miller having come to Jamaica alone to conduct the purchase transaction and to be the person who would supervise and inspect the construction.

(b) The vendor's receipt for the purchase price was in both names, despite the fact that it was Mr Miller conducting the transaction and that it was Mr Miller's testimony that he alone funded the purchase.

[49] The factors in Mrs Miller's favour are:

(a) She took care of the children while Mr Miller was in Jamaica supervising the building.

(b) In the stipulation signed by the parties and their respective attorneys-at-law in November 2007, after their separation, it was stated that Mr Miller would be entitled to use the income from the hotel to meet his expenses and that of the hotel but that he would provide Mrs Miller with a full accounting of that income. This is an indication of Mr Miller's acceptance that she has a beneficial interest in the property.

(c) Although Mrs Miller was allotted two of the three jointly held properties in the United States, both were houses and subject to mortgages. Mrs Miller lives in one of the houses with the children and the other house earns rental income. The property allotted to Mr Miller was, apart from some property taxes owed on it, free and clear. The income from it was to have been used, in part, to pay the maintenance expenses for the children of the marriage, but Mr Miller sold the property and reneged on that aspect of the agreement.

(d) Mr Miller has not been supporting the children in accordance with the separation agreement. He accepted this fact at pages 11-12 of his witness statement. Mrs Miller alone bears the expenses of maintaining the children as well as the sole responsibility of nurturing and caring for them.

[50] The factors in Mr Miller's favour are:

(a) Mr Miller was personally involved in the supervision of the original construction of the hotel.

(b) The learned trial judge, having seen and heard the witnesses, rejected Mrs Miller's claim to have, with the

assistance of a loan from her uncle, been the sole financier of the construction of the hotel.

(c) Mr Miller was solely responsible for the repair of the hotel at Yardley Chase after it was damaged by a hurricane in August 2007.

(d) Mr Miller, at his sole cost, constructed a house on the land on which the hotel is built. It appears, however, that this was done after the separation agreement was executed.

[51] When considered in isolation, the contribution to the purchase of the land and the construction of the hotel building, would suggest an equality of interest. That would normally have been the result prior to the introduction of the PROSA. The law, before the advent of the PROSA, with respect to determining the beneficial interest in respect of parties who are the joint legal owners of realty, was that if the common intention of the parties at the time of acquisition of the land was to take equal shares therein, that intention should be given effect. This was stated in the decisions of this court in **Forrest v Forrest** (1995) 48 WIR 221 and **Phipps v Phipps** SCCA No 77/1999 delivered on 11 April 2003.

[52] In **Forrest**, Forte JA (as he then was) expressed the principle at pages 225-226 of the report:

> "...Where there is no express agreement [as to the respective rights of the parties], the court is entitled to determine from the conduct and contribution of the parties, what was their common intention at the time of the acquisition of the property....
>
> Where then the common intention of the parties as to their proprietary interests can be ascertained by their conduct, the court should give effect to those intentions, and declare their beneficial interest as consistent with that to which it is clear that the parties intended at the time of the acquisition of the property....
>
> In my view, the evidence to which I have referred clearly establishes, through the mouths of the parties, that each had a common intention to share equally in the beneficial interest in the house....
>
> If the court is to give effect to the common intention of the parties, the conclusion must be that they should share equally as that was their obvious intention at the time of the acquisition and at least up to the time of their separation…."

[53] In **Phipps,** the court again emphasised the importance of the intention of the parties at the time of acquisition. Harrison JA (as he then was) stated the then accepted position at pages 6-7 of the judgment:

> "…Where property is bought in the joint names of parties to a marriage and there is no declaration of any trust nor any declaration of the manner in which the beneficial interest is to be held, the presumption is that the parties had the beneficial interest in equal shares…."

[54] With the introduction of the PROSA there have been two significant changes that are relevant to this case. Firstly, section 4 stipulates that the provisions of the PROSA displace "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". Nonetheless, the court is obliged to look at the intentions of the parties at the time of acquisition and

determine their intention at that time. If that is done in this case, the circumstances do suggest a joint intention by Mr and Mrs Miller to hold the property in equal shares. It is a factor to be considered in allocating the respective interests for these purposes.

[55] Also to be considered is the fact that at the time of their separation in mid 2007 Mr Miller had not yet constructed his dwelling house on the property. An application of section 12(2) of the PROSA would seem to suggest that the equality of interest would still have been in force at that time.

[56] It may also be said that when one considers the incidents occurring after the separation, there seems to be a counter-balance for each factor in favour of one party or the other. Although Mr Miller said that he alone stood the cost of repairing the property after the hurricane damaged it and although it is an uncontested fact that he constructed his dwelling house on the land, the fact is that he was able to stand that cost, at least in part in respect of the latter expense, because he reneged on his agreement and responsibilities to stand the cost of maintaining the children.

[57] His contention that the rental from one of the properties allocated to her would have been sufficient to meet the expense of maintaining the children, is not an answer to the criticism of his conduct. It was intended and agreed that the rental from his property would have the means by which he should have borne the maintenance expense. The agreement contemplated that Mrs Miller she would, despite his contribution to the maintenance, have had the benefit of income from one of her

properties. His failure to meet his end of the bargain was therefore a real loss to her and meant cash in his pocket.

[58] Similarly, although he bore the major part of the responsibility of supervising the construction of the building on the property, it was Mrs Miller who took care of the children in his absence. Section 14(3) specifically mentions the care of children as it does the performance of work in relation to property. Care of the children does not rank lower in value than the performance of work.

[59] It should be noted that although Mr Miller stated that he solely financed the repair of the hotel from his resources, Mrs Miller testified that there would have been money in the hotel's business' bank account which would have been adequate for that purpose. No details were, however, given as to the cost of the repair or the amount of money available. The learned trial judge made no findings in respect of this dispute of fact. Similarly, although Mr Miller testified that he alone financed the cost of the house that he built on the property, there is no evidence as to the value of that building.

[60] One other element of section 14(2) needs to be considered. It is the effect that any proposed order may have on the earning capacity either of the spouses. It is said that Mr Miller is dependent on the hotel as a source of income but that the hotel is, however, not thriving because of poor road infrastructure in the area in which it is located. Strictly speaking this does not affect the question of the respective interest of the parties in the property. The operator of the hotel must pay the owners for its use and occupation of the property.

[61] Based on all the above, it seems that there is no basis for departing from the equal allocation that the parties intended at the time of their acquisition of the property and the construction of the building. As a result the fair allocation of the interest in the property should be 50 percent each.

Mr Miller's dwelling house

[62] The analysis above, stressed that Mr Miller constructed a dwelling house on the property after the parties had separated. He did so at his own cost. His expenditure would inure to the benefit of the property as a whole. Fairness would normally require, that if they are declared to be equally interested in the property as a whole, that Mrs Miller should compensate him for his expenditure by paying to him one half of the value of that structure.

[63] That approach would be consistent with that used in **Forrest v Forrest**, where payments made by one joint tenant to clear the mortgage debt owed on jointly owned property was deemed to be an advance, as to one-half thereof, to the other joint tenant, who is liable to repay that sum (see page 227g-h).

[64] That approach would not apply in this case, however, because his expenditure was facilitated by the fact that he reneged on his responsibility to maintain his children and left that financial burden for Mrs Miller to bear alone. His expenditure was not from his sole finances but partly from money that was due to Mrs Miller as compensation for her maintenance of the children.

[65] There is another point concerning his dwelling house. Although in her claim, Mrs Miller asked for a first option in purchasing Mr Miller's interest in the property, the fact that Mr Miller has his home on the property makes it more appropriate for him to be given the first option of purchasing her interest therein.

The hotel operation

[66] It was pointed out above that the appeal did not concern the operation of the hotel. There has been no pursuit of the claim for relief concerning hotel assets and an accounting for the capital ploughed into it. Based on the allocation in the analysis made concerning the ownership of the Yardley Chase property, Mrs Miller is only entitled to an accounting and payment for use and occupation for the property based on its value.

Illegality?

[67] Another curious factor in this case was a discrepancy between the figure stated in the receipt for the property as the purchase price and that stated in the consideration in the indenture of conveyance of the property to Mr and Mrs Miller. The receipt, admitted in evidence as exhibit 3, expressed the price as being $1,075,000.00 whilst the conveyance (exhibit 4), expressed it to be $750,000.00. Both were dated 30 January 2004. Mr Hylton faced the issue squarely and confessed that he had no explanation for the discrepancy. Miss Shaw did not address the point.

[68] The discrepancy did not seem to arise as an issue at the trial. The vendor, Mr John Burton, stated in his witness statement and his oral testimony on behalf of Mrs Miller, that he sold the land for $750,000.00. He was not cross-examined on that or

any other point. Mr Miller, who was the party who conducted the transaction with Mr Burton, gave no testimony with regard to this issue.

[69] The point will not unduly delay this court. The possibility exists that there was a fraud on the revenue. Ignoring the registered title for these purposes, the possible fraud did not, by itself, prevent Mr Burton's title to the property from being transferred to the Millers (see **Singh v Ali** [1960] 1 All ER 269), and, in any event, the enforcement of the contract of sale, which the court would not countenance in the event of illegality, is not an issue before the court.

Summary and conclusion

[70] The learned trial judge made certain errors of fact which were fundamental to his conclusion and therefore resulted in a flawed decision. In the circumstances this court is entitled to consider the matter afresh and make a decision that the evidence warranted, recognising that it did not have the benefit of seeing and hearing the witnesses.

[71] The provisions of section 14 of the PROSA entitles a court to consider the contents of any agreement made between the parties concerning property, in assessing the proper allocation of the interests in property not contemplated by that agreement. When the agreement, made between the parties in this case, is considered along with all the other relevant factors, it must be said that the parties should be allocated an equal interest in the property which was bought in joint names and developed jointly, at least to the stage where they separated.

[72] The developments subsequent to the separation are in favour of a finding that Mr Miller's financial input was greater than Mrs Miller's. That input is offset, at least in part, by Mr Miller's failure to stand the expense of the maintenance of his children as was agreed in the separation agreement. In the absence of evidence as to the maintenance costs and to the expenditure, equality should prevail.

[73] In the circumstances, the joint tenancy in the property should be ordered severed and the interest therein should be allocated equally between the parties. It will be necessary to have the property valued in order to allow for its disposition, either by a sale of the interest of one party to the other or by a sale of the entire property on the open market. A valuation was already done and so an updated valuation should not require a lot of time. The cost of the valuation should be borne equally but, as Mr Miller is living on the property and enjoying its benefits he should advance the cost of the updated valuation and Mrs Miller reimburse him thereafter.

Costs

[74] If the parties are held to be equally entitled to the interest in the property it means that that should have been the order made in the court below. In those circumstances, the parties would normally have borne their own costs in that court. That should be the order made in respect of those proceedings. Mrs Miller has been successful in her appeal and is entitled to have her costs in this court.

McDONALD-BISHOP JA (AG)

[75] I too have read in draft the judgment of Brooks JA. I agree with his reasoning and conclusion and do concur with the terms of the orders proposed. I have nothing that I can usefully add.

DUKHARAN JA

ORDER

(1) The appeal is allowed.

(2) The judgment and order of the Supreme Court made on 27 January 2012 is hereby set aside.

(3) It is hereby declared that, as between themselves, the first appellant, Carlene Miller, and the first respondent, Harold Miller are equally entitled to the beneficial interest in all that parcel of land with buildings thereon situated at Yardley Chase in the parish of Saint Elizabeth comprising 4640.15m^2 and depicted in a checked survey plan by D St A Dixon, commissioned land surveyor, dated 19 September 2006 (hereafter called "the property").

(4) It is hereby declared that the joint tenancy of the first appellant and the first respondent in the property is severed.

(5) The first appellant and the first respondent shall secure a valuation of the property within 30 days of the date hereof. In the event that they shall fail to agree on a valuator, the Registrar of the Supreme Court shall be empowered to appoint a valuator. The cost of the valuation shall be paid by the parties in equal shares, but the payment shall be advanced by the first respondent.

(6) The property shall be sold and the proceeds of sale divided equally between the first appellant and the first respondent, subject to order 7 below. The first respondent shall have an option to purchase the first appellant's interest within 90 days of the date hereof. The purchase price shall be one half of the value of the property as found by the valuator. Should he fail to enter into a binding agreement to purchase the first appellant's interest in the property within that time, the first appellant shall be entitled within 30 days thereafter to enter into an agreement to purchase the first respondent's interest in the property. Should she fail to enter into a binding agreement within that time the property shall be sold on the open market by public auction or by private treaty.

(7) The first respondent shall compensate the first appellant, in respect of her interest, for the use and occupation of the property from 7 November 2007 (the date of their stipulation in the Connecticut court), to the date of sale.

(8) The parties shall have liberty to apply to the Supreme Court in respect of the execution of any of these orders or any issue that arises therefrom.

(9) Each party shall bear its own costs in respect of Claim No 2009 HCV 1204. The first appellant shall have the costs of this appeal. Such costs are to be taxed if not agreed.