



[2017] JMSC Civ. 200

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV01109

BETWEEN	FAITH STERLING-SIMMS	CLAIMANT
AND	GIFTON SIMMS	DEFENDANT

IN CHAMBERS

Mr. Gordon Steer and Mrs. Kaye-Anne Parke instructed by Chambers, Bunny & Steer for the Claimant

Mrs. Vivienne M. Washington for the Defendant

Heard: 16th and 17th of November 2015, 14th, 15th and 17th of March, 25th May and 19th December, 2017

Matrimonial Property – Parties divorced – Division of property acquired during the marriage –The Property (Rights of Spouses) Act, Sections 12, 13, 14 and 15.

COR: V. HARRIS, J

Background

[1] On the 10th of March 2011, the claimant, Mrs. Faith Sterling-Simms instituted a claim against her former husband, Mr. Gifton Simms pursuant to the **Property Rights of Spouses Act** ('PROSA'). This claim was originally concerned with five

(5) properties acquired during the parties' marriage of 27 years¹. Mrs. Sterling-Simms was initially seeking a fifty percent (50%) interest in the following properties:

- (1) 10 Stillwell Avenue, Kingston 8 in the parish of St. Andrew (registered at Volume 1179, Folio 486 of the Register Book of Titles) (the 'family home');
- (2) Kensington Manor – Apartment 112a;
- (3) Kensington Manor – Apartment 203;
- (4) Gardens of Arcadia – Apartment A15 (located at 3A Torrie Avenue); and
- (5) Desmond Court – Apartment.

[2] It is to be noted, however, that both the Kensington Manor apartments², as well as, the Desmond Court apartment have already been sold. Two of the properties were disposed of during the course of the marriage and one was disposed of shortly after the parties separated. For clarity, it should be stated that these properties were disposed of prior to the institution of the claim in 2011. As such there was no contravention of section 20 of the **PROSA** which prohibits the disposal of property which is the subject of a claim made pursuant to this legislation.

[3] By the time the matter came before this court for trial, the family home was also disposed of, though not by either of the parties. It was the mortgagee who exercised its power of sale and the parties' interest in the net proceeds of sale

¹ The parties were married on the 27th of June 1981, they were separated in 2008 and the marriage was dissolved on the 17th of March 2010

² Kensington Manor – Apartment 112a was sold in or around 1997, Kensington Manor – Apartment 203 was sold in or around 2009 and Desmond Court – Apartment A15 was sold in or around 2007.

was resolved by way of consent. Accordingly, a consent order was entered on the 25th of May 2017.

- [4] Therefore, all that remains to be resolved is whether Mrs. Sterling-Simms is entitled to an interest in the Gardens of Arcadia apartment which was registered in the sole name of Mr. Simms on the 30th of March 1994. This property, which is referred to by the parties as the Torrie Avenue apartment, is registered at Volume 1266 Folio 625 of the Register Book of Titles.

The Claim

- [5] As previously mentioned, Mrs. Sterling-Simms is seeking an order that she is entitled to a fifty percent (50%) interest in the only remaining property, i.e. the Torrie Avenue apartment. She has sworn to two affidavits³ in support of her claim and was cross-examined.

- [6] It is her evidence that during the course of their marriage, Mr. Simms purchased a number of properties which they jointly contributed to. Save for the family home, her name was not registered on any of the titles.

- [7] Further, Mrs. Sterling-Simms contends that all their investments (which included real estate, shares and bonds) were funded from their joint accounts (held at three institutions)⁴ that were financed by them both. Her evidence was also that they were aggressive savers. She stated that up until 2002, her salary was lodged to a joint account held at the Bank of Nova Scotia ('BNS') and that the said account was managed and controlled by Mr. Simms.

³ Filed on the 10th of March 2011 and the 14th of September 2012

⁴ The Bank of Nova Scotia, the National Commercial Bank and Jamaica Money Market Brokers

- [8]** In addition to funding their joint accounts from their respective salaries, Mrs. Sterling-Simms also stated that the proceeds of an informal business which they operated from the commencement of their relationship to about 2003 were also deposited to these accounts. This business involved buying and selling items from the United States of America, as well as, from other places which they visited. She recounted that the most profitable period of their business was when she worked at Desnoes & Geddes Limited (from 1984 to 2002). She stated that she would sell to her co-workers and customers.
- [9]** Mrs. Sterling-Simms also gave evidence that she formed a company (Wilco Sports Limited). She claims that she borrowed money on behalf of this company and purchased property. However, it ran into difficulties and the property had to be sold after she left in 2008.
- [10]** In essence, Mrs. Sterling-Simms contends that she foolishly allowed Mr. Simms to control their jointly pooled funds and investments because she trusted him. She stated that she trusted him not only because he was her husband but because he was also a banker by profession. She stated that she was under the impression that they were working and operating as a team.
- [11]** Mrs. Sterling-Simms asserted that Mr. Simms was unwilling to discuss the details of their jointly owned assets, but stated that she was aware of shares which were acquired in six entities.⁵ She specifically referred to the year 2008 which, she said, was when they decided that she should go abroad to work and maintain their children. She alleged that it was around this time that Mr. Simms began to

⁵ Bank of Nova Scotia, National Commercial Bank, Sagicor Life of Jamaica Limited, Jamaica Banana Producers, Jamaica Money Market Brokers and Jamaica Broilers.

hide their assets and dissipate them. This, in her view, contributed to the breakdown of their marriage.

The Defence

- [12] There is very little common ground between the parties. Mr. Simms asserts that he purchased all the properties (including the family home) from his own resources. He stated that he purchased the four apartments as a part of his pension plan without any input from Mrs. Sterling-Simms, and that her name was never registered on any of the titles because there was no intention to share them with her. Mr. Simms further explained that he worked as a banker for most of his adult life (until January 2009), save for eight years when the banking sector collapsed and he was between contracts. He said that except for the time when he worked at BNS, he always worked on contract and thus did not accumulate any pension benefits. In support of his defence Mr. Simms swore to a number of affidavits. However, only the one that was filed on the 8th of June 2012 stood as his evidence in chief. He was permitted to give *viva voce* evidence and was extensively cross-examined.
- [13] Mr. Simms denied that the investments (real estate, stocks and paintings) were funded from the parties' joint accounts. He contends that these investments were funded solely by him, even though some of the stocks were purchased in Mrs. Sterling-Simms' name. He admitted that he acquired shares in four of the six entities named by Mrs. Sterling-Simms and that he invested in stocks, securities and shares for his family. He also stated that he was never an aggressive saver, as Mrs. Sterling-Simms stated, because the returns provided by the banks were low.
- [14] Mr. Simms also contends that he paid all the bills, as well as, the expenses of Mrs. Sterling-Simms' family members who lived with them for about 24 years. He denies that Mrs. Sterling-Simms' salary was lodged to a BNS joint account which he managed and controlled. What he does admit is that he paid the bills from a

personal staff account on which Mrs. Sterling-Simms' name was placed and that her salary was placed in this account for a period.

- [15] It is Mr. Simms' evidence that he did not control any jointly pooled funds, investments or property. He further states that he did not hide anything from his former wife and that even though he paid all the bills, the cheques and receipts were placed at a convenient place in the house for all to have access to them.
- [16] With regards to the informal business which generated funds for investments, Mr. Simms asserts that he started this business long before 1997, which was even before he met Mrs. Sterling-Simms. He disagreed with her assertion that the most profitable time for the business was when she worked at Desnoes & Geddes Limited. This he stated was because she only sold a small number of items and was eventually unable to continue as it was against company policy.
- [17] In relation to Mrs. Sterling-Simms' migration to the USA in February 2008, Mr. Simms stated that he was of the view that she went there for the purpose of collecting her green card and she would have to remain there for six months. It is Mr. Simms' evidence that his ex-wife did not return and he was unaware of her whereabouts. He said that he later discovered that in February 2008, Mrs. Sterling-Simms already had her green card.
- [18] In response to Mrs. Sterling-Simms' assertion that he hid their assets and began to dissipate them in her absence, he stated at paragraph 35 of his affidavit, *"Since the Claimant left, one asset was sold to liquidate loans which were spiralling out of control and before the Claimant left Jamaica, another asset was sold at her insistence and approximately One Million Three Hundred and Fifty Thousand Dollars (\$1,350,000.00) was given to the Claimant as part of the net proceeds of sale."* Even though Mr. Simms did not specify, based on the chronology of events it seems that it was the Desmond Court apartment (A15) which was sold in 2007 before Mrs. Sterling-Simms left in 2008 and the

Kensington Manor apartment (203) which was sold in or around 2009 to liquidate loans.

The Law

[19] Lord Wilson noted in **Eutetra Bromfield v Vincent Bromfield**⁶:

5. ... The Property (Rights of Spouses) Act (which also, and enviably, confers rights on certain non-marital cohabitants) confers on the court following divorce limited redistributive powers in relation to the family home and wider such powers in relation to other property: sections 13-15. It requires the court, in any redistribution of other property, to take into account not only the financial contributions, direct or indirect, which would have been relevant to the creation of an equitable interest in property but other contributions and indeed all other circumstances which the justice of the case requires to be taken into account: section 14(2) and (3).

[20] This is a case which concerns ‘other property’, that is, not the family home. As such the relevant provisions of the **PROSA** are sections 12, 13, 14, 15. It may be noted also that the statutory definition of ‘property’ is quite expansive and includes real property to which either spouse is entitled.⁷ It is therefore clear that the Torrie Avenue apartment which is registered to Mr. Simms constitutes property which can be divided.

[21] Mrs. Sterling-Simms’ application has been duly made within the period provided for by section 13 (i.e. 12 months after the dissolution of marriage)⁸ as such the court can exercise its redistributive powers under section 14(1)(b) having regard to the factors contained in section 14(2).

⁶ [2015] UKPC 19, paragraph [5]

⁷ See: section 2 of the PROSA

⁸ The Decree Absolute was granted on the 17th of March 2010 and the claim was instituted on the 10th of March 2011

The section 14(2) factors

Contribution

- [22] The issue of contribution is by far the most vexed issue in the instant case. Mr. Simms contends that Mrs. Sterling-Simms made no contribution to the family home or the investment properties (including the Torrie Avenue apartment). Whereas Mrs. Sterling-Simms asserts that she contributed to the acquisition of all the properties. She claims that her contribution came in the form of her salary which was directly deposited to a joint account at BNS from about 1979 to 2003 (that is for 24 years).
- [23] It should be noted that the Torrie Avenue apartment was purchased in 1994 and Mr. Simms accepted in cross-examination that he paid the mortgages for the properties from their joint account where both their salaries were placed.
- [24] It was suggested to Mrs. Sterling-Simms in cross-examination that she made no contribution to the acquisition of the Torrie Avenue apartment as she withdrew all her salary from the joint account. This suggestion was vehemently denied. She stated that while she did have a cheque book for the account and that she would at times draw cheques on the account, at no time did the withdrawals that she made represent her entire salary.
- [25] On this point, counsel for Mrs. Sterling-Simms submitted that the Torrie Avenue apartment was purchased by way of a mortgage which was serviced through monies placed in a joint account held by the parties. It was further submitted that, *“Notwithstanding that the property was purchased in the sole name of the defendant does it now preclude the court to find that the property was intended to be held by both parties and if not so that over the years the Claimant would have contributed to the preservation of this property thereby giving her a share therein.”*

- [26]** It seems to me that two submissions are being made, perhaps in the alternative. Firstly, Mrs. Sterling-Simms made direct financial contributions to the acquisition of the properties (particularly the Torrie Avenue apartment) because her salary was lodged to the joint account which was used to service the mortgages. Secondly or alternatively, if Mr. Simms did not use monies contributed from Mrs. Sterling-Simms' salary, then she indirectly contributed to the preservation or, to use the language of the statute, 'the conservation of the properties.'
- [27]** There appears to be some merit in the latter submission. Mrs. Sterling-Simms is clearly not in a position to prove that she directly contributed to the purchase of the Torrie Avenue apartment. However, it is her evidence that her salary was placed in the joint account which serviced the mortgage. Mr. Simms has accepted that this was so.
- [28]** With regards to her employment history, Mrs. Sterling-Simms gave evidence that she was an executive secretary at T Geddes Grant Limited at the time of the marriage. She subsequently went to work at Desnoes & Geddes Limited and then at the Lasco Group of Companies ('Lasco') before leaving to operate her own company. It is to be noted also that Mrs. Sterling-Simms' has supplied documentary evidence that she was gainfully employed to Desnoes & Geddes Limited from the 3rd of January 1984 until the 31st of July 2001 when she was made redundant. The court accepts this aspect of Mrs. Sterling-Simms' evidence. She stated that she gave Mr. Simms the money which she obtained when she was made redundant. She has also provided documentary evidence of her employment with Lasco from February 2004 to March 2005. During her employment at Lasco, she said that she received her salary by cheques which she in turn gave to her former husband.
- [29]** When asked in cross-examination Mrs. Sterling-Simms stated that she could not say how much she made per month. She estimated that she made about \$300,000.00 per month at Desnoes & Geddes Limited and about \$100,000.00 per month (plus upkeep) at Lasco. Mrs. Sterling-Simms in cross-examination did

not agree that at all times her former husband's income was much greater than hers. It would have been useful if Mrs. Sterling-Simms was able to clearly demonstrate that without her consistent deposits to the joint account, Mr. Simms' means would have been insufficient to keep up the mortgage payments. However, I bear in mind that her evidence is that her former husband was the person who managed their accounts. She also stated that although she took an interest in everything, Mr. Simms hardly disclosed anything to her and it was as if everything was "under lock and key."

[30] Mrs. Sterling-Simms also stated that she and Mr. Simms would have had discussions about their joint account from time to time but she said that she was not able to say that these discussions pertained mostly to reconciling the joint account.

[31] She admitted that she was free to write cheques whenever she felt like and that she used the cheque leaves provided by Mr. Simms. She stated however that they were not used by her without any reference to him. Mrs. Sterling-Simms stated that she stopped using the joint account when Mr. Simms stopped giving her cheque leaves.

[32] Having regard to the undisputed evidence that Mrs. Sterling-Simms made regular contributions to their joint account which serviced the mortgage(s) and I have accepted that this would have been for a period of at least 17 years (between 1984 and 2001); and during this period both the family home and the Torrie Avenue apartment were purchased (the former in 1991 and the latter in 1994), it seems to me on a balance of probabilities that she would have contributed directly to the acquisition of at least one of these properties, most likely the family home, and indirectly to the acquisition and/or conservation of the other, that is, the Torrie Avenue apartment.

[33] Despite Mr. Simms assertion that he purchased all the properties exclusively from his income, he has not brought any documentary evidence to show that his

income was sufficient to service all the mortgages, cover the household expenses and financially support the members of Mrs. Sterling-Simms' extended family who resided with them. In relation to his salary he stated in cross-examination that, *"My salary and the other things I did to augment my salary from 1991 to 2002 was enough to service all the loans and the bills in the household."* However, as indicated above, this assertion is not supported by any documentary evidence of any nature.

- [34]** He has given evidence that he took out a number of loans. These included loans from family members such as his niece in the amount USD\$21,000.00 and his mother in the amount of £2,200.00. He also took out a staff loan to purchase two motor cars.
- [35]** Even though Mr. Simms maintained that Mrs. Sterling-Simms did not contribute financially to the acquisition of any of the four apartments nor did she visit any of them, he did admit that one of the properties (Desmond Court) was sold at her insistence and that he gave her a cheque from the net proceeds. In respect of the Torrie Avenue apartment he stated that he borrowed money from CIBC (King Street) in his name alone and that this loan was eventually refinanced by BNS.
- [36]** The timing of events in this case is quite informative. It is Mrs. Sterling-Simms' evidence that she had no income in 2004 as the company was new and struggling and she stopped paying anything towards the mortgage from 2008 when she left for the USA. It is Mr. Simms evidence that after she left one of the investment properties (the Kensington Manor apartment (203)) had to be sold in or around 2009 to liquidate debts. It is not in dispute that subsequent to this, in 2012, the mortgagee exercised its power of sale over the family home because

the parties were in default for over a month⁹. While there might have been other factors at play, such as the unprofitable company, it is reasonable to infer that without Mrs. Sterling-Simms' regular monthly contributions (which would have stopped in July 2001 and then resumed for a year, from 2004 – 2005) it became difficult to manage all the parties' expenses. These expenses naturally included the conservation of the investment properties.

[37] Accordingly, I find that Mrs. Sterling-Simms did contribute to the acquisition and conservation of the investment properties (in particular the Torrie Avenue apartment) insofar that her income which was pooled with Mr. Simms for at least 17 years when the property was purchased (in 1994) and it was from this account that the mortgage was serviced. The fact that Mr. Simms' name alone was registered on title, and according to him the mortgage loan as well, is not in my view determinative. In the same vein, it is to be noted that her name was not placed on the title for the Desmond Court apartment, yet Mr. Simms stated that it was sold according to her instruction and she was given a cheque from the net proceeds of the sale.

[38] I wish to add that monies placed in an account are by its nature fungible. So Mr. Simms would have been on stronger ground if he could demonstrate that only his income was placed in the joint account and used to service the mortgage for the Torrie Avenue apartment. However, since this was not the case he would have to account for what was done with Mrs. Sterling-Simms income which was consistently deposited in their joint account. I do not accept that she withdrew all her salary from the account every month as suggested to her in cross-examination. If it was used for anything in relation to the family, which on a

⁹ Paragraph 9 of the affidavit of Mr. Richard Fraser (Vice President, Senior Legal Counsel and Company Secretary of Scotia Group Jamaica Limited) states that as at the 20th of November 2012 the mortgage was in excess of 30 days in arrears.

balance of probabilities I accept it was, then it would be difficult to say that she made no contribution. It must be borne in mind that “contribution” is broadly defined by section 14(3) of the **PROSA** and it is not confined to monetary contributions, nor are monetary contributions presumed to be of greater value.

[39] Further, I find it difficult to accept that Mrs. Sterling-Simms did not directly contribute to or assist with the mortgage of any of the properties, in particular the Torrie Avenue apartment when it is Mr. Simms’ own evidence that he did not work as a banker for eight years when the banking sector collapsed and he was between contracts. While Mr. Simms did not specify the period, this court takes judicial notice that the collapse of the financial sector is commonly regarded to have taken place in the mid 1990’s. Indeed, if this is the eight year period which Mr. Simms was referring to when he was not employed or was between contracts as he puts it, then it seems likely that at some point Mrs. Sterling-Simms would have contributed to the mortgage which was registered on the 23rd of October 1995, and which was serviced from the joint account where her salary was consistently deposited. I note that Mr. Simms gave no evidence that while he was unemployed that he made a steady income from his buying and selling business, and thus was able to meet his expenses without assistance from Mrs. Sterling-Simms.

Family home

[40] This is not a case in which there was no family home. As previously mentioned the Stillwell Avenue property was the family home. There is no longer a dispute between the parties that it belonged to them equally, both their names were registered on the title and they agreed to share the net proceeds equally.

Duration of the marriage

[41] The parties were married on the 27th of June 1981, they were separated in 2008 and the marriage was dissolved on the 17th of March 2010. As such, their marriage of over two decades is one of considerable duration. I note also that the union produced two children, none of whom are minors.

Agreement with respect to the ownership and division

[42] It is clear that there is no agreement as contemplated by section 10 of the **PROSA**. As such any agreement would have to be inferred by the conduct of the parties.

[43] It is Mrs. Sterling-Simms' evidence that she was of the view that they were working and operating as a team. I take this to mean that she believed that there was a common intention or mutual agreement between herself and Mr. Simms that they were *ad idem* that "*what's mine is yours*" with regards to their assets.

[44] On the other hand, Mr. Simms stated that the titles were indicative of ownership. He sought to distinguish between the family home which was registered in both their names and the other properties which were registered in his name solely.

[45] As previously mentioned, it was Mr. Simms' own evidence that one of the investment properties was sold at Mrs. Sterling-Simms' insistence and that she received JMD\$1,350,000.00 as part of the net proceeds of sale. Therefore, it seems to me that Mr. Simms himself has acknowledged that his former wife had an interest in that particular apartment, notwithstanding that her name did not appear on the title. The fact that it was sold because of her insistence shows that she had a say in the disposal of this property and this coupled with her receipt of some of the proceeds of sale leads me to the conclusion that the titles were not necessarily indicative of ownership, as Mr. Simms contends.

[46] I bear in mind also that Mr. Simms gave evidence that he did not hide anything from his former wife and that even though he paid all the bills, the cheques and

receipts were placed at a convenient place in the house for all to have access to them. If true, this sort of accounting to the other spouse is very much indicative of a common intention to share and supports Mrs. Sterling-Simms' view that they were operating as a team.

[47] I am also mindful of the fact that the company, Wilco Sports Limited, which was incorporated on the 10th of August 1998 obtained a credit facility from BNS which was guaranteed by both Mr. and Mrs. Simms. This credit facility was supported by a second mortgage of the family home. This to me is also indicative of the teamwork which Mrs. Sterling-Simms contends was at play. It was Mrs. Sterling-Simms' evidence that the company had two directors, herself and Mr. Simms. Each of them had 25% of the share capital and the remaining 50% was unissued. The company never made a profit and was sold in 2011 or 2012. Further, I note that when the asset of the company was sold its net proceeds were divided equally between the parties. Again, this supports Mrs. Sterling-Simms' assertion that the parties were operating as a team.

Cases relied on by counsel for Mrs. Sterling-Simms

[48] Learned counsel for Mrs. Sterling-Simms relied on the principles from the case of **Vincent Lloyd Guthrie v Dorretta May Guthrie**¹⁰ which cited at paragraph [27] the Court of Appeal case of **Gem Harris v Eugene Harris**¹¹ as being demonstrative of the treatment of joint accounts. It was acknowledged by counsel that the principles set out in **Harris v Harris** were at a time when the **Married Women's Property Act** was in place as the **PROSA** only came into force on the 1st of April 2006. R. Anderson J found:

¹⁰ (unreported), Supreme Court, Jamaica, Claim No. 2009HCV3430, judgment delivered 19 July 2011

¹¹ (1982)19 JLR 319,333

(27) *I am strengthened in the views arrived at above by the decision in the Jamaican Court of Appeal **Gem Harris v Eugene Harris [1982] 19 JLR page 333**. There, the Court held as follows [sic]:*

- a. *A common pool of funds does not require anything other than an intention that it was for the joint use of the parties and the parties having constituted a common pool from which the funds were provided to pay for property which was conveyed into their joint names, the only question arising is what proportion each should share.*
- b. *Where property is transferred into the joint names of husband and wife, prima facie the parties are treated as beneficially entitled in equal shares.*

It should also be noted that the relative contributions of each party to the joint pool does not affect the rule that prima facie each is entitled to a fifty percent(50%) share. These considerations here, are also relevant in considering the issue of the joint accounts which I deal with below.

[49] I think it appropriate to remind myself and consider as R. Anderson J did in **Guthrie v Guthrie**, that section 4 of the **PROSA** explicitly states that the rules of common law and equity and any attendant presumptions have been overtaken and replaced by the provisions of the Act. I must note that in **Guthrie v Guthrie**, the application could not proceed under section 14 as there was non-compliance with section 13 and no application for an extension of time was made. In those circumstances R. Anderson J proceeded to consider the claim according to the rules of common law and equity.¹² Such is clearly not the case in the matter at bar, as I have stated earlier at paragraph [21] herein. Mrs. Sterling-Simms' application has been duly made under section 13 and as such the court can exercise its redistributive powers under the **PROSA** having regard to the statutory considerations. Notwithstanding some factual similarities, I regard **Guthrie v Guthrie** to be quite distinguishable from the case at bar, I note

¹² See: paragraph [20]

however the colourful quote at paragraph [30] which R. Anderson J took from an unspecified source¹³ and find it to be somewhat apt:

(30) It is said: “ ‘Joint bank accounts’. Sounds so lovely and cosy, don’t they: a fiscal manifestation of a couple’s unity, a declaration of mutual trust ... Nothing says “what’s mine is yours” quite as much as pooling your resources, especially if you earn double what your partner does”...

[50] Reference was also made to the recently decided case by my brother Laing J, **Allicent Kelly-Lasisi v Jimoh Lasisi**¹⁴ which was concerned with the family home and the court’s power to vary the equal share rule. Counsel submitted that Laing J, “embarked upon a section 14 analysis in so far as the contribution of the wife,” and an important consideration was stated at paragraph [39]:

“[39] The parties did not have a joint account nor did the parties have any children together.”

Counsel submitted, “Despite this the court gave the wife a share in the family home. What however is relevant in this case is that a joint account, children and a long marriage was considered to be a contribution in of itself.”

[51] Again, I find that this case is quite distinguishable. It is factually dissimilar, as the parties were married later in life for a short duration and acquired their assets independently of each other. There was no evidence of a pooling of resources and as stated there were no children of the union. As such the “section 14 analysis” commended by counsel is not particularly helpful, the property in dispute was the family home and my brother Laing J was primarily concerned with the section 7 factors.

¹³ It appears that the quote was taken from a UK newspaper article titled ‘Should couples have joint bank accounts?’ published in the Times on the 10th of December 2009

¹⁴ [2016] JMSC Civ. 25

Cases relied on by counsel for Mr. Simms

[52] Learned counsel for Mr. Simms cited twice as many authorities. Some of which were decided ‘pre-**PROSA**’ and thus pursuant to the rules and presumptions of common law and equity. She referred the court to the dicta of Morrison JA (as he then was) from **Glenford Greenland v Camille Greenland**¹⁵ wherein he opined at page 7:

“It seems to us that although the Act intends itself to be a complete code for the division of matrimonial property, it does not entirely rule out a consideration of the earlier approach under the common law because the factors mentioned in section 14(2) to some extent replicate the former law.”

[53] Prior to the quote cited by counsel, Morrison JA clearly stated:

“It will be seen immediately that although section 4 of the Act speaks to the former presumptions of the common-law and equity having no effect in respect of property that comes within the Act, what section 14(2) does is in effect to import the same things that would have been of significance in determining the legal position when the property was owned jointly before the Act, which is to say contribution, agreement between the parties, duration of the marriage and other relevant factors.”

[54] It was submitted that, *“Notwithstanding the provisions of **PROSA** and the relevant factors which the court is mandated to examine in its application of the law, the court has a duty to also take into account a number of equitable principles which could establish an interest for the claimant under a resulting or constructive trust, and to look closely at the extent, if any, of that trust, and in that regard, the common intention of the parties is relevant.”*

[55] While I do agree that the court can consider the parties’ common intention or put another way the agreement between the parties, which I have done, I do not

¹⁵ (unreported), Court of Appeal, Jamaica, [Supreme Court] Civil Appeal No 71/2008, judgment delivered 20 January 2009

accept that the court must consider the equitable principles relevant to the establishment of an interest under a resulting or constructive trust. What I understand Morrison JA to be saying in **Greenland v Greenland** is that the older pre-**PROSA** authorities can be useful and thus relied on to the extent that they consider the factors which have been codified by section 14(2) of the **PROSA**. In any event section 14(2)(e) clearly states that the court may take into account, “such other fact or circumstances which, in the opinion of the Court, the justice of the case requires to be take into account.”

[56] Counsel cited the following cases **Judith Plummer v Andrew Plummer**¹⁶, **Richard Elliott v Sharon Brown Elliott**¹⁷ and **Gassan Elias Azan v Dawn Genevieve Azan**¹⁸. I will discuss the applicability of each case in turn.

[57] **Plummer v Plummer** was relied on for the approach that R. Anderson J took, which was to consider the principles of constructive trust and common intention where the claim was brought pursuant to the **PROSA**. It should be noted however that there was some doubt on the part of counsel as to whether the **PROSA** applied in that case¹⁹ and as such counsel relied on principles of presumed resulting trust, common intention constructive trust and proprietary estoppel. This reliance found favour with R. Anderson J who commended the approach given his view that the property in dispute was not the family home. Curiously, the section 14(2) factors were not mentioned in R. Anderson J’s statement of the law but were mentioned and considered under the heading of furniture. In my view this approach is somewhat nebulous and not particularly helpful to the determination of the instant case.

¹⁶ (unreported), Supreme Court, Jamaica, Claim No. 2006HCV00864, judgment delivered 15 June 2009

¹⁷ (unreported), Supreme Court, Jamaica, Claim No. 2006HCV03415, judgment delivered 17 September 2007

¹⁸ (unreported), Court of Appeal, Jamaica, [Supreme Court] Civil Appeal No.53/1987, judgment delivered 22 July 1988

¹⁹ See: page 11

[58] Reliance was placed on **Elliott v Elliott** wherein the court refused the claimant's claim and found that one of the properties was purchased for investment purposes and was not intended to be shared with the claimant (husband). While this may appear to support Mr. Simms' position, upon a closer reading of D. McIntosh J's succinct judgment it is clear that this case is quite distinguishable from the case at bar. In **Elliott** the evidence indicated that the claimant made absolutely no contribution to the acquisition of the properties in dispute, he was found to be an unreliable witness and crucially there was conclusive evidence that a third party (his mother-in-law) was the person who made down payments on the properties and was registered thereon as a joint tenant with her daughter (the defendant). It was this third-party (Ms. Sylvia Salkey who was not a party to the claim) that the court accepted that bought one of the properties as an investment towards securing a pension for herself. The facts of this case are entirely distinguishable in my view and it does not in any way assist Mr. Simms' case.

[59] Finally, with regards to **Azan v Azan**, it was submitted as follows:

"On the issue of the joint account and pooled resources, I implore her Ladyship to accept the decision of the Court of Appeal in Azan v Azan, when they found that shares which the Claimant, Mrs. Azan was claiming as being purchased from an account jointly owned by herself and her husband, was not so, as the evidence did not support that assertion, and her claim to a beneficial interest in the shares in Elias Azan and Sons Limited failed as there was no implied, resulting or constructive trust.

On the basis of the decision of Azan v Azan, I ask Her Ladyship to find that the Claimant has no beneficial interest in the subject real estate properties as these were purchased by mortgages obtained by the Defendant solely, and were not purchased from any pooled funds in any joint account, neither did the Claimant contribute to the acquisition of any of the properties, or to their upkeep or maintenance."

[60] It should be noted that in **Azan v Azan** the application was made pursuant to the **Married Women's Property Act** for the determination of the wife's interest in shares held in the name of her husband, in the company Elias Azan & Sons Limited. While there are some factual similarities, some being quite uncanny

such as the almost identical duration of marriage, the parties' initial occupations (secretary and sales) even working at some of the same firms (T Geddes Grant Limited) and resolving their other properties acquired together (save for one). Those aside, there are also other more significant similarities such as the parties embarking on business ventures together and pooling their resources to achieve financial success.

[61] However, there are also some critical differences. In **Azan**, the wife never paid money into the joint account from which the shares were bought nor did she withdraw from it, save for rare occasions and on her husband's request. They also used their salaries individually to purchase whatever they needed as separate individuals. This is not so in the instant case.

[62] In **Azan v Azan**, Forte JA (as he then was) referred to a number of cases on joint account and pooled funds, one of which included **Heseltine v Heseltine**²⁰ wherein Lord Denning MR recognised that each case depended on its own facts and opined:

"... In some cases where husband and wife each contribute to a joint account, the proper inference is that they are putting their moneys into the account with the intention that they should belong to them both jointly. If the marriage breaks down, investments made out of that account belong to them jointly, usually half and half, although in the name of one only: see Jones v Maynard. But there are other cases where one party provides all the money in the joint account and it is only opened and used as a matter of convenience of administration. In such cases, if the marriage breaks down, the moneys belong to the one who provided them. So do any investments made with those moneys."

Forte JA concluded at page 17 that, *"The facts of the present case (**Azan v Azan**) in so far as they relate to the joint account in the joint names of the parties, fall within the latter category described by Lord Denning MR as the accepted*

²⁰ (1971) 1 ALL ER 952, 956

evidence is that only moneys belonging to the appellant (Mr. Azan) was placed in that account, the respondent (Mrs. Azan) withdrawing from it only at times when permitted so to do by the appellant.”

[63] If the court were to place reliance on this case, as counsel for Mr. Simms suggests, it seems to be that this would tend to support Mrs. Sterling-Simms' claim rather than Mr. Simms' defence. I am of the view that the facts of the instant case fall within the former category described by Lord Denning MR rather than the latter category as Forte JA (and the majority) found.

Findings

[64] I accept that the parties pooled their resources and maintained at least one joint account which they both were able to make withdrawals from. I also accept that Mr. Simms managed their joint account at the BNS, not only because he was *au fait* with banking and finance but from his own evidence it is clear that he was very proactive. He claims that he started the informal business of buying and selling goods, made investments for the benefit of the family, accessed loan facilities, paid all the bills and expenses, and maintained and supported extended family members. Mr. Simms was adamant that he was the provider for the family. He even spoke of settling credit card debts incurred by Mrs. Sterling-Simms during the marriage and after their separation.

[65] I find that the parties' investments were funded from their pooled resources and although Mr. Simms limits the investments he made for the family to stocks, securities and shares, I find that the investment properties were also acquired for the benefit of securing the family's future and not just for his own personal retirement. It is likely that it was foresight on Mr. Simms' part, considering that he knew he would have no pension, that caused him to acquire the investment properties so that he could continue in his role as provider. As such if the marriage had lasted it seems to me that Mrs. Sterling-Simms would have benefitted from the income from the investment properties and that is why she

was able to request that one of the investment properties be sold prior to her departure to the USA.

[66] Even though both parties gave evidence in relation to items of art, furniture and bone china, I am not prepared to make any finding in respect of same. There is simply not enough information before the court. I note that counsel for Mrs. Sterling-Simms did not make any submissions in relation to these items. Accordingly, I refuse the relief sought by Mrs. Sterling-Simms that Mr. Simms account to her for same.

Disposal

[67] Based on the foregoing reasons, it is hereby ordered:

- 1) The Claimant is entitled to a fifty percent (50%) interest in the property referred to as the Gardens of Arcadia – Apartment A15 which is located at 3A Torrie Avenue in the parish of St. Andrew and which is registered at Volume 1266 Folio 625 of the Register Book of Titles;
- 2) The parties shall secure a valuation of the said property within three months of the date hereof. In the event 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 is to be borne equally by both parties;
- 3) The Defendant shall have the first option to purchase the Claimant's interest within 90 days of receiving the valuation. If he fails to exercise this option, the Claimant shall be entitled within 60 days thereafter to enter into an agreement to purchase the Defendant's interest in the property, failing which the property is to be sold on the open market. Both parties are to bear the cost of the sale equally;
- 4) The Registrar of the Supreme Court is empowered to sign any and all documents required to give effect to the orders made should any of the

parties be unable or unwilling to do so within fourteen (14) days of being notified in writing;

- 5) Each party to bear their own cost; and
- 6) The Claimant's Attorneys-at-Law are to prepare, file and serve the orders made.