[2014] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 37/2011

BEFORE:	**THE HON MR JUSTICE PANTON P** **THE HON MISS JUSTICE PHILLIPS JA** **THE HON MR JUSTICE BROOKS JA**

BETWEEN	**DALFEL WEIR**	**APPELLANT**
AND	**BEVERLY TREE**	**RESPONDENT**

Dr Leighton Jackson for the appellant

Mrs Judith Cooper Batchelor instructed by Chambers Bunny & Steer for the respondent

7, 8 February 2013 and 17 March 2014

PANTON P

[1] I have read the draft reasons for judgment of my learned sister Phillips JA. I agree with her reasoning and conclusion and have nothing to add.

PHILLIPS JA

[2] This is an appeal relating to the vexed issue of dividing matrimonial property under the Property (Rights of Spouses) Act ('PROSA'). The appellant is seeking to challenge the order of D O McIntosh J made on the appellant's fixed date claim in which he had sought, among other things, the following reliefs:

1. a declaration that he was solely beneficially entitled to the parcel of land numbered lot 9 on the subdivision plan of property located at Norwich in Portland being part of lands registered at Volume 899 Folio 23 of the Register Book of Titles (the land) and containing a dwelling house constructed thereon. The appellant claimed to be entitled to this portion of land by virtue of a contractual licence given to him by the respondent, she having promised him that she intended to give him the lot and encouraged him to expend significant sums to build a dwelling house on the land;

2. in the alternative, a declaration that both he and the respondent were beneficially entitled pursuant to section 6 of PROSA to equal shares of the land and the dwelling house thereon as being the family home;

3. that he be granted the right of first refusal to buy the respondent's interest, if any, in the family home;

4. at the time of sale, a valuation report of the family home should be obtained from an agreed valuator by the parties or alternatively, from a valuator appointed by the court; and

5. the costs of transferring the title on the sale of lot 9 including the cost of the valuation report and survey, if any, be borne equally by the parties.

[3] On 25 March 2010, after trial of the claim, McIntosh J gave judgment for the appellant in the sum of $1,300,000.00, being half the value of the dwelling house on the land according to the valuation report of DC Tavares and Finson Realty Ltd. This

valuation was made pursuant to a court order made by Beckford J on 12 October 2009 in the absence of the appellant.

Background

[4] The parties were married on 5 January 1987 in Jamaica. It is not clear from the evidence the date on which they met but the respondent, who is ordinarily resident in the United States of America, started visiting Jamaica in 1982, and went to Port Antonio in 1983. It was on one of those visits that she met the appellant, who is a Jamaican national. The respondent would visit Jamaica about three times for the year for a period of three to four weeks. There are not many areas of agreement between the parties and it may therefore be convenient to set out the evidence of each in relation to the acquisition and use of the property.

The appellant's evidence

[5] The appellant's evidence was that the respondent had offered to buy him a car, but he had dissuaded her from doing so and had told her to buy land instead. He said that he and the respondent approached one Hamlet about land and that Hamlet had sourced lands which they both liked. He and the respondent had sought the services of an attorney-at-law together and had negotiated the price. The respondent told him that she would send the money so that he could "partake of the property". The lands which comprised approximately 16.5 acres, were purchased before they were married and registered in the respondent's name only, but she told him that later her attorney would transfer the land into both their names. He stated that within a year of purchase he

began living on lot 9, which comprised 6 acres, and he began "cutting it down", farming it and set up a shack on it. He said he planted vegetables and seeds and when he sold the crops he used the money to keep on planting on the property. He stated also that he had sold lumber from the property although he had not planted any of the trees that he sold. The money received from the sale was used to pay young men to clear the land. The respondent, he said, had given him money to plant seeds and vegetables. He also indicated that he paid taxes for the land.

[6] The appellant stated that he expended significant sums from his resources and constructed a dwelling house on lot 9, which became his home and their home when the respondent was in Jamaica. According to the appellant, he built the dwelling house in two phases. In the first phase, the house had stone at the base and board on top, while in the second phase he changed all the board on the structure into concrete. He had constructed the original structure sometime around 1987. The respondent moved out and in 1989 he started to build the concrete portion. When the concrete portion was added, it became a split level building. He stated that he tore down the board section which he termed the "cottage" because it was "rotting down from chi chi" and that the respondent never slept with him in the "new house". In the first phase, he said, the respondent had given him some money which he used to contribute towards buying zinc and lumber. Prior to the construction of the dwelling house, the respondent would stay in hotels. Thereafter, she stayed at the house. However, towards the end of their relationship, she stayed at hotels complaining that the house did not have enough amenities for her comfort. The relationship, he said, finally broke down in 2000.

[7] He stated that he gave the surveyor instructions for the subdivision of the property in the respondent's absence, but she paid the cost of the survey. Prior to the subdivision, he farmed the entire property and planted permanent trees and crops, but after the subdivision he continued to plant the trees and crops on lot 9 only. When it was put to him in cross-examination that he was interested in the respondent for her money, he denied this stating that he wanted her for her land. He stated also that he was claiming lot 9 as he had lived on it "ever since". He did state however, that when he had built the new house he had built it for both of them.

The respondent's evidence

[8] The respondent stated that she and the appellant met after she decided to purchase the land. She denied any participation of the appellant in identifying the land or negotiating the price. She, however, admitted that she had discussed buying the land with the appellant. She stated that she started searching for land to purchase in 1985 and it was a taxi-driver, "Hamlet Johnson" who had told her about the property which she decided to purchase. She sent US$3000.00 to the "executor of land" and it was agreed that she would pay the outstanding amount of the purchase price by September 1986. However, she was given early possession in April 1986 and began clearing the land. She agreed in cross-examination that she had advised the appellant to take possession of the land. She denied offering to purchase a car for the appellant and stated that when she paid for the land, she and the appellant had a visiting relationship. She denied telling the appellant that she would transfer the property into

both their names and stated that she had hired the appellant and two other men to clear the land.

[9] She stated that the appellant agreed to assist her to produce vegetables on the land and she gave him money to buy crops to cultivate and animals to rear. He never planted crops on most of the land but farmed only about 30% of it. She said she never received any money from the sale of anything from the property. The respondent stated that the marital relationship began to deteriorate in 1992 and in that year she stopped funding everything. By 1993 they were separated. She stated that it was after the breakdown of the relationship in 1993 that she told the appellant to pay the taxes for the land as he was benefitting. However, she had had to repay persons from whom he had borrowed the money to pay the taxes. Although the respondent admitted that the appellant had shown the surveyor where the boundaries were, she denied that he was the one who gave the surveyor instructions. She stated that she met the surveyor and gave him the instructions.

[10] With respect to the construction of the house, it was the respondent's evidence that the original structure had a stone base and the rest was board. She stated that she had paid the appellant for his labour on the structure which she regarded as her cottage and that most of the lumber on the land was used to build it. She denied that the concrete structure was started in 1989 but stated that the "blocking up" never began until sometime in 1990 when the appellant started "blocking up" under the cottage saying that he wanted storage space. She stated that she had not slept in the house after 1996 and at that time renovation was not underway. The house was,

however, in a serious state of deterioration due to a lack of maintenance. She stated that the house remained board until 2002. According to the respondent, years after they separated, the appellant had torn down the board house and had started to use cement to build without getting her permission. She was shocked and dismayed when she realised that the appellant had demolished the house and replaced it without her permission. She said that she had only given him permission to build the storage area below the house.

The decision below

[11] The learned judge in coming to his decision that the appellant was entitled to half of the value of the house, made the following findings:

a. There was no issue that the lands were owned solely by the respondent and that they were paid for by her before the parties were married. Further, there was no issue that she did not give him any land.

b. The resources used to build the house came directly or indirectly from the respondent who was told that the original house was being refurbished.

c. At the time the house was built the land was not subdivided and no particular area of land had any number or demarcation. The subdivision came after the divorce proceedings and lot 9 could not have been in contemplation before the concrete structure was in place.

d. The appellant's interest in the respondent was clearly a monetary one which cemented his desire to acquire her lands.

e. The respondent had never indicated any interest or desire to give the appellant land or any part of lands she had purchased. She was never hesitant in giving him money.

[12] He concluded that the only property which could have been said to have been acquired by the couple during their marriage was the house built on the land and as a consequence, the only interest that could accrue to the appellant would be one half of the value of the dwelling house on the land.

[13] Dr Jackson on behalf of the appellant filed the following grounds of appeal:

> "(a) The learned Judge misdirected himself in failing to apply the provisions of the Property (Rights of Spouses) Act 2004 which defines the 'family home' as including, not only the dwelling-house, but 'together with any land, buildings or improvements appurtenant to such dwelling house and used wholly or mainly for the purposes of the household.'
>
> (b) The learned Judge failed to honour the legislative judgment that the equality of the marriage relationship should be demonstrated by giving parties an equal share of the family home, including the land on which the house is built and which is used wholly or mainly for the purposes of the household.
>
> (c) That the learned Judge erred in failing to properly weigh the objective and consistent evidence before him that:
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> i. This 20 year marriage was a joint enterprise centered around the property at Norwich which, though initially acquired by the more well-to-do defendant, the Claimant cooperatively and

substantially contributed in expertise, labour, resources and effort, freeing the defendant to return and remain for extended periods in California, USA, where she operated a business;

ii. Much of the evidence of the defendant consisted of after-the-fact concoctions remembered through the prism of the present adversarial jostling to exclude the Claimant from his entitlement to 50% share of the family home as mandated by the legislative fiat of Parliament;

iii. The parties herein, like all parties to a marriage were free to arrange and conduct, and did arrange and conduct, their affairs in unconventional ways, and the learned Judge failed to assess the facts before him within the subjective context of the parties' arrangements, and instead subjected [the] Claimant to demeaning and prejudicial gender, racial and cultural stereotyping.

(d) The learned Judge erred in failing to find that there was a common intent to share the property beneficially at the time of the acquisition as well as detrimental reliance based on the logical sequence of facts and the abundance of evidence of the activities of [the] Claimant which he would only have performed based on his belief he had an interest in the property.

(e) The learned judge erred in placing emphasis on the fact that the lands were acquired prior to the marriage of the parties, although the evidence was that the Claimant and defendant were deeply involved in a relationship at the time of the acquisition, that [the] Claimant was involved in the finding and selection of the property, and immediately took possession of the land together with [the] defendant and became involved in clearing and cleaning the land for the construction of the family home. In any event, by acknowledging unions other than marriage as being within its ambit, and giving no consideration as to whether the

property is owned by one or both parties, the Property (Rights of Spouses) Act eliminates the date of marriage as significant, in a situation where the parties pooled their efforts and resources and married shortly thereafter and remained married for over 20 years.

(f) The learned Judge erred in finding a date of separation and failing to address his mind to the additional statutory requirement of s13(1)(c) that 'there is no reasonable likelihood of reconciliation.'

(g) The learned Judge erred in failing to find that [the] Claimant had established a proprietary estoppel based on the clear evidence of his believe [sic] that he had or was going to be given an interest in the property, acting on that belief, together with [the] defendant's knowledge and encouragement of [the] Claimant's belief.

(h) The learned Judge erred in ordering a valuation of the dwelling house in violation of s 12(3) of the Property (Rights of Spouses) Act without the agreement of the parties, limiting the valuation to the dwelling house only and ignoring the objections of [the] Claimant's trial counsel."

Submissions

[14] At the hearing of the appeal Dr Jackson abandoned the ground relating to proprietary estoppel and indicated that he would not be traversing the remaining grounds of appeal but would be arguing points set out in his skeleton arguments. In written submissions, it was argued that the case is entirely governed by PROSA and the definitive interpretation by this court in **Brown v Brown** [2010] JMCA Civ 12 where PROSA was defined as a "dramatic break with the past demanded by section 4". It was argued that the award could not have been made under PROSA since the learned judge had made no reference whatsoever to the extensive provisions of that Act or otherwise

indicated that he was following the guidelines carefully outlined by PROSA. Dr Jackson submitted that the judge's total disregard of the legislative mandate of PROSA and his failure to adhere to its terms or to give an explanation for this is "a per se reversible error and requires a de novo evaluation of the entire case".

[15] It was also submitted in writing that this court has held that PROSA mandates an equal division of the family home unless exceptional circumstances are found. There is no occasion to employ any enquiry regarding whether under equitable or common law rules and principles the claiming spouse is deserving, which was the course on which the learned judge had embarked. No exceptional circumstance was referred to by the judge that would allow for a variation of the equal entitlement rule and none existed, Dr Jackson argued.

[16] Dr Jackson submitted before this court that where the court is being asked to vary the 50% share rule, there should be an application under section 7 of PROSA. Counsel referred to **Graham v Graham** Claim No 2006 HCV 03158, delivered 8 April 2008, a decision of McDonald Bishop J in the Supreme Court in which it was said that the requirement for the application was a matter of form. He argued that that *ratio* was somewhat questionable as it results in reading down the statute. The presumption imposed by virtue of section 6 places a burden of proof on the applicant and so the respondent must be put on notice. No such application had been made in this case. Learned counsel further submitted that in varying the 50% share rule, the approach adopted by the Supreme Court was to approach the matter *de novo* and to do what is just. However, this was the wrong approach; the half-share must be the starting point

and this court had affirmed that the 50% can only be departed from in "exceptional cases". If this latter approach is not adopted, he contended, the result would be to conflate section 14 of PROSA. Dr Jackson submitted that the learned judge's emphasis was on weighing contributions to the purchase of the land, the planting of the crops, the building of the house and how much the appellant got from the relationship, coming to the remarkable conclusion that the only reason for entering the marriage was for money. The legislature clearly made a judgment that the 50% share is the starting point and the learned judge had turned the statute on its proverbial head.

[17] Dr Jackson submitted that the statutory definition of "family home" is broad and all-encompassing and clearly includes the structure on lot 9 which the appellant occupied with his wife during the early years of the marriage. The circumstances of this case where one party lives abroad and one lives in Jamaica and the one abroad travels to Jamaica from time to time for the consummation of the relationship was contemplated by the legislature as indicated by the inclusion of the words "from time to time", he argued. It mattered not that the land was bought by the respondent alone. The learned judge used this as his main thrust, it was argued. It was clear that the appellant and the respondent were both involved in identifying and negotiating for the purchase of the home while they were having an intimate relationship. It was only after this relationship started that the respondent, the more affluent party, became interested in purchasing a home in Jamaica. It was not coincidental that they were married shortly after the land was purchased and the appellant went into possession.

They were married before the registration of the transfer was complete and it would be defeating the goal of PROSA if this prior purchase were used to undermine its effect.

[18] It was also submitted that the fact that the house was renovated and improved did not cause it to cease being the family home. The building was upgraded from bottom to top, which is the way the upgrade is done in Jamaica. It was clear from the appellant's evidence, and the learned judge so found, that the wooden structure was destroyed by termites and it did not make sense replacing it with another wooden structure. He submitted that the learned judge found that the rebuilding and conversion gradually took place, that it started in 1989 and the couple were separated somewhere between 1993 and 2000; this was despite the respondent's testimony that she did not live in the house after 1996 and the completion of the restructured house was in 2000. Counsel submitted that it would be ironic and make nonsense of PROSA if the appellant would have been entitled to half of the land and the termite-eaten wooden structure as the family home under PROSA but not entitled to a half of the land and the structure which the respondent admitted that the appellant was responsible for building. Counsel also submitted that the improvements to the structure of the family home could not change the fact that it was still the family home. If it were otherwise, he argued, then a party could easily make substantial improvements to the house to defeat a claim for 50% share. Clearly, the land and the house comprised the family home as the land was owned by one of the spouses, and the house used as a dwelling house from time to time and lot 9 on which it was situated was utilised for the benefit of the house.

[19] Dr Jackson also challenged the judge's findings of fact as being, to a large extent, irrelevant. He submitted that it mattered not what the motive was for the appellant to give up his business and engage in what was clearly a conjugal enterprise with the respondent. The entire acquisition of the land, the working of it and the building of the family home were the central points of the relationship.

[20] He submitted further that the appellant had lived on the property for 25 years and PROSA seeks to protect accommodation. By adopting the 50% rule, it sought to eschew all other considerations that hitherto plagued the law. Moreover, he argued, there was no evidence that the appellant left his business and married the respondent for her money. The reality was that he contributed equally to the partnership. He provided companionship and care which made the respondent come home three or four times a year. There was not one scintilla of evidence that the appellant ever abused the respondent.

[21] Dr Jackson challenged the judge's finding that the parties separated in 1995 as, he submitted, a review of the evidence makes it much more likely that they separated in 2000, as the appellant claimed, since the respondent ceased coming to Jamaica between 2001 and 2007. He also challenged the findings that stilts formed the base of the wooden house and that the appellant informed the respondent that he would be constructing a concrete basement for the house. This, he said, was contrary to the evidence that the house always had a concrete foundation. He also took issue with the judge's finding that at the time when the house was built the land was not subdivided and no particular area of land had any number or demarcation as being incorrect.

[22] He contended that all the findings of the judge were inconsistent with the reality because he sought to view it through the eyes of the old abandoned law. The advantage enjoyed by the judge of seeing and hearing the witnesses was not sufficient to explain those findings of fact, he submitted. Therefore, this court has the jurisdiction to disturb them.

[23] In relation to the valuation of the property, Dr Jackson referred to section 12 of PROSA which provides the procedure for valuation of the matrimonial property. The record, he pointed out, reveals that the appointment of the valuator was by notice of application for court orders, which was not the procedure mandated by PROSA. There was much credibility in the objections of counsel for the appellant as the record was that lots that were one-tenths of the size of lot 9 were valued more than the value placed on lot 9 by the valuator chosen by the respondent. The learned judge, however, did not consider this and opining that the respondent's valuators are reputable, used that as his basis for using that valuation. He argued that this was precisely the reason the legislature devised a formula to ensure that these kinds of "difficulties" do not arise. The legislature must be presumed to know the mischief that besets this society and therefore, it was not an error which could be waived. The formula was there for the protection of the parties, it was submitted.

[24] Mrs Cooper Batchelor submitted that when the judgment is examined it is clear that though the actual words were not used, the matter had been decided using PROSA. Additionally, counsel argued, in order to escape the learned judge's findings of fact, the appellant was obliged to show that the judge was palpably wrong. Counsel

referred to **Princess Wright v Alan Morrison** [2011] JMCA Civ 14, and **Anthea McGibbon v Ambrose Burke** [2011] JMCA Civ 35, for this submission and maintained that on this appeal the appellant was unable to do so.

[25] Counsel submitted that there was no issue and, the learned judge had so found, that the respondent had purchased the property with her own funds before the parties were married. At no time, she stated, did the appellant use any of his own funds. Also, the respondent had, on the evidence, made indirect contributions to the construction of the concrete structure.

[26] Counsel asserted that on a detailed perusal of the judgment it was clear that the judge had rejected the appellant's contention that the concrete structure was the family home. Counsel submitted that there were two houses in this case, the wooden house and the concrete structure, and the evidence was that the wooden house had been demolished and the concrete structure built in its place. However, counsel submitted, since the evidence was that the respondent had never slept nor lived in the concrete structure then the court could never have found that house to be the family home. She argued further, that the wooden house could not have been accepted by the court as the family home either, as the respondent had also never "lived" there. Neither house, counsel argued, fell within the definition of "family home" in PROSA. Counsel maintained that the evidence disclosed that the respondent was ordinarily resident in the United States of America, and the house was therefore not used by the appellant and the respondent habitually or from time to time as the only or principal place of residence.

[27] Counsel submitted that if the house could not fall within section 6 of PROSA, that should have been the end of the case, and the trial judge ought not to have had to trawl through PROSA to ascertain if any other section in it was applicable. The appellant, she said, had put himself in a "straight jacket". Additionally, counsel argued, there was no evidence to support a finding by the judge that the 6 acres in lot 9 were appurtenant to the dwelling house on lot 9 and, were used for the purposes of the household. Counsel referred to and relied on **Jack v Jack** 1 NZLR 205, for assistance in the meaning of "appurtenant", and submitted that in any event, the burden lay on the appellant to show that that was so, which he had failed to do.

[28] Counsel contended that the learned trial judge having implicitly found that the claim could not succeed under section 6 of PROSA, had nonetheless, based on his conclusions, examined the matter pursuant to section 14 of PROSA and, having reviewed several factors arising on the evidence, and acting pursuant to his discretion, decided to divide the property as he saw fit. He ordered that the land belonged to the respondent and the house to the parties equally.

[29] Counsel argued further that the learned judge had made a monetary award as he was empowered to do pursuant to section 23 of PROSA. The learned judge had explained how he had arrived at the sum he had granted to the appellant.

Analysis

[30] This appeal ultimately was far more difficult to resolve than appeared initially. The evidence adduced in the court below was sketchy to say the least, certain matters

were assumed without carefully setting out the evidence to support the statements averred, and the reasoning of the learned trial judge was sufficiently succinct so as to be unhelpful with regard to the several areas of contention between the parties.

[31] In my view, the real issues in this case are:

(i) Whether, within the meaning of section 2 of PROSA:

(a) the "board house", and "concrete structure", could each be considered the "dwelling house"

(b) the whole of lot 9, being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles was land appurtenant to the dwelling house; and if (b) is in the affirmative,

(c) the land comprising lot 9, was used wholly or mainly for the purposes of the household and can be considered together with the dwelling house as the "family home."

(ii) Did the court find and/or ought the court to have found that the "dwelling house" with any land appurtenant thereto was "such property, other than the family home" within the meaning of section 14 of PROSA?

(iii) Was the order of Beckford J made on 12 October 2009 directing DC Tavares and Finson Realty Ltd to value the dwelling house and land comprising lot 9 in compliance with the provisions of section 12(3) of PROSA?

[32] Unfortunately, as can be seen from the findings made by the learned judge and set out herein, in paragraph [11], he has not addressed many of the conflicts in the evidence specifically. Indeed it is difficult to ascertain whether the learned judge was addressing the issues which arise in this matter with reference to the provisions under PROSA, commencing with the interpretation to be given to sections 2 and 6, of PROSA, which are of great significance to the determination of this appeal, and sections 7, 10, 14, 12 and 23, which are of relevance also.

[33] Before dealing with the relevant provisions of PROSA, I would wish to refer to certain statements made by this court in **Brown v Brown** with regard to the purpose, intent, and interpretation to be given to the legislation. In dealing with section 4 of PROSA, which states that the provisions of PROSA would replace the rules and presumptions of the common law and of equity with regard to transactions between spouses and between spouses and third parties, Cooke JA said this:

> "By section 4 of the Act, the legislature directed that there was to be an entirely new and different approach in deciding issues of property rights as between spouses."

He made it clear that section 4 is "a directive to the courts as to what the approach should be". Morrison JA in a masterful tracing of the development of the law in this area referred to the legislative predecessor to the Act, the Married Women's Property Act, sections 16 and 17, which were "procedural only and gave no discretion to the court to override or adjust existing property rights to accord with the court's view of what was fair or reasonable". He stated further, referring to the decisions of the House of Lords of

Pettit v Pettit [1969] 2 All ER 385, and **Gissing v Gissing** [1970] 2 All ER 780, that "…the mechanism for the resolution of disputes between husband and wife as to the beneficial ownership of property vested in the name of one or the other of them was to be found in the law of trust, in particular, in the principles governing resulting, implied or constructive trusts". The promulgation of PROSA therefore brought in a different regime, dealing with new concepts entirely. As Morrison JA put it, "it introduces for the first time the concept of the 'family home', in respect of which the general rule is that, upon the breakup of marriage, each spouse is entitled to an equal share" (section 6).

[34] Section 2, the definition section of PROSA, is very important to this new regime, and for the purposes of this appeal I will set out certain relevant definitions, namely "family home" and "property":

> " 2.--- (1) In the Act---…
>
> '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;…
>
> 'property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled;..."

[35] Sections 6 and 7 are also special provisions with regard to the family home and fall under Part II of PROSA under the heading "Family Home". 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."

Subsection 2 deals with an exception to this rule on the death of one of the spouses if the family home is held by them as joint tenants and section 10 deals with agreements made between spouses in respect of division of their property, neither of which is applicable to this appeal. Section 7, which deals with the variation of the equal share rule, will be dealt with later in this judgment when analyzing issue (ii).

[36] Section 12 is also of much significance as it stipulates the relevant dates for determination of the value of shares in property falling under PROSA. The section does not expressly use the term "family home", but in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47, this court held that the use of "property" in that section extends to "family home". The section provides that a spouse's share in property shall be determined as at the date on which the spouses cease to live together as man and wife. Therefore, an important consideration in the division of the family home is the date of separation. In this case, the learned judge appears to have made no finding in this regard as his statement in the judgment that the parties separated in 1995, seems to

have been made as a part of his recounting of the appellant's evidence. In any event, this finding would not have been consistent with the evidence of either party, as in the respondent's affidavit she said that they had separated in 1993 and on the appellant's case, the date of separation was 2000.

[37] It is therefore for this court to make a finding in this respect as it will be critical to the analysis of issue i(b) and (c). There is not much to support the respondent's statement that the date of separation was 1993, as it is contradicted by her evidence that the last time she slept in the house was in 1996. On the other hand, the appellant's position has much to commend it. The appellant said that he gave the surveyor instructions to survey and subdivide the land in the respondent's absence, but the respondent paid the costs of the survey. Although initially denying the appellant's participation in the surveying process, the respondent agreed that it was the appellant who showed the surveyor the boundaries. In addition, the plan exhibited as "DW3" to the appellant's affidavit, states that it was prepared in June 1999, at the request of the appellant and the respondent. In the absence of any delay on the part of the surveyor, it seems to me that on the balance of probabilities, the date of separation was in 2000 rather than in 1993.

[38] I will now address the issues as outlined in paragraph [31] herein.

Issue i (a)

The dwelling house

[39] In **Peaches Stewart v Rupert Stewart**, Claim No HCV 0327/2007, delivered 6 November 2007, Sykes J in delivering the judgment dealing with sections 2 and 13 of PROSA analysed excellently, the definition of "family home" and the interpretation to be given to it. I endorse his comments in the main and have set out below most of his discussion in relation thereto, with which I agree. He stated the following in paragraphs 22 and 23:

> "22. It is well known that when words are used in a statute and those words are ordinary words used in every day discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended…
>
> 23. It should be noted that the adjectives *only* and *principal* are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. *Only* means sole or one. *Principal* means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the expression *family residence*. Indeed even the noun residence is qualified by the noun *family* which is functioning as an adjective in the expression *family residence.* Thus it is not any kind of residence but the property must be the *family residence.* The noun residence means one's permanent or usual abode. Thus *family residence* means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses."

He then referred to the fact that in the definition of family home it was vital that the "property" was used *habitually* or *from time to time* by the spouses as the *only* or

principal family residence, and those adverbs indicated how the property was to be used. I agree with that statement, but in my view, in the definition, that reference in respect of use with regard to property relates to the "dwelling house". Sykes J went on to say further in paragraph 24, that:

> "The legislature, in my view, was trying to communicate as best it could that the courts when applying this definition should look at the facts in a common sense way and ask itself [sic] this question, 'Is this the dwelling house where the parties lived?' In answering this question, which is clearly a fact sensitive one, the court looks at things such as (a) sleeping and eating arrangements; (b) location of clothes and other personal items; (c) if there are children, where [do] they eat, sleep and get dressed for school and (d) receiving correspondence. There are other factors that could be included but these are some of the considerations that a court ought to have in mind. It is not a question of totting up the list and then concluding that a majority points to one house over another. It is a qualitative assessment involving the weighing of factors. Some factors will always be significant, for example, the location of clothes and personal items."

Of course I would add as always that each matter must be dealt with on its own peculiar facts. I will set out in summary the relevant facts within the above stated legal framework, as I deal with the first issue on the appeal.

[40] As stated previously, the appellant's evidence was that the house was built for the parties, and was constructed in two phases. The house in the first phase comprised one bedroom, bathroom and kitchen with stone at the base and board on top. In the second phase he said that he converted the previous bedroom into a living room, added a room which became the bedroom, built a new bathroom and used the space where

the previous bathroom was to become a part of the kitchen. He said that he changed all the board on the previous structure into concrete. The respondent did not accept this as it was her contention that the original structure had a stone base and the rest of the structure was board, and so she eventually, after 2002, had a two bedroom board house, as up until then it was simply a board house. It was the appellant's contention that he had constructed the dwelling house from his own resources; the respondent denied this and said that the house was paid for by her. On the evidence, the house (as required by section 2 of PROSA) was owned by either or both of the parties. I do not think that the fact that the wooden house with either a stone or concrete base and with the adjusted concrete structure, would prevent it from being a dwelling house within the meaning of PROSA. However, that is not the end of the matter.

[41] The parties also could not agree on the issue of whether they lived in this structure, wooden or concrete, as man and wife, habitually or from time to time. As can be seen from the evidence, the respondent was ordinarily resident in the United States of America. She came to Jamaica in 1983, met the appellant around that time, the property was purchased with her funds, the completion of the purchase was done in 1986, and within a year of the purchase the appellant was living on the land. The parties were married in 1987 and the appellant constructed the dwelling house which became their home. The respondent came to Jamaica three times a year and stayed for a minimum of three weeks at a time. It seems accepted by the parties that before and while the board house was under construction the respondent stayed in hotels; but once it was completed she stayed in the house with the appellant, but not the concrete

structure as that, she said, was built without her permission. When the marriage broke down the respondent resumed staying at a hotel. The parties do not agree on certain dates. The respondent said that the concrete structure started in 1989, that she left the relationship in 1993, but had not slept in the house since 1996, when the renovation of it was underway. The appellant said that the board house was constructed in 1987, the concrete structure was commenced in 1989, he moved into it while it was being built and the parties separated in 2000.

[42] It is clear in my view that the parties had made the wooden structure their home. They had so arranged their lives so that the respondent would habitually and from time to time return to Jamaica and spend weeks there. She may have been ordinarily resident in the United States but she maintained her marriage here in Jamaica by regular visits where she stayed with the appellant either in their home as constructed by him or in hotels when that was not convenient due to the renovation of that home. In my opinion the wooden structure, adjusted and converted, as it was over the years was where the appellant and the respondent lived together as man and wife. It was their only family residence as they did not live together as man and wife anywhere else.

[43] The fact that the nature of the building material used to construct the family home had changed did not remove from the dwelling house the elements that originally qualified it to be the family home. It is to be noted that modifications were done over a period of time. The respondent accepted that some of those modifications were done with her consent. Additionally, the fact that during and since the time of the

modification that involved the conversion of the wooden section to concrete, the respondent did not live in the premises, would not deprive the structure of the element that brought her to visit it and, being the place that she would have stayed were it not for the construction being underway. This construction was being done, it must be remembered, prior to their separation.

[44] This structure would therefore have satisfied the meaning of "dwelling house" within the definition of "family home" for the purposes of the Act. Pursuant to section 6 of PROSA each spouse would be entitled to one-half share of the family home. The appellant was therefore, at least, entitled to a one-half share in the house. The learned trial judge made such an order (although there is a dispute as to the valuation of the house) but there was no indication that he was making that order pursuant to sections 2 and 6 of PROSA. As a consequence, that is not an end to the matter, as in section 2, the definition of family home envisages the dwelling house *together* with any land, buildings or improvements appurtenant to such house if used wholly or mainly for the purposes of the household, and the learned judge did not address that at all in his judgment. As can be seen from the respondent's submissions, it was suggested that that was because he was making an order pursuant to section 14 of PROSA. I will deal with that position and provision later in this judgment. It is necessary therefore, to examine the other aspects set out in the definition of family home in section 2.

Issue i (b) and (c)

(b) Is the land on lot 9 appurtenant to the dwelling house?

(c) Was that land used wholly or mainly for the purposes of the dwelling-house?

[45] Both issues, although separate, touch and concern the same facts and will therefore be dealt with together.

[46] In determining what lands are appurtenant to the dwellinghouse, and whether these lands are used "wholly or mainly for the purposes of the household", much guidance may be found from decisions of the courts in New Zealand concerning the Property Relationships Act of that jurisdiction, which defines "family home" as "the dwellinghouse that either or both of the spouses or de facto partners use habitually or from time to time as the only or principal family residence, together with any land, buildings or improvements appurtenant to that dwellinghouse and used wholly or principally for the purposes of the household". It is immediately recognisable that this definition is in similar terms to the definition of "family home" in PROSA.

[47] One such decision is **Vessey v Vessey** [2001] NZHC 320, in which Williams J, in an appeal from the Family Court, had to determine whether property located on 9 Wharf Road could be regarded along with property adjoining it at 11 Wharf Road as part of the matrimonial property. Williams J referred to Fisher on Matrimonial Property 3rd edn, where it is stated that the question whether land and buildings are appurtenant to the dwellinghouse used as the matrimonial home and have been used, at least principally, for household purposes, is a question of fact; and he cited with approval the

dictum of Speight J in **Jorna v Jorna** (1979) 2 MPC 104,107 that this question is usually determined by the circumstances of acquisition and utilisation and that the word has a broader meaning than in strict land law cases. Williams J then applied the definition of 'appurtenant' in Fisher on Matrimonial Property thus:

> "'Appurtenant' does not seem to lend itself to rigid definition but instead seems to involve a value judgment based on a number of factors. These factors include the extent to which there is an absence of any physical division such as a fence or wall between the dwellinghouse and the extras in question, whether the dwellinghouse and the extras were acquired at the same time and for the same general purpose, whether they are physically contiguous or at least in close proximity to each other, whether they are laid out in a manner suggesting a physical relationship with each other, the previous history of the two properties as separate or combined, the general attitude of the parties to the two properties as separate or combined, whether the extras have had any use or are likely to have any use for any purposes other than that of the household, and whether the extras are on the same certificate of title."

He thereafter concluded that although the parties lived on 9 Wharf Road, their use of 11 Wharf Road including removing a fence that was between both properties, meant that 11 Wharf Road was appurtenant to and used principally for the purposes of the household, with the result that it was to be regarded as matrimonial property. The evidence relied upon also included the fact that 11 Wharf Road was used for household storage and as a playground for the parties' children.

[48] In **Jack v Jack** [1987] 1 NZLR 205, the Court of Appeal had to determine what the family home constituted. The property in dispute was a matrimonial residence

consisting of a two-storey building. The parties lived in the master flat, which comprised 80% of the floor space and was on the upper floor. The rest of the building was a self-contained flat located on the ground floor, which had been let to tenants for the duration of the marriage. The income from the lower flat was used to meet some of the weekly expenses of the parties such as food, electricity and other utilities. It was held, among other things, that the upper flat was clearly the dwellinghouse which was the family residence, and the lower flat could not be said to have been used for the purposes of the household merely because the rental from it was used to supplement the family income.

[49] Cooke P was of the view that the tenanted flat was not used for the purposes of the household in that the obtaining of rent from separate occupation by tenants who are not members of the household cannot be regarded in any ordinary sense as a purpose of the household. He considered that the case was analogous to **Evers v Evers** [1985] 2 NZLR 209 where it was held that the matrimonial home which was situated on 3 acres of land was confined to the family residence and the immediately surrounding land, thereby excluding the balance of the 3 acres which was not used for household purposes but for a commercial orchard and proposed orchid-growing purposes. He considered also with approval the decision in **S v S** (1978) 2 MPC 178 where it was held that some business use of a villa-type family residence, not physically divided into two distinct parts, did not prevent the whole from being classified as the matrimonial home.

[50] In his judgment in **Jack v Jack** McMullin J remarked that the use of the dwelling house for family purposes must involve a "physical one" and that the reference to "wholly or principally" in the definition of "family home" in the New Zealand Act meant that not every use will suffice. He referred to the statement in Fisher on Matrimonial Property that the "use to which the spouses have put a property in terms of family residence seems to be a key factor". Then at page 213 he said:

> "But certain observations made by North J in **Fairmaid v Otago District Land Registrar** [1952] NZLR 782 are worth noting …. North J said that the matter 'must in every case be viewed broadly and as one of common sense'; that it was not 'a bar to registration that some business is carried on on the land or in the dwellinghouse' nor was it 'necessarily a bar that a room in a dwellinghouse is let to another person'. He said: 'The true test must be 'for what purpose are the dwellinghouse and land principally used? That is a question of degree'."

After reviewing several other decisions in which premises were used in part for business and were regarded as the family residence, he said (page 214):

> "It is possible to think of a number of instances in which a part of premises claimed to be the matrimonial home is used other than as the family residence or where part of the land on which the acknowledged family home is built is used other than as a family residence. … Whether in one case the dwellinghouse with all the land around it is to be treated as the matrimonial home notwithstanding that it is used in part for other purposes, or in another case what buildings and what part of the land are to be treated as the family home, will fall to be decided on their facts. The possible factual situations are many. I think it would be unwise to attempt to lay down a general rule to cover all cases…."

[51] From these authorities, it can be seen that the determination of whether the land comprising lot 9 was appurtenant to the dwelling house and used wholly or mainly for the household must include an examination of the principal physical use to which the land was put, up to the parties' separation in 2000.

[52] The appellant made a claim, inter alia in the alternative, for a declaration that he was beneficially entitled to equal shares in the land described as lot 9 on the subdivision plan prepared by FG Nembhard, commissioned land surveyor from a survey done in 1999. The subdivision plan was annexed to his affidavit in support of the fixed date claim form as exhibit "DW3". There was no other evidence delineating the area which comprised lot 9, for instance other than stating that it made up 6.5 acres of the entire 16 acre property.

[53] The appellant's evidence in relation to his use of the entire property that the respondent bought was that from the land was purchased he "started cutting it down and farming it and set up a board shack on it". He deposed to farming the entire lands, planting permanent trees and crops thereon. He testified that he had sold crops to "higglers", and used the money to keep on planting. While he had sold lumber from the land, he had not sold any of the trees that he had planted and the money obtained from the sale of lumber was used to get assistance with the clearing of the land. He said also that he had sold lumber from lot 5 of the subdivision in 2009, with the intention of using those sale proceeds to effect further clearing of lot 9.

[54] His evidence was that after the subdivision of the property, he had planted on lot 9 only. He listed the items planted on lot 9 which included coconuts, breadfruit, lime, pear, oranges, cedar, mahogany, Spanish Elm, plaintain, carrot, scallion, tomato, corn and pumpkin. He indicated further that the respondent had given him money for many things including the purchase of seeds and the planting of vegetables.

[55] In my view, the land comprising lot 9 undoubtedly had the characteristics of being appurtenant to the dwelling house: lot 9 and the dwelling house were physically contiguous; there was no physical division between them; and they were obviously combined in terms of the appellant's and the respondent's use of them.

[56] It may be said from the evidence outlined above that there appears to have been some use of the property to carry out a commercial activity in that crops were being planted and sold and the proceeds used for further clearance of the land. In addition, lumber from the land was being sold. However, the evidence is sparse as to the frequency and scale of the selling of lumber and the planting and selling of crops during the period of the marriage, which evidence, in my view, would be necessary for a conclusion to be reached as to whether this was the main use to which the land was put. This is in light of the fact that based on the authorities as examined above, the existence of some business activity on the land in question does not automatically exclude it from being regarded as being used wholly or mainly for the household and thus falling within the definition of family home. The necessity for evidence as to the scale and frequency of the planting and sale of crops assumes all the more significance when it is considered that in the ordinary course of domestic life, some of the crops

planted would have been available for the consumption of the appellant and the respondent.

[57] The respondent's evidence at first glance may be regarded as giving some support to the idea that the land may have been used for commercial enterprise. She stated that it had been her intention to produce vegetables on the land; the appellant had given her the impression that he was capable of running a farm and he had agreed to assist her. She said that she had given him money to buy crops to cultivate and animals to rear. Her evidence that she had spent between US$35,000.00-$45,000.00 over a period of three years supporting the appellant and trying to make the farm profitable would certainly support that conclusion. However, this evidence tending to point to a farming venture would have to be considered against her other evidence that most of the land had not been farmed; the property had had many breadfruit and ackee trees at the time she purchased it; and that although she had paid for the land and the material for planting, she had never received money from the sale of anything or benefitted from the investment. (The judge made no finding as to her credibility in this area, but in the absence of any stated reasons for her not receiving any monetary returns, I am not prepared to ascribe any dishonest motive on the appellant's part for that.) Of significance also was the fact that the respondent did not state that she and the appellant had not consumed any of the crops on the property. It is my view that on the totality of the evidence, the principal use of the land and the crops thereon were for the benefit of the household.

[58] It should also be considered that although the application for subdivision approval was made in 2000, subdivision, which has as its core meaning "a division of property accomplished by depositing a survey … and the obtaining of separate titles" (**Hyde v Hyde** 2009 NZCA 125, [2010] 1 NZLR 224), may be regarded as formalising on paper what in fact exists on the ground and as such a common sense meaning ought to be given to it which will conform to the context in which it is used (**Hyde v Hyde** (para 32)). Lot 9 was identified by the appellant as a specific area of property, and was formally given that designation in the survey report in 1999, before the subdivision approval was ultimately granted, on his evidence, in 2002. It was a specific area of land on which the house was constructed and cultivation was taking place around the house on that land. I am of the view therefore that although there was no evidence of the extent of the cultivation on lot 9 that should not result in a finding that part of the land was not used principally for the household. Additionally there is also no evidence of any other use to which the lot was put. The circumstances of this case are not similar to that which obtained in **Evers v Evers** where there was a commercial enterprise on the land in question evidenced by the presence of a packing room for the use of an orchard, a 2000 square foot green house for the purpose of growing orchids and the purchase of a large number of orchid plants. Furthermore, the land had also been used for sheep-rearing.

[59] There is no doubt that the respondent has made her contribution in financing the purchase of the property and the materials for planting and for the building of the dwelling house. There is also no doubt that the appellant cultivated crops which he said

that he sold along with other lumber that he had cut down, to be able to clear the land including lot 9. He made his contribution to their joint lives together in this way. He was evidently through his industry, providing a house for the parties, and reaping the produce on the property for the use of the household and the further development of the property for their joint welfare. I have no doubt that the appellant was using, clearing, planting and reaping crops on lot 9. In my view, although the evidence generally in this regard was very sketchy, and so I do so with some difficulty, I have accepted, that the use to which lot 9 was put up to 2000 was mainly for the purposes of the household, and for the mutual benefit of the appellant and the respondent. That being the case, pursuant to section 6 of PROSA, the appellant would be entitled to one-half share of lot 9 including his one-half share of the dwelling house situated thereon.

[60] In the instant case, the respondent did not apply to the court claiming that it would be unreasonable or unjust for each spouse to be entitled to one-half of the family home, pursuant to section 7 of PROSA on the basis of the factors set out in the section. It is not, however, fatal for the party who is seeking, by virtue of section 7, to dispute the application of the equal share rule, not to proceed by way of a formal notice of application for court orders (**Carol Stewart v Lauriston Stewart**). The triggering events as stated in section 7 include the fact that the family home had been inherited by one spouse; that the family home had been owned by one spouse at the time of the marriage or at the beginning of cohabitation; or that the marriage was of a short duration. In fact, it was the respondent's case that the dwelling house and the lands appurtenant thereto *could not* be construed as the family home within the meaning of

section 2 of PROSA. It was her position that she owned the land before the marriage and that she had financed solely every stage of its development. In any event, in this case the property was not inherited, but was purchased, and it would seem, on the totality of the evidence, in contemplation of the marriage. The marriage also was not of short duration. In this court in **Carol Stewart v Lauriston Stewart**, Brooks JA said (para [49] (e) of the judgment):

> "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."

[61] It is clear that no such triggering factor existed in this case. The family home did not exist prior to the marriage. The financial contribution per se to the creation of the family home is not considered a section 7 factor, and so in this case there would have been no basis for the judge to have embarked on the exercise to consider a departure from the equal share rule.

Issue (ii)

Was the dwelling house with any land appurtenant thereto "such property, other than the family home" within the meaning of section 14 of the Act?

[62] Section 14 is yet another section in PROSA which deals with the division of matrimonial property, and as Morrison JA put it in **Brown v Brown**, it is one of "the

most important sections of the Act". It permits the court, once a spouse applies for a division of property under section 13 of PROSA, to make an order for the division of the family home under sections 6 and 7 as the case may require (section 14(1)(a)), or divide "such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection 2" (section 14(1)(b)), or the court can make orders under both paragraphs (a) and (b) of section 14. The factors are set out in section 14 (2)(a)-(e) to include the contribution, financial or otherwise, made indirectly or directly by or on behalf of a spouse to the acquisition; conservation or improvement of the property (although section 14(4) makes it clear that there should be no presumption that a monetary contribution is of greater value than a non-monetary contribution); the fact that there is no family home; the duration of the marriage or the period of co-habitation; whether there are any agreements in relation to the ownership or division of property; and such other factor or circumstance, which in the opinion of the court, the justice of the case requires to be taken into account.

[63] In the instant case, once in the opinion of the court, the dwelling house with the land appurtenant thereto, namely lot 9, were all considered to form part of the family home, section 14 in respect of the division of such property other than the family home, and the factors stated therein, is inapplicable. In any event, I do not agree with the submissions of learned counsel for the respondent that the judge made his decision pursuant to section 14 of PROSA as there was no indication whatsoever that that is what he did.

Issue (iii)

Was the order of Beckford J directing DC Tavares and Finson Realty Ltd to value the dwelling house and land located at lot 9 in compliance with PROSA?

[64] The order of Beckford J stated:

> "**UPON** the **NOTICE OF AN APPLICATION FOR COURT ORDERS** coming on for hearing and after hearing **Mrs Judith Cooper-Batchelor**, Attorney-at-Law instructed by the firm **CHAMBERS BUNNY & STEER**, Attorneys-at-Law on the record for the Defendant and claimant not appearing nor being represented **IT IS HEREBY ORDERED THAT:-**
>
> 1. D.C. Tavares and Company Limited shall value the house and land located at Lot 9 Norwich District, Port Antonio in the parish of Portland a part of property registered at Volume 899 folio 23 of the Register Book of Titles.
> 2. Costs to be costs in the claim."

[65] Section 12(3) provides:

> "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 the family home."

[66] There is no evidence before us that the parties had endeavoured to agree a valuator and were unable to do so. The complaint of the appellant was that the court had made "an ex parte order for the appointment of a valuator in violation of the mandated procedure of section 12" of PROSA. The appellant's further objection was that the valuation of the dwelling house and lot 9 were at an undervalue as other lots of smaller sizes on the property were sold for a greater value.

[67] The section does not state, and therefore does not envisage an application being made before the court on behalf of one of the spouses for the appointment of a valuator, as was done in this case. Presumably, once the court is informed that the parties cannot agree, then the court will independently and impartially appoint a valuator. If there was before Beckford J no evidence of a lack of agreement between the parties, then I would agree that the statutory formula, as Dr Jackson describes it in his submissions, was not followed in this case, and of course it would be preferable if there is strict compliance with the provisions of the Act.

[68] The valuation effected was not limited to the dwelling house but referred to "the site" being valued as shown on the proposed subdivision plan containing an area by "survey of 2.5984 hectare [6.421 acres] (25 983.81 square metres)". The valuation report refers to the dwelling house on lot 9, its description and accommodation, construction, state of repair and age. The report, however, does not contain a specific value for the dwelling house and I have not found any evidence to support the learned trial judge's statement that the "dwelling house has been valued by the reputable firm of the D.C. Tavares and Finson Realty Company Ltd., at $2,600,000," whereby he ordered "judgment for [the appellant] in the sum of $1,300,000.00" being one half of that value. The reasoning of the learned trial judge would therefore have been flawed in this respect.

[69] In spite of the allegations of an undervaluation of lot 9, and there was no documentary evidence to support them, I doubt whether the appellant can claim any prejudice, in respect of the valuation of the site (lot 9), as there was no indication that

the valuator appointed by the court, was not a reputable one as the learned judge had stated, with the expertise to conduct the valuation as directed. The evidence that was placed before Beckford J in support of the application has not been placed before us. Further, the order does not state on the face of it that the application was made "ex parte", or without notice, only that the order was made by Beckford J, with the appellant "not appearing nor being represented". There has been no explanation for the absence of the appellant. Had the appellant been present at the hearing of the application, such a challenge to the procedure may have been successful. But without any adverse claim as to the competence and/or independence of the valuator, or the time at which the valuation was effected (being 9 November 2009, with the dates of the trial being 18 and 27 November 2009 - see section 12(1) of PROSA), I do not think that the challenge to the appointment of the valuator has any merit. Nonetheless, as previously stated, it is prudent for the future, that parties ought faithfully to comply with the requirements of the section. It should be noted also that the section does not expressly provide for an order for a valuation to be made at the time of sale. However, section 12(1) does recognise that the court can "otherwise decide", as the valuation was done over four years ago, I would order that the same be updated to reflect the current market value of lot 9 including the dwelling house situated thereon.

[70] Pursuant to section 23 the court is empowered to make an order for the sale of the property or a part thereof and for the division, vesting or settlement of the proceeds and for the payment of a sum of money by one spouse to the other spouse (section 23(a) and (i)). I would order that lot 9 be sold by private treaty or public

auction and the proceeds divided equally but that the appellant have the first option to purchase same with such option being exercised within three months of the order for sale.

Conclusion

[71] It is my view that : (i) In the light of all of the above, the board house/concrete structure was the appellant's and the respondent's dwelling house, and the land in lot 9 (as described on the subdivision plan, being part of the lands registered at volume 899, Folio 23 of the Register Book of Titles) was appurtenant to the dwelling house and was used mainly for the purposes of the household, and together comprise the family home for the purposes of section 2 of PROSA. The appellant is therefore, pursuant to section 6 of PROSA, entitled to one-half share of the said family home. (ii) As a consequence of (i) above, in the circumstances of this appeal, section 14(1)(b) of PROSA does not apply. (iii) There is insufficient evidence before the court to support the claim that the application made to the court pursuant to section 12(3) was not in strict compliance with the requirements of the section. Even if it were not in strict compliance, the valuation done pursuant to the order of Beckford J was not invalid and can be utilised by the parties but should be updated to reflect current market value.

[72] I would therefore suggest the following orders:

(a) The appeal is allowed and the order of D O McIntosh J made on 24 March 2010 is set aside;

(b) The appellant is entitled to one-half share of the family home, comprising the dwelling house together with land on the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland, prepared by F G Nembhard, commissioned land surveyor, and being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles.

(c) An updated valuation shall be done by DC Tavares & Finson Realty Ltd and utilised by the parties to arrive at the value of the one-half share of the family home, namely the dwelling house together with the land comprising lot 9 to which the appellant is entitled.

(d) Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally or the appellant shall have the first option to purchase same and such option must be exercised within three months of the order for sale, failing which it shall lapse.

(e) Costs of the appeal and the proceedings below shall be the appellant's to be taxed if not agreed.

BROOKS JA

[73] I have read the draft reasons for judgment of my learned sister Phillips JA and I agree with the reasoning and conclusions. I have nothing to add.

PANTON P

ORDER:

(a) The appeal is allowed and the order of D O McIntosh J made on 24 March 2010 is set aside;

(b) The appellant is entitled to one-half share of the family home, comprising the dwelling house together with land on the lot numbered 9 on the approved subdivision plan part of Norwich in the parish of Portland, prepared by F G Nembhard, commissioned land surveyor, and being part of the lands registered at Volume 899 Folio 23 of the Register Book of Titles.

(c) An updated valuation shall be done by DC Tavares & Finson Realty Ltd and utilised by the parties to arrive at the value of the one-half share of the family home, namely the dwelling house together with the land comprising lot 9 to which the appellant is entitled.

(d) Lot 9 shall be sold by private treaty or public auction and the proceeds divided equally or the appellant shall have the first option to purchase same and such option must be exercised within three months of the order for sale, failing which it shall lapse.

(e) Costs of the appeal and the proceedings below shall be the appellant's to be taxed if not agreed.