[2013] JMCA Civ 47

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 15/2011

BEFORE:	**THE HON MRS JUSTICE HARRIS JA** **THE HON MR JUSTICE MORRISON JA** **THE HON MR JUSTICE BROOKS JA**	
BETWEEN	**CAROL STEWART**	**APPELLANT**
AND	**LAURISTON STEWART**	**RESPONDENT**

Gordon Steer and Mrs Judith Cooper-Batchelor instructed by Chambers Bunny and Steer for the appellant

Mrs Symone Mayhew for the respondent

6 May and 6 December 2013

HARRIS JA

[1] I have read, in draft, the judgment of Brooks JA. I agree with his reasoning and his conclusions and have nothing to add.

MORRISON JA

[2] I too have read the draft judgment of Brooks JA and agree with his reasoning and conclusion. I have nothing to add.

BROOKS JA

[3] Mr Lauriston Stewart and his estranged wife Carol are registered as joint proprietors on the certificate of title for premises known as 1 Spring Park Drive, in the parish of Saint Andrew (the premises). On 10 January 2011, a judge of the Supreme Court of Judicature rejected Mrs Stewart's claim, made pursuant to the Property (Rights of Spouses) Act (the Act), for a declaration that she was entitled to one-half of the beneficial interest in the premises. During their cohabitation, the premises undoubtedly constituted the family home. Despite this, the learned judge decided that Mr Stewart was entitled to 75% of the beneficial interest while Mrs Stewart was entitled to 25%.

[4] Mrs Stewart has appealed against that decision. She asserts that the learned judge erred in determining the respective interests of the parties, made a finding against the weight of the evidence and ignored the purpose and intent of the Act. Mr Stewart has opposed the appeal and has sought to defend and support the judgment.

[5] This appeal requires an identification of the factors that a court should consider in assessing the question of the respective interests of the parties, and a determination of whether the learned judge:

a. considered the evidence in the context of those factors,
b. gave undue weight to Mr Stewart's financial contribution to the acquisition and m aintenance of the premises, or
c. erred in considering post-separation activities in relation to the premises.

The factual background

[6] The undisputed facts of the case are that the parties married in 1978 and purchased the premises in 1981. The purchase was financed, in large part, by a mortgage loan. Undoubtly, Mr Stewart bore the major costs of financing the purchase, including the repayment and the eventual discharge of the mortgage loan.

[7] The parties lived together and raised two children at the premises until 1996 when Mrs Stewart removed and went to live elsewhere. Both parties provided support and maintenance for their children but it was Mr Stewart who bore the major financial costs, during the time of their cohabitation, of maintaining the premises and supporting the family. It was his behaviour in other respects that the learned judge found to have justified Mrs Stewart's leaving the premises. That finding has not been challenged.

[8] Subsequent to the separation, Mr Stewart occupied the premises with the two children of the marriage, one of whom, their son, died tragically in 1999. Their daughter went overseas in 2000 for tertiary education. It was not disputed that after the marital separation, Mr Stewart bore all of the financial costs associated with the premises. The support and maintenance of the children were, however, borne by both parties with Mr Stewart bearing the greater financial burden thereof. The learned judge accepted Mrs Stewart's testimony that after the separation, she continued to visit the home, up to the year 2000. This was for the purpose of rendering care to the children, and, after the death of their son, to their daughter.

The submissions

[9] Mr Steer, on behalf of Mrs Stewart, submitted that despite finding that Mrs Stewart was entitled to leave the premises, and thereby having to incur expense to house and maintain herself elsewhere, the learned judge improperly found that Mr Stewart's re-payment of the mortgage loan and the maintenance of the children, enhanced his interest in the premises. Mr Steer submitted that the learned trial judge had "rewarded" Mr Stewart for having forced Mrs Stewart to leave the family home.

[10] Despite his criticism of the decision, learned counsel supported the learned judge's finding that the premises comprised the family home, as defined by the Act. He submitted that section 7 of the Act had implicitly, and section 14(4) had expressly, removed financial contribution as being a dominant factor in determining whether the statutory rule of equal entitlement to the family home should be displaced. In that context, he argued, the learned trial judge, in relying on Mr Stewart's greater financial contribution, including contributions made after Mrs Stewart's departure, had erred in awarding him a larger interest in the family home. Mr Steer cited, among others, **Jones v Kernott** [2012] 1 All ER 1265; [2011] UKSC 53, in support of these submissions.

[11] Learned counsel relied on section 12 of the Act to support his submission that the respective interests of the parties were "concretised" at the time that the parties separated. In that regard, he submitted, Mr Stewart's contributions, made after the separation, should not have been considered in determining those interests.

[12] Mrs Mayhew, on the other hand, supported the learned trial judge's findings and judgment. Learned counsel submitted that section 7 of the Act is not restrictive in the categories that the learned trial judge was entitled to consider. She argued that financial contribution remained a relevant factor and that the learned trial judge was correct in finding that the dissimilar financial contributions, and the fact that Mrs Stewart had left the children in Mr Stewart's care, were sufficient to displace the rule of equal entitlement that is created by section 6 of the Act.

[13] Learned counsel accepted that the learned trial judge did seem to have considered the post-separation contribution but argued that she was not wrong to have done so. According to Mrs Mayhew, even if one ascertains the value at separation, activities after separation must be relevant. She submitted that even if that were an aberration in the judgment, the learned trial judge had otherwise properly stated and applied the relevant principles in arriving at the correct decision. Mrs Mayhew did, however, accept the applicability of the principle of the partial refund of post-separation expenses, to the party who has met those expenses. The cases that Mrs Mayhew relied upon in support of her submissions, included **White v White** [2001] 1 AC 596; [2001] 1 All ER 1 and **Stack v Dowden** [2007] 2 AC 432.

Analysis

a. The relevant provisions of the Act

[14] The Act has been in force for less than 10 years and the decisions at the appellate level have largely dealt with areas other than the review of a first instance decision to

depart from applying the statutory rule of equal entitlement to the family home. That is the task of this analysis.

[15] It would be appropriate to commence the analysis of this appeal with an examination of the relevant provisions of the Act. It may first be stated that the Act utilises what Morrison JA, in **Brown v Brown** [2010] JMCA Civ 12 (at paragraph [34]), termed a "composite approach" to matrimonial property. In this approach the family home is treated differently from other property owned by either or both of the spouses. Such other property will, on occasion, be referred to herein as "other matrimonial property". Unlike its treatment of other matrimonial property, the Act creates a statutory rule of equal entitlement to the beneficial interest in the family home.

[16] The composite approach mentioned above is in contrast to the equivalent English legislation, the Matrimonial Causes Act 1973, where there is no statutory equal share rule in respect of any matrimonial property. Although the composite approach is not unique to Jamaica, the position taken by the Act is not as detailed as the equivalent legislation of some other jurisdictions that have adopted that approach. The equivalent New Zealand legislation, the Matrimonial Property Act 1976 (amended and renamed "The Property (Relationships) Act 1976"), also utilises the composite approach. It, however, is far more detailed in its provisions concerning the division of matrimonial property. For example it specifically addresses the matter of contribution in respect of the matrimonial home in certain circumstances. Additionally, it applies the equal share rule not only to the matrimonial home but also to certain other family assets.

[17] From their submissions, it may be said that both counsel before us, accepted that the Act provides the courts in this jurisdiction with less flexibility than English courts are allowed, in apportioning interests in the matrimonial home, but more flexibility than that afforded to the New Zealand courts.

[18] Despite the difference in approach by the respective legislation, it is said that each seeks to achieve fairness. This was explained, in part, at page 3 of the judgment of Lord Nicholls of Birkenhead in **White v White**. Lord Nicholls went on to set out the different paths that the respective legislatures took to achieve that end. He said, in part, at page 4:

> "So what is the best method of seeking to achieve a generally accepted standard of fairness? Different countries have adopted different solutions. Each solution has its own advantages and disadvantages. **One approach is for the legislature to prescribe in detail how property shall be divided, with scope for the exercise of judicial discretion added on**. A system along these lines has been preferred by the New Zealand legislature, in the Matrimonial Property Act 1976. **Another approach is for the legislature to leave it all to the judges**. The courts are given a wide discretion, largely unrestricted by statutory provisions. That is the route followed in this country. **The Matrimonial Causes Act 1973 confers wide discretionary powers on the courts over all the property of the husband and the wife**." (Emphasis supplied)

[19] The historical underpinnings of the Act, as set out in **Brown v Brown**, are consistent with the opinion of McDonald-Bishop J (Ag) (as she then was) expressed in

Graham v Graham Claim No 2006 HCV 03158 (delivered 8 April 2008). She assessed the statutory basis for the equal share rule at paragraphs 15-16 of that case, thus:

> "15. By virtue of the statutory rule, the claimant [applying under section 13 of the Act] would, without more, be entitled to [a] 50% share in the family home...and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See **R v R** [1992] 1 AC 599, 617 per Lord Keith of Kinkel). **So, it has been said that because marriage is a partnership of equals with the parties committing themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary**; fairness requires no less: per Lord Nicholls of Birkenhead in **Miller v Miller**; **McFarlane v McFarlane** [2006] 2 AC 618, 633.
>
> 16. The object of the Act is clearly to attain fairness in property adjustments between spouses upon dissolution of the union or termination of cohabitation...." (Emphasis supplied)

[20] That dictum is a further illustration of the philosophy behind the statutory concept of the family home. The philosophy is that the contribution that a spouse makes to the marriage entitles that spouse to an equal interest in the family home. The philosophy may also be found expressed in the judgment of Lord Nicholls of Birkenhead in **Jones v Kernott**. In that case, he emphasised the effect of the joint hopes and aspirations with which parties embark on a life together in a property used as their matrimonial home, and the absence of any intention to adopt anything akin to a tally-sheet in respect of their contribution to that property. He said, at paragraphs 19-22:

"19. The presumption of a beneficial joint tenancy is not based on a mantra as to 'equity following the law'... There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. **If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint enterprise**. That is so even if the parties, for whatever reason, fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case: [2010] EWCA Civ 578, [2010] 1 WLR 2401, para 90.

20. One of the most striking expressions of this approach is in the judgment of Waite LJ in **Midland Bank plc v Cooke** [1995] 4 All ER 562, 575....:

> 'Equity has traditionally been a system which matches established principle to the demands of social change. The mass diffusion of home ownership has been one of the most striking social changes of our own time. The present case is typical of hundreds, perhaps even thousands, of others. **When people, especially young people, agree to share their lives in joint homes they do so on a basis of mutual trust and in the expectation that their relationship will endure**....'

22. **The notion that in a trusting personal relationship the parties do not hold each other to account financially is underpinned by the practical difficulty, in many cases, of taking any such account, perhaps after 20 years or more of the ups and downs of living together as an unmarried couple**. **That is the second reason for caution before going to law in order to displace the presumption of beneficial joint tenancy**. Lady Hale

pointed this out in **Stack v Dowden** [[2007] UKHL 17; [2007] 2 AC 432] at para 68 (see para 12 above), as did Lord Walker at para 33:

> `**In the ordinary domestic case where there are joint legal owners there will be a heavy burden in establishing to the court's satisfaction that an intention to keep a sort of balance-sheet of contributions actually existed, or should be inferred, or imputed to the parties**. The presumption will be that equity follows the law. **In such cases the court should not readily embark on the sort of detailed examination of the parties' relationship and finances that was attempted (with limited success) in this case**.'" (Emphasis supplied)

[21] It would be fair to say that the concept of the family home, as recognised in the legislation, may be considered in the light of that philosophy. The manner in which the composite approach of the legislation in this jurisdiction, is applied, must be determined from the provisions of the Act. As an appropriate starting point, it would be of assistance to determine the manner in which the Act defines the term "family home". Section 2(1) does so:

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

[22] In addressing the relevant provisions of the Act, it is important to note that it has replaced a principle, which previously applied, and is hinted at in the excerpt from the

judgment of Lord Nicholls, cited above. That principle stipulated that where married couples accept the title to real property in joint names, it is a rebuttable presumption that they intend to be equally beneficially interested in that property. A pithy expression of the principle concerning an acquisition in joint names may be found at page 7 of the judgment of Langrin JA (with whom the rest of the court agreed) in **Barnes v Richards-Barnes** SCCA No 77/2001 (delivered 5 July 2002) where he said:

> "Where a husband and wife purchase property in their joint names, intending that the property should be a continuing provision for them both during their joint lives, then even if their contributions are unequal the law leans towards the view that the beneficial interest is held in equal shares (see **Gissing v Gissing** [1970] 2 All ER 780 and **Cobb v Cobb**..."

An examination of the Act must therefore, bear in mind, not only its difference from counterpart statutes in other jurisdictions, but also the absence of previously existing common law and equitable presumptions.

[23] It is section 4 of the Act which stipulates that the provisions of the Act, so far as they are relevant, have replaced presumptions, concerning spouses and property, which pre-existed the Act. The section states:

> "**4.** The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions [are] made by this Act, between spouses and each of them, and third parties."

[24] Despite the replacement of the presumptions in equity and at common law, sections 6 and 7 of the Act create a statutory framework in respect of interests in the

family home. That framework is similar to the principle that was stated by Langrin JA in **Barnes**. The difference is that the statutory framework allows less scope for judicial divergence.

[25] Section 6 of the Act creates the rule that each spouse is entitled to one-half of the beneficial interest in the family home, despite the manner in which the legal interest is held. Section 6(1) states:

> "**6.** – (1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home—
>
> (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
>
> (b) on the grant of a decree of nullity of marriage;
>
> (c) **where a husband and wife have separated and there is no likelihood of reconciliation**." (Emphasis supplied)

Neither section 6(2), which deals with the death of a joint tenant, nor section 10, which deals with agreements between the parties, is relevant to this analysis. It is important to note, however, that the rule of equality created by section 6(1) may be displaced.

[26] Section 7(1) explains the method by which the statutory rule may be displaced. It authorises the court to vary the equal share rule at the request of a party wishing to dispute the application of that rule. Section 7(1) also sets out some of the circumstances that could displace that statutory rule. It states:

> "**7.**-(1) Where in the circumstances of any particular case the Court is of the opinion that it would be **unreasonable or unjust** for each spouse to be entitled to one-half [sic]

> the family home, the Court may, **upon application by an interested party**, make such order as it thinks reasonable taking into consideration such **factors** as the Court thinks relevant **including** the following-
>
> (a) that the family home was inherited by one spouse;
>
> (b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
>
> (c) that the marriage is of short duration." (Emphasis supplied)

[27] At least three things are apparent from section 7(1):

a. The section requires the party who disputes the application of the statutory rule, to apply for its displacement.
b. The use of the word "including", implies that the court is entitled to consider factors other than those listed in section 7(1).
c. The equal share rule has to be shown to be unreasonable or unjust; equality is the norm.

[28] There is no dispute as to the assertions in (a) or (b) as set out above, although the "other factors", mentioned in (b) will be discussed further, below. In respect of (c), it may be noted that the evidence required to satisfy the court that the application of the equal share rule "would be unreasonable or unjust" is different from the requirement in section 15(2), which deals with the proof in respect of other property. Section 15(2)

requires the court to be satisfied that its order, in respect of other property, is "just and equitable". In other words, in section 15(2) there is no requirement to displace the norm.

[29] In respect of the cogency of the evidence required to displace the statutory rule of equal division, Mrs Mayhew submitted that the standard of the circumstances required by section 7(1) is not as high as Mrs Stewart contends it to be. Mrs Mayhew demonstrated her point by comparing section 7(1) with the equivalent section in the legislation in New Zealand. The relevant parts of that statute, for these submissions, are sections 11 and 13. Section 11 establishes the principle of equal entitlement. It states:

> "11 **Division of relationship property**
>
> (1) On the division of relationship property under this Act, each of the spouses or de facto partners is entitled to share equally in—
> "(a) the family home; and
> "(b) the family chattels; and
> "(c) any other relationship property.
>
> (2) This section is subject to the other provisions of this Part."

Section 13 sets out the basis on which the court may depart from the principle of equal entitlement. It states:

> "13 **Exception to equal sharing**
>
> (1) If the Court considers that there are **extraordinary circumstances** that make equal sharing of property or money under section 11 or section 11A or section 11B or section 12 **repugnant to justice**, the share of each spouse or de facto partner in that property or money is to be determined **in accordance with the**

> **contribution of each spouse to the marriage** or of each de facto partner to the de facto relationship.
>
> (2) This section is subject to sections 14 to 17A." (Emphasis supplied)

[30] Learned counsel cited **Martin v Martin** [1979] 1 NZLR 97 to support her submission that the terms "extraordinary circumstances" rendering equal sharing "repugnant to justice", as used in the New Zealand statute, required a higher standard than that of "unreasonable or unjust", as used in section 7(1). In **Martin**, Woodhouse J, in New Zealand's Court of Appeal, drew a distinction between the term "unjust" and the phrases used in that statute. He said at page 102:

> "If the legislative intention had been no more than to define a simple situation 'where the circumstances make the equal sharing between the spouses unjust' then those very words could have been used. Instead [the statute requires that] the circumstances must be so 'extraordinary' that they would 'render repugnant to justice' an application of the general rule in favour of equality."

Cooke J, at page 106 of the report in **Martin**, used similar language. He approved the following statement by Quillam J in **Castle v Castle** [1977] 2 NZLR 97:

> "'Extraordinary circumstances' is a strong expression – stronger, for instance than 'special circumstances'. And 'repugnant to justice' is an unusually emphatic expression not commonly found in statutes. Manifestly it is intended to impose a more exacting test than such common expressions as 'unjust' or 'inequitable'."

[31] Mrs Mayhew's argument is a powerful one bearing in mind those statements. Considered alongside the earlier contrast between sections 7 and 15, however, it is well to bear in mind that in these cases it is the civil standard of a balance of probabilities

that should guide the court. In some cases, however, such as where a statutory rule exists, particularly cogent evidence is required to displace that rule. This was recognised by Ungoed-Thomas J (as he then was) in **Re Dellow's Will Trusts** [1964] 1 All ER 771, where he said, at page 773:

> "It seems to me that in civil cases it is not so much that a different standard of proof is required in different circumstances varying according to the gravity of the issue, but, as Morris LJ, says [in **Hornal v Neuberger Products, Ltd** [1956] 3 All ER at p 973], that **the gravity of the issue becomes part of the circumstances which the court has to take into consideration in deciding whether or not the burden of proof has been discharged**. The more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it. This is perhaps a somewhat academic distinction and the practical result is stated by Denning LJ ([**Hornal v Neuberger Products, Ltd**] [1956] 3 All ER at p 973; [1957] 1 QB at p 258):
>
> > 'The more serious the allegation the higher the degree of probability that is required; but it need not, in a civil case, reach the very high standard required by the criminal law.'" (Emphasis supplied)

Based on the above analysis, it may be said that, if the door is opened, by the existence of a section 7 factor, for the consideration of displacement of the statutory rule, then very cogent evidence would be required to satisfy the court that the rule should be displaced. The level of cogency required may not be as high, however, as that required by the New Zealand legislation.

[32] Another aspect of section 7, which requires closer examination, is the question of the other factors that the court may consider in deciding whether the statutory rule has been displaced. It must first be noted that the three factors listed in section 7(1) are

not conjunctive, that is, any one of them, if shown to exist, may allow the court to depart from the equal share rule. Secondly, there does not seem to be a common theme in those three factors by which it could be said that only factors along that theme may be considered.

[33] It is true that the first two factors, (a) and (b) mentioned in section 7(1), contain the common element that there was no initial contribution from one of the spouses to the acquisition of the family home. The third factor, (c), does not, however, include such an element. It is conceivable that, despite the marriage being a short one, there may have been active participation in, and contribution to, the acquisition of the matrimonial home by both spouses.

[34] The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration. For instance, the family home may have been inherited by one spouse, but the other may have, by agreement with the inheriting spouse, solely made a substantial improvement to it at significant cost. In such a case the court would be

unlikely, without more, to award the entire interest to the spouse who had inherited the premises.

[35] The proposition that matters such as contribution may only be considered if a section 7 gateway is opened may, perhaps, be an unconventional view. It is, however, based on a comparison of sections 7 and 14 of the Act. Whereas, by section 14, the legislature specifically allows the consideration of financial and other contributions in considering the allocation of interests in property, other than the matrimonial home, such a factor is conspicuously absent from section 7. Similarly, what may, inelegantly be called, a "catch-all" clause, placed in section 14(2)(e), to allow consideration of "other fact[s] and circumstance[s]", is also absent from section 7. From these absences it may fairly be said that the legislature did not intend for the consideration of the family home to become embroiled in squabbles over the issues of contribution and other general "facts and circumstances", which would be relevant in considering "other property".

[36] It is in section 14, that the legislature stipulates the difference in approach between the family home and other types of property. That section must, therefore, be the next to be considered. Section 14(1) states:

> "**14**.-(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-
>
> (a) **make an order for the division of the family home in accordance with section 6 or 7, as the case may require**; or
>
> (b) subject to section 17(2), divide such property, **other than the family home**, as it thinks fit,

taking into account the factors specified in subsection (2),

or, where the circumstances so warrant, take action under both paragraphs (a) and (b)." (Emphasis supplied)

[37] The emphasised portions of subsection (1) seem to exclude the provisions of subsection (2) and, by extension, subsection (3), from the consideration of a claim in respect of the family home. That is emphasised by the fact that some of the provisions in subsection (2) clearly do not apply to such a claim. The portion of subsection (1), which speaks to taking action under both paragraphs (a) and (b), does not allow for the application of section 14(2) provisions to the family home. It, instead, applies to a situation where the application concerns the family home as well as other property.

[38] Subsections (2) and (3) state as follows:

"(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."

[39] As subsections (2) and (3) seem to be expressly excluded from the consideration of the interests in the family home, it could be convincingly argued that subsection (4) is, by implication, also excluded from that consideration. Subsection (4), placed as it is, appears to be more of an explanatory note for subsection (3), rather than being a provision of general application. Subsection (4) states:

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

[40] Portions of section 14(2) have been emphasised above to demonstrate that these are factors which would readily have occurred to the legislature to have been relevant to the consideration of deviation from the equal share rule, and yet the legislature did not use that approach. For that reason it is fair to say that the legislature did not wish the family home to be embroiled in arguments involving those issues, or to be ordinarily subject to the "value judgments on which judges might differ" (see **Piglowska v Piglowski** [1999] 3 All ER 632).

[41] Since section 7 does not allow for contribution and "other fact[s] and circumstance[s]" to entitle the court to consider a departure from the equal share rule, what else, since the section uses the word "include", may be considered as factors that may lead to such a departure? Perhaps only time and experience will bring about an answer to that question. One possible scenario, however, could be where spouses, on deciding to separate, agree that a house, in which the legal interest is vested solely in spouse A, be transferred to spouse B, who is leaving the family home, in order for it to

be a residence for spouse B. If the entire legal interest in the family home were vested in A, certainly, in those circumstances, it would be open to the court to consider whether it would be unreasonable or unjust to apportion equal interests in the family home. That is just an example, but it will be sufficient to observe, at this time, that the list of factors contemplated by section 7 is not closed.

[42] The difference, for the purposes of the present analysis, between section 7 and the English legislation is that section 25(1) of the English Matrimonial Causes Act 1973 requires those courts "to have regard to all the circumstances of the case". As mentioned above, there is no rule in that statute which is equivalent to that created by section 6. Section 25(1) of the English statute applies to all property. The effect of section 25(1) would be similar to the effect of the provisions in section 14(1)(b) of the Act, where it deals with property, other than the family home. The cases based on section 25(1), although they would be helpful for assessing cases in which one or more of the factors in section 7 existed, would not be as helpful in identifying whether a particular element constituted a section 7 factor.

[43] Thus, although Lord Nicholls of Birkenhead opined in **White v White**, at page 8, that "fairness requires the court to take into account all the circumstances of the case", his comment must be considered against the background of section 25(1) of the English Matrimonial Causes Act 1973. If, therefore, a section 7 factor existed, fairness would require our courts "to have regard to all the circumstances of the case" to decide

whether an unreasonable or unjust situation existed that should lead to a departure from the equal share division.

[44] The New Zealand statute makes it quite clear that where "the Court considers that there are extraordinary circumstances that make equal sharing of property [including the family home]...repugnant to justice" the court should determine the share of each spouse "in accordance with the contribution of each spouse" (section 13 of the Property (Relationships) Act 1976). The statute does not seek to define or limit the matters that could constitute "extraordinary circumstances". It does, however, prescribe the approach that the court should take where specific circumstances, such as a marriage of short duration, are proved to exist. That statute does not assist the present analysis.

[45] The next relevant section of the Act is section 13. It provides for applications for division of property in which either or both spouses are interested, including the family home. It is important to note that such applications will not be defeated only for lack of the proper form. In **Deidrick v Deidrick** SCCA No 4/2008 (delivered 15 July 2008), Cooke JA opined that failure to stipulate that the claim is being made under the provisions of the Act, or a particular section of the Act, is not fatal to the claim.

[46] Similarly, as was carefully explained by McDonald Bishop J in paragraphs 20-24 of **Graham v Graham**, there is no necessity for a party, who is seeking, by virtue of section 7, to dispute the application of the equal share rule, to proceed by way of a formal notice of application for court orders. In assessing the complaint in that case,

that there was no formal application in place, the learned judge noted that in the Acknowledgement of Service of the Claim Form, the defendant, Mr Graham, had stated that he did not admit any part of the claim and that he intended to oppose it. She went on to say at paragraph 21 of her judgment:

> "...There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of [the disputed property]. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of [that property] and for the court to make an order in the circumstances that is 'fit and just'. This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7."

In applications under both section 7 and section 13, what is required is that the documents, as filed, make clear to the court and to the respondent, the relief that the applicant seeks. The learned judge pointed out in **Graham v Graham** that the claimant in that case would have had ample notice from the defendant's affidavit that he was applying for a variation of the equal share rule. She is correct in her assessment that his application was one in substance, if not in form.

[47] The other relevant provision of the Act, for these purposes, is section 12. It stipulates that the court should use the date of separation of the spouses as the relevant date for determining the share of each spouse in the property in dispute. The section states:

> "**12.**-(1) Subject to sections 10 and 17 (2), the value of property to which an application under this Act relates shall

be its value at the date the Order is made, unless the Court otherwise decides.

(2) **A 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.

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

Subsection (2) does fix, as Mr Steer submitted, the beneficial interests of each of the spouses, as at the date of their separation. Section 9, to which it refers, deals with an exemption from transfer tax in the case of transfers between spouses, and is not relevant to the present analysis.

[48] It cannot be successfully argued, and no attempt was made to do so in the instant case, that the term "property", as used in section 12, does not include the family home. As was shown above, that distinction was drawn in section 14(1). Section 15(1) is also an example of a provision that demonstrates that the legislature made a distinction in respect of the ambit of the term "property" when it thought it necessary. The relevant portion of section 15(1) states:

"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…" (Emphasis supplied)

[49] Having outlined and analysed the effect of the relevant sections of the Act, attention will now be turned to the practical application of its provisions.

b. The approach of the court in considering departure from the equal share rule

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

[51] If a section 7 factor is credibly shown to exist, a court considering the issue of whether the statutory rule should be displaced, should nonetheless, be very reluctant to depart from that rule. The court should bear in mind all the principles behind the creation of the statutory rule, including, the fact that marriage is a partnership in which the parties commit themselves to sharing their lives on a basis of mutual trust in the expectation that their relationship will endure (the principles mentioned in **Graham v Graham** and **Jones v Kernott**, mentioned above). Before the court makes any orders that displace the equal entitlement rule it should be careful to be satisfied that an application of that rule would be unjust or unreasonable.

c. The approach of the appellate court

[52] The court that is considering, at first instance, a dispute as to the division of the family home, should set out those matters that influenced it in arriving at its decision,

especially where it decides on an unequal division. It is then for the appellate court to determine whether the decision was in accordance with the standard set by section 7(1), namely that it was "unreasonable or unjust" to have applied the equal entitlement rule.

[53] The appellate court must bear in mind, in approaching its task, that, as should usually be the case, the judge in the court below, would have had the opportunity of seeing and hearing the witnesses as they were cross-examined (see **Chin v Chin** PCA No 61/1999 (delivered 12 February 2001)). It should also bear in mind the injunction set out at paragraph 36 of **Jones v Kernott** that it should be slow to disturb an exercise of discretion by the tribunal at first instance. There, it was said:

> "The trial judge has the onerous task of finding the primary facts and drawing the necessary inferences and conclusions and appellate courts will be slow to overturn the trial judge's findings."

[54] Nonetheless, if the trial judge has applied an incorrect principle, has misinterpreted the evidence, or has not taken into account a relevant factor, the appellate court is entitled to set aside the decision and substitute its own findings, based on the affidavit evidence and the record of the proceedings below. That is the principle established in the well known case of **Watt (or Thomas) v Thomas** [1947] AC 484, which has consistently been accepted and applied by this court.

[55] Having considered the relevant principles, attention will now be turned to the instant case.

d. analysis of the learned judge's decision in the instant case

[56] In the instant case, in his affidavit filed on 1 June 2009, Mr Stewart denied that Mrs Stewart was entitled to an equal share in the premises. In his concluding paragraph of that affidavit he asked the court to vary the equal share rule. Despite the absence of a formal application under section 7 of the Act, he had made his position clear to the court and Mrs Stewart. The want of form should not be fatal to his application. Mr Steer's restrained submission to the contrary is, therefore, not correct.

[57] In arriving at her decision, the learned judge reviewed the evidence given by both parties. Although the learned judge dealt with and decided a number of procedural points and points of law, she did not put in writing, many findings of fact. She did, however, at paragraphs 40-41 of her judgment, set out the findings that seemed to have weighed heavily with her and influenced her decision on the issue of the allocation of the beneficial interest. After stating the finding that Mr Stewart had borne the major financial burden, she said:

> "41. I accept as true, on a balance of probabilities, the evidence of Mrs. Stewart's financial contribution to her household, but in my view it was small, compared to her husband's contribution, and stopped when she left the home, over 12 years before this suit was filed. Nonetheless, I am mindful of the undisputed evidence that she played an integral role in the upbringing of her children, and consider that important contribution as I determine the respective shares in the house."

[58] It is immediately after that finding that the learned judge stated her decision in favour of Mr Stewart. She said at paragraph 42:

"I am of the view that it would be reasonable and just for Mr. Stewart to be entitled to the majority of the family home."

Upon making that finding, the learned judge stated the 75/25 division that she found appropriate and set out the procedure by which the judgment should be effected.

[59] Two criticisms may be made, in this context, about the judgment. The first may be regarded as a matter of style but the effect is important. It is that, in stating in paragraph 42 that "it would be reasonable and just", the learned judge does not communicate an appreciation of the principle that the court had to be satisfied that it would have been "unreasonable or unjust" to award equal entitlement, thereby giving priority to the norm of equal shares.

[60] The second criticism is that, having found that this was the family home, the learned judge did not, in paragraphs 40-42 or otherwise, seem to have fully considered the concept that there is more to the creation of the family home than a monetary contribution. To be fair to the learned judge, she did mention Mrs Stewart's non-financial contribution. That contribution does not seem, however, to have weighed very heavily with the learned judge. Based on the intention of the legislation, it should have done so.

[61] In addition to the two criticisms set out above, it must also be said that the learned judge's remark, that Mrs Stewart's contribution "stopped when she left the home, over 12 years before this suit was filed", implied a disregard of section 12(2) of the Act.

[62] For those reasons, it should be said that the learned judge erred in her approach.

e. The application of the law to the instant case

[63] In considering this appeal it may firstly be said, based on the comparison of sections 7 and 14 that has been set out above, there was no basis for the learned trial judge to have embarked on the exercise to consider a departure from the equal share rule. Since contribution, by itself, does not qualify as a section 7 factor, there was no section 7 factor proved and, therefore, there was no basis to consider a departure from the statutory rule of an equal division. As a result, the order should have been that the parties were equally entitled to the beneficial interest in the property. On that basis alone, the learned judge's decision should be set aside and an equal allocation of the beneficial interest substituted.

[64] Even if, as an alternative approach, one were to consider the matter from the point of contributions, the evidence concerning the acquisition of the property, the day to day realities of the marriage and the separation, an examination of the respective contributions of the parties, does not reveal that Mr Stewart had rebutted the statutory rule created by section 6. The experience of these parties, despite the greater financial input by Mr Stewart, does not indicate that they intended an approach to their lives that was different from the average married couple. There is nothing to suggest that it would be unjust or unreasonable for the interest in the family home to be shared in a way other than in accordance with the manner intended by Parliament.

[65] In **Simon v Wright** [2013] NZHC 1809, Ko's J spoke of the ordinary experience of marriage. In that case, the wife sought a greater share in the family home on the basis of her greater financial contribution to the family and the husband's depletion of family assets by way of his gambling habit and his covert borrowing of funds. On appeal from a decision refusing her quest, Ko's J spoke of her burden of proof as "the persuasive onus [which] lies upon the party invoking s 13" (paragraph 69).

[66] In assessing their marriage experience of 22 years, he stated that early disparity in contribution to the purchase price of the matrimonial home, "[j]udged from a distance of 22 years...pales into insignificance. These things happen in ordinary marriages" (paragraph 76). In dealing with the persistent disparity in financial contribution to the family ($1,785,000.00 by the wife as against $52,000.00 by the husband, over 18 years) Ko's J accepted the principle that "disparity of income is part and parcel of any marriage. It is a frequent occurrence in ordinary marriages....It is just something that happens in countless ordinary marriages" (paragraph 78). On a cumulative view of the evidence in that case, he found that there was nothing extraordinary about the experience of that couple that warranted a departure from the equal share rule. He said at paragraph 85 of his judgment:

> "None of these...considerations...amounts in my view to extraordinary circumstances meeting the test [to displace the equal share rule]. Rather they reflect the particular version of normality that applied through the course of a 22 year relationship that endured between these two parties....they are the consequence of a long relationship between one spouse who generates the bulk of the family income, and the other who does not."

Despite the fact that the New Zealand statute establishes a more stringent test than section 7 does, similar sentiments may be expressed about the matrimonial experience of Mr and Mrs Stewart, prior to their separation. The learned judge was therefore in error in finding that the imbalance in financial contribution should result in a displacement of the equal share rule.

[67] Their separation brings into focus the provisions of section 12 of the Act. As mentioned above, that section fixes the interests of the parties as at the date of the separation. If, therefore, there was equal entitlement to the family home at the time of separation, there was no post-separation event, barring agreement between the parties, which could adjust that entitlement. That was also the common law position prior to the advent of the Act. It is not a position that is restricted to parties in an intimate relationship. In **Patten v Edwards** (1996) 33 JLR 475, this court ruled that expenditure on property, by one of two or more co-owners of that property, does not adjust the proportions in which the interests are held. Patterson JA explained the principle at page 478D-F:

> "…Any amount expended by [one co-owner] to improve the property must be regarded as an accretion to the value of the property as a whole. It cannot be regarded as an accretion to [that co-owner's] undivided share alone with the resultant diminution in that of the [other co-owner]. If that was the position, then one tenant in common could effectively acquire the entire interest in the property by making improvements without the consent of the other tenant in common.
>
> The true position is this: The value of the undivided share of each tenant in common will increase but the proportion in which they hold their respective share remains constant…."

The principle would become relevant to joint tenants upon claims for partition or, as in the instant case, for determination of the respective interests of each spouse.

[68] There is a practical method of compensating the party who has borne a property-related expense alone. In **Forrest v Forrest** (1995) 32 JLR 128, the court ruled that, in the event of one party incurring all the expense which ought to have been borne by both, the party who has met the expense is entitled to be refunded, by the other party, one-half of the expense incurred. Carey JA stated the relevant principle at page 136G-H thus:

> "Once the interests of the parties are defined at the time of acquisition, it is my view that the unilateral action of one party cannot defeat or diminish the proportions in which the parties hold the property. The payment to redeem the mortgage cannot, therefore, diminish or increase the proportions in which the parties intended to hold at the time of acquisition. **In the redemption of the mortgage the respondent must be regarded as having made a loan to the appellant to the extent of the proportion of his interest in the property. That amount is a debt recoverable on the order for accounts to be taken, made by the judge**." (Emphasis supplied)

That principle may be adapted to the application of the provisions of the Act. In such an application, where the family home is concerned, "the time of acquisition" would be replaced by "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 12(2) of the Act). The result would be that there is also no basis, in the instant case, for disturbing the equal share rule on the consideration of the separation of the parties.

[69] In the context of the amount paid as mortgage instalments by Mr Stewart after the separation, it is to be noted that Mr Stewart testified that it was not significant. The learned judge noted that he testified in cross-examination that "[h]e had paid off most of the mortgage even before his wife left" (paragraph 25 of the judgment). Mr Stewart deposed, at paragraph 15 of his affidavit filed on 1 July 2009, that, in February 1996, he gave instructions concerning the complete discharge of the mortgage loan. The certificate of title for the property reveals that the mortgage was discharged on 11 April 1996. The record does not reveal the date in 1996 that Mrs Stewart left the family home. It seems from her affidavit, however, that she was privy to the discharge transaction and the reason for it.

[70] Regardless of the sum, if any, paid as mortgage repayment and any expenditure for maintenance, after Mrs Stewart's departure from the family home, it would not be fair to require her to repay any of that sum. Mr Stewart's behaviour is what forced her to leave. As the learned judge noted, Mrs Stewart was obliged to meet other expenses as a result of the separation. The learned judge said, in part, at paragraph 20 of her judgment:

> "[Mrs Stewart's leaving the house] resulted in her having to bear additional expenses to maintain herself outside of the family home, thus reducing her ability to contribute to other expenses of the family home and of the children."

[71] Another factor to be considered in respect of the post separation period is that the party in occupation could be ordered to pay, what is referred to, in particularly the

English authorities in this area, as an "occupation rent". One judicial approach to occupancy by one party of jointly owned property is set out in **Simon v Wright**, where Kós J said:

> "**Retained occupation by one party may be regarded as a contribution by the other, non-occupying party**. Permitting retention of the family home gives the occupying party emotional and practical benefits. It also averts the financial and practical burden of having to relocate to alternative accommodation. That burden is borne instead by the non-occupying party until relationship property issues are resolved." (Emphasis supplied)

[72] Considered in the way explained in that excerpt, it would be apparent that Mrs Stewart did make a post-separation contribution to the property. From another viewpoint, it may also be said that if Mrs Stewart is to be spared the cost of refunding to Mr Stewart one half of his post-separation costs, it would not be fair to require him to pay an occupation rent. In any event there has been no point taken on the appeal by Mrs Stewart in which she claims any occupational rent from Mr Stewart for his sole occupation of the property for the past 13 years, since their daughter left the family home in 2000.

[73] Based on the above analysis, Mrs Mayhew is not on good ground in her submissions that the post-separation expenses should be considered and that, considered as a whole, Mr Stewart's financial contribution required a displacement of the statutory rule. Consequently, it must be stated that the learned judge was in error in considering the post-separation contributions of the parties as being relevant to determining their respective beneficial interests in the family home.

[74] By comparison to the instant case, it should be noted that in **Deidrick v Deidrick**, the family home was registered in the husband's name alone. In assessing the husband's assertion that the equal entitlement rule should not apply, Cooke JA reviewed the experience of that family at paragraph 8 of the judgment:

> "It would seem to us that there was more than ample evidence to say that the premises...was the family home. This is where the family (the wife, the husband and the children) resided...The wife undertook the responsibilities which this Court considered to be the usual, normal and natural incidents of living in a family home. These include payments to the helper, payments of the telephone bills, the buying of groceries, the choosing of the tiles and the painting of the rooms from time to time...."

[75] This court, in that case, found that the judge at first instance was correct in finding that there was no good reason to disturb the statutory rule of an equal share to each of those parties. Likewise, Mrs Stewart's contribution to the family in the instant case, although not involving as much financial input, cannot be said to be so small as to cause an equal division to be unreasonable or unfair.

Conclusion

[76] In order to displace the statutory rule for equal interests in the family home, the court must be satisfied that a factor, as listed in section 7 of the Act, or a similar factor, exists. Contribution to the acquisition or maintenance of the family home, by itself, is not such a factor, it not having been included in section 7. This is in contrast to its inclusion, as a relevant factor, in section 14, which deals with property other than the family home.

[77] If the court is satisfied that a section 7 factor exists, it may then consider matters such as contribution and other circumstances in order to determine whether it would be unreasonable or unjust to apply the statutory rule. The degree of cogency of that evidence is greater than that required for other property. In considering whether the equality rule has been displaced, the court considering the application should not give greater weight to financial contribution to the marriage and the property, than to non-financial contribution.

[78] The court should also bear in mind that the interests in the family home are fixed, in the case where the parties have separated, at the date of separation. Post-separation contributions cannot disturb the entitlement at separation.

[79] The learned judge in the instant case did not demonstrate that she appreciated all of those principles. In considering the evidence afresh, it may firstly, be said that it was not evident that a section 7 factor existed so as to allow a consideration of the respective levels of contribution. Secondly, an as an alternative position, even when the evidence of contribution is considered afresh, along with the learned judge's impressions of the evidence, it cannot be said, bearing in mind the principle of the marriage being a partnership of equals, that equal entitlement to the family home would have been unreasonable or unjust.

[80] In the circumstances, the appeal should be allowed, the order of the learned judge, in respect of the entitlement to the beneficial interest of the parties in the property, set aside, and the following order substituted:

> Mrs Carol Antoinette Stewart and Mr Lauriston Hugh Stewart are equally entitled to the legal and beneficial interest in all that premises known as 1 Spring Park Drive, in the parish of Saint Andrew, being all that premises comprised in certificate of title registered at Volume 1050 Folio 364 of the Register Book of Titles.

All other orders made by the learned judge should remain in place. There should be no order as to costs.

HARRIS JA

ORDER

It is ordered as follows:

a. The appeal is allowed.

b. the order of the learned judge in respect of the entitlement to the beneficial interest of the parties in the property is set aside, and the following order substituted:

> Mrs Carol Antoinette Stewart and Mr Lauriston Hugh Stewart are equally entitled to the legal and beneficial interest in all that premises known as 1 Spring Park

Drive, in the parish of Saint Andrew, being all that premises comprised in certificate of title registered at Volume 1050 Folio 364 of the Register Book of Titles.

c. All other orders made by the learned judge shall remain in place.

d. There shall be no order as to costs.