IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2009HCV02358

BETWEEN THELMA MAY WHILBY-CUNNINGHAM CLAIMANT

AND LEROY AUGUSTUS CUNNNGHAM DEFENDANT

IN CHAMBERS

Ms. Carleen McFarlane instructed by McNeil & McFarlane for the claimant

Mr. Nelton Forsythe instructed by Forsythe & Forsythe for the defendant

HEARD: June 17, September 15 & October 31, 2010 & September 16, 2011

Matrimonial Property - Claim for 50% share in dwelling-house - Parties separated - Claim brought more than twelve months after date of separation - Whether the Property (Rights of Spouses) Act applicable – Which section of the Act applicable or not or whether the rules of common law and equity apply - House built by spouses on family land - Whether house is not family home because it is built on family land - Whether application of equal share rule ousted by absence of legal title in land on which house is built - the Property (Rights of Spouses) Act, ss 2, 4, 6, 11, 13 &14.

McDONALD-BISHOP, J

BACKGROUND

[1] Mrs. Thelma May Whilby-Cunningham, the claimant, and Mr. Leroy Augustus Cunningham, the defendant, enjoyed a common law union for approximately thirty years. The union commenced when they were teenagers

and has produced two children who are now adults. After roughly thirty years, the parties formalized their arrangement through holy matrimony on July 19, 2006. That marital union, however, was to last no time as, within a year or so, the parties separated.

[2] The separation of the parties prompted the commencement of proceedings by the claimant under the **Property (Rights of Spouses) Act, 2004** (hereinafter called "the Act") to settle the question of their entitlement to the house in which they live on land belonging to the defendant's family at Green Hill, Alexandria, in the parish of St. Ann.

THE CLAIM

[3] The relief being sought by the claimant against the defendant, as set out in the Fixed Date Claim Form filed on June 3, 2009, is set out as follows:

1. a Declaration of the respective interest of the parties in house situated on lands located at Green Hill, Alexandria in the parish of St. Ann; or, in the alternative,
2. a Declaration that she is entitled to a fifty percent (50%) beneficial interest in the said house situated on lands located at Green Hill, Alexandria in the parish of St. Ann; or, in the alternative,
3. a fifty percent interest in all the items of furniture purchased by the parties and located in the said dwelling house;
4. an Order that the said dwelling house be valued by a valuator to be agreed between the parties, and that the defendant is to purchase the claimant's interest based on the agreed value, failing which there be such Order for sale or other subsequent Orders as may be just; and

5. the Registrar of the Supreme Court be empowered to sign all necessary documents to give effect to the Orders made herein, in the event of any failure or unwillingness of either party to sign.

THE RESPONSE

[4] The defendant has not admitted the claim and has asked in his statement of case that the relief being sought by the claimant in the Fixed Date Claim Form be refused. Also, at the commencement of the trial, Mr. Forsythe raised three points by way of preliminary objection to the claimant's claim been brought pursuant to the Act. He contended that:

(1) The Act does not apply as the separation of the parties had occurred more than twelve months before commencement of proceedings. The separation occurred in May, 2007 but the claim was filed in 2009 and as such the claimant ought not to be allowed to proceed with the claim pursuant to the Act. The claim was filed out of time.

(2) The Court is being asked to adjudicate on facts before the passing of the Act but the Act does not have retrospective effect. For that reason, the Act does not apply.

(3) The house, the subject matter of the claim, is not the family home within the meaning of the Act as it is built on land not owned by either party. The action is brought under section 6 (1) of the Act which deals with a presumption of the 50/50 share in the family home and since the house is not the family home, section 6 is inapplicable. Accordingly, the claim cannot be brought under the Act and the matter ought properly to be determined by reference to the rules of common law and equity.

Preliminary point # 1

Whether Act inapplicable because claim was filed out of time

[5] Mr. Forsythe's contention that the Act does not apply to the claimant's case because the claim is brought out of time is based, fundamentally, on the provisions of section 13 of the Act. Section 13 reads, in so far as is relevant to these proceedings:

> *13.- (1) A spouse shall be entitled to apply to the Court for a division of property-*
>
> *(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or*
>
> *(b) …*
>
> *(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation;*
>
> *(d) …*
>
> *(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation…or separation or such longer period as the Court may allow after hearing the applicant."*

[6] It is worthy to note, however, that apart from section 13, the Act also makes provisions under section 11 for applications to be made in respect of property dispute between spouses. Section 11 states, in so far as is absolutely relevant:

> *11.- (1) Where, during the subsistence of a marriage or cohabitation, any question arises between the spouses as to the title to or possession of property either party …may apply by summons or otherwise in a summary way to a Judge of the Supreme Court…"*
>
> *(2) The Judge of the Supreme Court …may make such order with respect to the property in dispute under subsection (1) including an order for the sale of the property.*

[7] What section 11 clearly does is to give persons in a subsisting marriage (or a legally recognized union outside of marriage) the privilege to approach the Court in relation to property questions that may arise between them. On the other hand, section 13 gives the same right to spouses whose unions are no longer subsisting. Section 11 replaces, to an extent, the repealed section 16 of the **Married Women's Property Act**, while section 13 is a new provision allowing proceedings to be brought within a certain time following separation of the parties without a reasonable likelihood of reconciliation, dissolution of the marriage or termination of cohabitation, as the case may be.

[8] Applications that are to be brought pursuant to section 13 are subject to a time line while those under section 11 are not. Mr. Forsythe has focused on the provisions of section 13 (1) to say that the claimant ought not to enjoy the benefit of the Act since the claim was filed after twelve months had elapsed since the parties' separation. He has put forward the stipulated time limit in section 13 (2) as a basis for the Court to reject the claimant's claim pursuant to the Act. The thrust of his contention is that the claimant has brought a claim pursuant to section 6(1) but given that the claim falls outside of section 13 because it is out of time, then section 6 (1), that invokes the equal share rule, cannot apply. As such, it would be the former rules of common law and equity that would have to be employed in settling the property question between the parties.

[9] I have paid due regard to Mr. Forsythe's arguments and the first thing I have noted in examining the submissions on this point is that there is nothing on

the claimant's statement of case indicating under which section of the Act the application is made. There is no mention of section 11, 13 or even section 6. This omission seems to run afoul of the provisions of the **Supreme Court of Jamaica Civil Procedure Rules, 2002** (the CPR) that provides in rule 8.8 that a Fixed Date Claim Form must state, *inter alia*, the enactment under which a claim is made, if it is being made under an enactment. I believe the term enactment would mean not only the statute but the particular provision (s) of the statute that allows for the claim to be brought since often times different sections may require different things to be established by the claimant or the defendant, as the case may be.

[10] I will, however, not treat the omission as being fatal given that the statute itself was identified in the claim and it is clear from paragraph 1 of the claim form that the claimant is asking the court to determine their respective interest in the property in question pursuant to the statute named in the claim. Also, no objection was taken by the defence on this point and the matter had been through first hearing (which would have operated like a case management conference) without an issue raised as to the omission of the section of the statute to which the claim relates.

[11] Furthermore, there is no dispute that the parties, up to the time of the filing of the claim, were married. They were, therefore, spouses, properly- so -called, for the purposes of the Act. The Act, itself, also declares that it is, *"AN ACT to Make provision for the division of Property belonging to Spouses and to provide*

for matters incidental thereto or connected therewith." It is evident in this case that it is a 'spouse' who has approached the Court for assistance in resolving a matrimonial property question in keeping with the letter of the Act and so I will not drive her away from the judgment seat merely for the omission in stating the actual section under which the claim is being pursued.

[12] If it is accepted that a subsisting marriage is one that has not yet been dissolved, then, it should really follow that in the case of parties who are separated, the marriage would still be viewed as a subsisting one. This is because from a legal stand-point, the parties are not, at all, free to marry. It would follow from this line of thinking that at the time the claim was filed in this case, the parties would have still been in a subsisting marriage and so an application could properly be made or entertained under section 11 relating to any question between them concerning property as was formerly the case under the **Married Women's Property Act.**

[13] Section 13, however, makes provision for an application to be made by separated spouses for division of property when there is no reasonable likelihood of reconciliation. Parliament had apparently seen it fit to draw a distinction between a subsisting marriage and a marriage in which the parties are separated without there being a likelihood of reconciliation. It would seem from this that where parties might be separated but the possibility of reconciliation still exists, or they are uncertain as to reconciliation, then such a marriage would be

regarded as still subsisting and the relevant section for an application to be made concerning property entitlement would be section 11.

[14] If that interpretation is correct, then it would mean that where a spouse is not divorced and the marriage is, therefore, subsisting from a legal stand-point, once the parties are separated without reasonable likelihood of reconciliation, then section 13, and not section 11, would be the applicable section. That means that the time limit of twelve months for a spouse to bring an application for division of property, while being separated in such circumstances, would apply.

[15] A curious result of the operation of section 11 is that it is not expressly made subject to the section 6 equal share rule in respect of the family home while section 13 is. In fact the considerations for the Court under section 11 applications in determining the property question between spouses in a subsisting marriage are not spelt out as they are for section 13 applications. In particular, no reference is made to the equal share rule being applicable under section 11 where the property in question happens to be the family home. It is, obviously, for that reason that Mr. Forsythe had insisted that the claimant, being out of time with a section 13 application, could only seek to proceed under section 11 and in such a situation, it would be the rules of common law and equity that would apply and not the provisions of the Act.

[16] In looking at the provisions of the two sections, it is noted, that the claimant, in bringing the claim, had not set out whether or not there was separation without any likelihood of reconciliation. The most the affidavit in

support of the claim states is that they were married and separated since May 2007. As such, the claim is really presented, on the face of it, as one that would be brought during the course of a subsisting marriage since the requirement of unlikelihood of reconciliation is not clearly established on the affidavit evidence. That would have made section 11 the applicable provision.

[17] If section 11 were to be taken as applicable, then there would have been no time limit within which to bring the claim and the application would be properly within time for the Act to apply. Mr. Forsythe's argument that under section 11, the applicable rules would be the former rules of common law and equity is, however, erroneous in law. Section 4 of the Act makes it abundantly clear that where the provisions of the Act apply those rules are inapplicable to any question concerning transactions between the parties as to the property in issue. So even if this claim ought properly to be treated as a section 11 application, as Mr. Forsythe is suggesting, the provisions of the Act would still be applicable and not the rules of common law and equity.

[18] When the circumstances are considered, though, it is seen that when the claim was brought in June 2009, the parties would have been, by then, separated for two years or so. It was brought out during the course of the hearing, as an agreed fact, that on September 28, 2009, being within three months of the filing of the claim for division of property, the parties received a Decree Nisi for dissolution of the marriage. The grant of the Decree Nisi, to my mind, is the best evidence that shows, on a balance of probability, that at the time the claim was

filed, the parties would have been separated without any likelihood of reconciliation.

[19] I am prepared to say, in the light of the time frame between the filing of the claim and the grant of the Decree Nisi, that the claim was filed at a time when the parties were separated without a reasonable likelihood of reconciliation. This is so because it is taken that the learned Judge who granted that decree was satisfied that the parties had lived separate and apart for a continuous period of at least twelve months preceding the filing of the petition and that there was no reasonable likelihood of cohabitation being resumed. I conclude that the application ought properly to have been instituted under section 13 (1), as opposed to section 11, at the time of filing.

[20] The claim pursuant to section 13 (1) would have been, however, as Mr. Forsythe contended, out of time by virtue of section13 (2) of the Act given that more than twelve months would have passed since the actual date of the parties' separation. The question that arose from counsel's objection was whether time ought to be extended to permit the claimant to proceed by virtue of section 13 (1).

[21] In considering whether an extension of time should be granted to allow the claim to proceed by virtue of section 13 (1), I have formed the view that it is rather imprudent to subject separated spouses, in the circumstances specified, to a twelve month window within which to bring the claim given that the question as to whether there is possibility of reconciliation might not readily be answered,

even by the parties themselves, within that period of time. Some allowance must be made for counseling and reasoned reflection and, in any event, whether there is reasonable likelihood of reconciliation is, ultimately, a question of fact for objective assessment by .the Court.

[22] Furthermore, the law requires parties to a marriage, for the purpose of bringing a petition for dissolution of the marriage, to satisfy the Court that they have lived separate and apart for a continuous period of no less than twelve months preceding the date of filing of the petition. Yet, the law has seen it fit to limit the parties when separated to a shorter time to approach the court in respect of the division of matrimonial property at a time when they cannot approach the court for divorce. It is hard for me to understand the reason behind the limitation under section 13 in respect of separated spouses.

[23] What makes the time limit imposed on separated spouses under section 13 even more incomprehensible is the fact that upon dissolution of the marriage, a spouse may still bring the claim for division of property under section 13 and even has the right to do so up to twelve months after the dissolution of the marriage. What we have then is that a person, who is a divorcee, who brings the action within twelve months after the dissolution of the marriage can enjoy the benefits of the Act conferred by section 13 and other related sections, but a separated spouse without reasonable likelihood of reconciliation, who has been separated for over twelve months, cannot. But yet, if that spouse were to proceed to obtain a decree for dissolution of the marriage, which would come later in time,

he would be in a position to enjoy the benefit of the Act up to twelve months after the dissolution of the marriage.

[24] Having considered all the circumstances against the background of the relevant provisions of the Act, it seemed to me that it would be somewhat unreasonable to deprive the claimant of the right to proceed by virtue of the Act because she had been separated over twelve months before bringing the claim. If she had waited until the grant of a decree absolute of dissolution of the marriage, she could have properly brought the claim up to twelve months thereafter. The claimant would thus be qualified to apply at a time subsequent to the filing of her application. I find that I could not agree with Mr. Forsythe's argument that the Act should not apply because the application is out of time under section 13.

[25] Having examined the nature of the claim and having heard the claimant, I ruled that the claim is one that ought properly to have been brought under section 13 and that I would extend the time within which the application may be brought under section 13. In the result, I have allowed the claim to proceed as having been filed within time under section 13 and so the defendant's objection that the Act does not apply because the claim was filed two years after the parties had separated, is not sustained.

Preliminary point # 2: Retrospectivity of the Act

[26] Mr. Forsythe had also contended that the claimant ought not to be allowed to proceed under the Act because the Court is being asked to adjudicate on

matters that had occurred before the passing of the Act and the Act does not have retrospective effect. In the end, by the time of closing submissions, Mr. Forsythe had had the benefit of the decision of the Court of Appeal **in Annette Brown v. Orphiel Brown** 2010 JMCA Civ 12 and conceded that this argument as to retrospectivity cannot stand.

[27] I must say, though, that even without the pronouncement of the Court of Appeal that the Act has retrospective effect, I have found it impossible to agree with Mr. Forsythe that the fact that the claimant is relying on matters that occurred before the passing of the Act to support her claim would render the Act inapplicable. The fact of the matter is that the claimant is relying on a trigger event that occurred after the passing of the Act to invoke the Court's jurisdiction under the Act. That is their separation. Separation without reasonable likelihood of reconciliation is a trigger event for the operation of the Act.

[28] The important thing is that the trigger event being relied on to invoke the application of the Act occurred after the Act was passed and not before. So, no issue of retrospectivity would have arisen in the circumstances. It is not the facts on which the claimant is relying to establish her entitlement to a share in the property that is material for the applicability of section 13 but the trigger event being relied on to invoke the Court's jurisdiction. It must be expected that spouses will have to rely on the history of their transactions and dealings within the union to ground their respective cases. Mr. Forsythe's argument that the Act could not apply in the circumstances of this case for such reason was, from the

very outset, without merit and not simply because of the Court of Appeal's subsequent decision in **Annette Brown v. Orphiel Brown.**

Preliminary Point #3: Act does not apply because house not family home

[29] Mr. Forsythe has argued too that the claim is brought under section 6 (1) of the Act which gives rise to the invocation of the equal share rule where the property in question is the family home. However, according to him, the property in question cannot be seen as the family home because it is built on land not owned by either party. His primary stance on this issue is that since the land on which the house stands is family land not belonging to either spouse, and that the Act speaks to family home being the dwelling -house owned by both or either spouse "*together with any land appurtenant to such dwelling -house used wholly or mainly for the purposes of the household",* then, the house cannot be regarded in law as the family home in order for the claimant to be entitled to a half share. He then followed up on this by saying that because the house cannot be taken as the family home, the applicable law would be the rules of common law and equity that pre-dated the passing of the Act and not the Act.

[30] Mr. Forsythe's apparent preoccupation with section 6 (1) of the Act concerning the division of the family home is quite incomprehensible in the light of the provisions of the Act as a whole. The reality is that the claimant has not in her claim averred that she is claiming 50% on the basis that the house is the family home. In fact, as noted before, no reference is made to any section under which the claim is being pursued. It is merely stated that she is asking the Court

to declare, first, their respective interest in the house or, in the alternative, to declare that she is entitled to 50% share in the house. She has detailed the facts and circumstances on which she is relying to ground such a claim and those, as far as I see it, come down basically to contribution, financial and otherwise.

[31] The even more important thing to note is that the Act does not preclude an application being brought for determination of spousal interest in property that is not the family home. Apart from section 11, which gives the Court the power to determine the proprietary interest of spouses in subsisting marriages, section 14 provides in relation to section 13 applications:

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

[32] In looking at what the Act means by property that may be divided, it states that property means, *inter alia:*

> *"Any real or personal property, any estate or interest in real or personal property… or any other right or interest whether in possession or not to which the spouses or either of them is entitled."*

[33] Clearly, property is not defined to mean only the family home. The only thing the law has done in relation to the family home, and not in relation to other

property, is to provide that that there be the automatic application of the equal share rule to it unless good grounds exist to warrant a deviation from it.

[34] So, a mere claim for 50% in property does not mean that a person is asserting that the property is the family home. There can be a 50% entitlement to any property if the Court considers that apportionment to be just and reasonable in a given case, bearing in mind the considerations to be taken into account according to law. So, ultimately, the important thing to note in the instant case, is that the house in question is spousal property within the meaning of the Act and so the question as to whether it is the family home or not would not affect the applicability of the Act, on a whole. The issue as to whether it is the family home or not would only go to the question as to whether the equal share rule under section 6 (1) should be invoked and nothing else. So, the fact that section 6 (1) might not apply to the house in question does not mean the claim cannot be pursued under the Act.

[35] Even if the property is not the family home, which by extension would mean that section 6 (1) does not apply, then section 14 (1) (b) of the Act would still be applicable. That section gives the Court the power to deal with property other than the family home and section 14(2) specifies the factors to be taken into account by the Court in dividing such property as it sees fit.

[36] In the light of the clear provisions of the Act, I have no choice but to reject the submission made on behalf of the defendant that the Act does not apply because the house is not the family home. In fact, whether or not the house is

the family home is a mixed question of both law and fact that would have to be determined by the Court on a consideration of the evidence. A finding that the house is not the family home, without a consideration of the claim and all the evidence, would be rather premature.

Ruling on Preliminary Points

[37] I have found that the preliminary objections taken on behalf of the defendant cannot be sustained. My ruling is that time is extended for the claim to proceed under section 13 (1) of the Act and so the claim is to stand in good stead as if filed within time. The applicable law in determining the parties' share in the house in question is that provided by the Act. Hence, there is no need, by law, to revert to the rules and presumptions of common law and equity to determine the parties' entitlement to the house in question. In fact, by virtue of section 4 of the Act, those principles are inapplicable to the transactions between the parties in respect of the house. The substantive claim will have to be examined for a proper determination of the parties' interest in the house and that, of necessity, includes the question whether the house is, or is not, the family home.

ANALYSIS AND FINDINGS

The acquisition of the house

[38] I have duly noted that the claimant has seen it fit to separate the house from the land in her claim. She specifically states that her claim is in respect of a share in the house. She has asserted no claim to an interest in the land and so without any amendment to the claim, the claimant is bound by her statement of case to establish an interest in the house, it being the subject matter of the claim.

The task at hand for me, therefore, is to determine the parties' interest in the house in question.

[39] The undisputed evidence is that the parties commenced a relationship when they were both teenaged students. They started a family in 1978 with the birth of their daughter. In or around 1986, they moved into the house. The house is constructed on unregistered lands owned by the defendant's family. When the parties moved into the house, it consisted of two rooms but over time an expansion was done leading to the creation of the present two storey structure. Up to the date of the hearing, both parties continued to reside in the house with the defendant occupying the top floor and the claimant, the ground floor.

[40] There is some dispute between the parties on several facts contained in their statements of case. All have been duly noted but I have seen it fit, for immediate purposes, to only deal with those issues pertinent to the question of the circumstances that surrounded the acquisition of the house. I say this to point out that my immediate concern is not with who or what was responsible for the cause of the break- up of the marriage or who was responsible for the withdrawal and sharing of money in joint accounts, among other things, as contested between the parties. Those have no bearing on the material issue concerning the claimant's share in the house and so will be ignored for the purposes of my analysis and resolution of the issue at hand.

The claimant's version

[41] The claimant's version of the dealings between them concerning the acquisition of the house is summarized as follows. After she left school at 16 years old, she began working as a pre-trained teacher in the National Youth Service from which she earned an income. She lived with her mother at the time and the defendant would visit her. She became pregnant with her first child when she was 19 years old and the defendant then moved in to live with her at her mother's house. They lived there for five years.

[42] Both began farming and the defendant would assist his mother who sold in the market in Port Maria, St. Mary. They both started in the higglering business together but the defendant was the one who would go to the market. She gave the defendant the sum of $60.00 she earned from teaching to assist in purchasing produce for sale at the market. They also farmed crops that were sold in the market. The defendant was responsible for the selling of all farm produce that they cultivated and all the proceeds from that was used to construct the house.

[43] In addition to doing farming, she became a caretaker for the community tank from the 1980's up to the date of trial from which she earned an income. This income she further supplemented by earnings derived from a grocery shop she operated, in excess of fifteen years, and from door to door selling of goods she bought from Kingston. She also went overseas on several occasions to work

so she could earn money to put towards construction of the house, which she did.

[44] They have also been involved in the exporting of farm produce and she is a registered exporter having received her export permit from Jampro Production Limited. She played an active role in the export business along side the defendant and his brother. The house was constructed from their joint effort and proceeds from joint business ventures. So, both are entitled to occupy it and to benefit from it equally.

The defendant's response

[45] The defendant denies, among other things, that the claimant was ever a farmer. He maintained that she has always been a housewife and that that was the role she had played ever since they were married up until they were separated. He denied that the claimant ever bought goods and sold from door to door.

[46] He asserted that it was from his income as a farmer that he opened a shop that was operated by both of them. While he does admit that the claimant went overseas from time to time, he denied that she used any income derived from such source towards the construction of the house. His contention is that apart from the "stipend" the claimant received per month from the St. Ann Parish Council in her role as caretaker for the tank, she had never worked during the years of the relationship and he had been the sole provider for the family.

[47] Even more immediately relevant, the defendant, in his affidavit in response to the claimant's affidavit, contends that she has made no financial contribution to the construction of the house. According to him, the construction of the house was originally started by his brother who later became ill. He and his sisters then decided to complete the house from their own resources and from materials that were already bought by his brother. The extension to the house was later done by him from his own resources and with the contribution of his sisters who lived abroad. His sisters would give him as much as US$50.00 from time to time.

[48] The evidence of the defendant was to change, however, in some fundamental respects under cross-examination. Upon being cross-examined, he stated that the claimant did, in fact, contribute to the construction of the house which is contrary to what he had initially said. His testimony was that she contributed towards the construction of the ground floor only. He was the one who built the top floor with the assistance of his sisters. He also conceded under cross-examination that the earnings from the shop, operated and managed by the claimant, were used to meet the educational needs of the children and to maintain the house.

[49] He also stated that the claimant is more able to read and write than he can and so certain items relating to the construction of the house were purchased in her name and that most, if not all, financial transactions and investment projects were left up to her. He stated that this accounted for receipts she has exhibited

concerning construction of the house being in her name only. He said that he entrusted her with his earnings and she took advantage of him.

[50] The claimant, of course, has vehemently denied the defendant's claim to being the sole provider for the family. She denied that she has been a housewife for the duration of the union and re-asserted that after leaving school, she was always employed. She also denied that the defendant constructed any part of the house with the assistance of his relatives. She stated that for the 22 years or so she lived on the property, she has never seen any of his sisters stays at the house at any time. She is aware that the defendant did assist his brothers and sisters with repairs to their family house (a different house) but none of his relatives assisted in the construction of the house in question. She indicated that based on the relationship between the defendant and his sisters, it is unlikely that the defendant's sisters would have used their resources for a house in which she would live for the future.

Discussion of the evidence and the applicable law

[51] All the evidence adduced by both parties has been duly considered. I do not propose, however, to present a recital of the details of all the evidence. My effort has been directed at dealing with the evidence that is immediately and materially relevant to the issue that confronts me for determination, and that is, what is the parties' interest in the house at Green Hill.

[52] It is clearly seen from the substance of the testimony of the parties that both are seeking to establish, primarily, direct financial contribution towards the

construction of the house as the basis for an entitlement. Financial contribution is thus given primacy of place on both parties' cases but whether contribution is a prime consideration, or a consideration any at all, will, of course, depend on the question whether the house is the family home.

[53] The need to first consider that question is imperative because different considerations will have to be applied depending on the nature of the property in dispute. This is so because with the advent of the Act, direct or indirect financial contribution towards the acquisition, preservation and maintenance of matrimonial property does not, by itself, enjoy pride of place as it once did prior to the Act. It is now well established that the division of what is now referred to as the family home demands different considerations from other property not the family home.

[54] This requirement for different treatment of the family home is made clear on the wording of section 14 (1) of the Act. It provides that on an application under section 13, the Court shall divide the family home in accordance with section 6 or 7 of the Act, as the case may be, while all other property should be divided according to the consideration of other factors specified in the Act.

[55] So, although the claimant has not stated in the Claim Form, itself, that the claim is specifically in respect of the family home, the question as to whether the property in question is the family home is a live one arising on the facts of the case. This makes it necessary at this point in time to remind oneself of what in law is the family home.

[56] The *"family home"* is defined under section 2 of the Act as:

> "[t]*he dwelling house that is wholly owned by either or both of the spouses and use 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 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."*

[57] In relation to the division of the family home, section 6 (1) of the Act, then, states:

> *6.-(1) Subject to subsection (2) of this section and share of the family home-*
> *sections 7 and 10, each spouse shall be entitled to one-half*
> *(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 husband and wife have separated and there is no likelihood of reconciliation.*

[58] Section 7, however, authorizes the Court to vary the equal share rule upon the application of an interested party where, in the circumstances of the case, the Court is of the opinion that applying the rule would be unjust and unreasonable. It is convenient to state here that there is no application under section 7 for the variation of the rule and so the question is whether section 6(1) is applicable.

[59] The question that now arises for examination is whether the property in question falls within the definition of the family home. An examination of the evidence shows that the parties enjoyed a relationship spanning well over three decades. In 1986, being twenty five years or so ago, they moved into this house

where they have continued to reside, at least, up to the trial of this claim. I find on all the evidence adduced that the house was jointly constructed by the parties from joint funds to which both contributed as a team. I reject the defendant's claim that the top floor was built by him alone with the help of his relatives and that the claimant only contributed to the ground floor.

[60] I am partly assisted in concluding that the claimant is more credible than the defendant in the light of several internal inconsistencies in the defendant's case that I find go to the root of his credibility and, partly, by their demeanour in responding to the questions asked of them on cross-examination. One striking example of note is that the defendant, at first, had indicated that the claimant had made no contribution at all to the construction of the house but then he was later to change his mouth to say that she contributed but only towards the construction of the ground floor. I find that the defendant did not impress me overall as a reliable witness.

[61] Having accepted that the house was built by both parties and so belong to them both, I now turn to consider the argument of Mr. Forsythe that because the house was built on family land, it cannot be the family home within the meaning of the Act. There can be no dispute that the house would fit within the definition of what would be a family home for the purposes of the Act. It is undeniable that it was the parties' only, or at least, principal place of residence during the union. It was not a gift to any of them but was constructed by them both as I have

already accepted. It is thus property within the meaning of the law owned by both of them. This, without more, would entitle each of them to an interest in it.

[62] The material question at this point, therefore, is whether the fact that the legal title for the land does not reside in any of the parties would affect the standing of the house as the parties' family home. In this regard what the undisputed evidence does prove is that the land has been used wholly by the parties and their family for the purposes of the household for well over two decades. This would, therefore, satisfy the requirements in law for the land, together with the house, to be taken as the family home. There is nothing in the Act to say that the land must be owned by either party or both of them, it only states the dwelling house should be.

[63] Ms. McFarlane has submitted, on behalf of the claimant, that when the circumstances are examined, the fact that the land on which the house stands is family land is not a relevant factor in determining the claimant's entitlement in the circumstances of this case. She pointed to several facts that arose on the evidence to show that the question of the ownership of the land is not such so as to stand as a proper reason to deny the claimant a share in the house. I agree with those submissions having myself examined the evidence concerning the circumstances surrounding the acquisition of the land and the construction of the house by the parties. I have found some key facts worthy of due consideration some of which have been relied on by Ms. McFarlane in support of her contention. These are noted to be as follows.

[64] The land on which the house stands forms part of a larger parcel that was owned by the defendant's father who passed away. Upon the defendant's father's death, the land was to be shared up among the family members to include the defendant. The defendant would, therefore, stand as a beneficiary of his father's estate. The evidence is not clear whether that would be by will or by virtue of the rules of intestacy. Be that as it may, however, upon the death of the defendant's father, the defendant's mother handed over to him the papers relating to the land (which were never exhibited). Both the claimant and defendant have had access to those papers at some time, or the other, during the course of the union. The defendant and the clamant having received papers entered the land and proceeded to build the house, making it their matrimonial home.

[65] The construction of the house commenced with the knowledge and obvious acquiescence of the defendant's mother and other family members. No one did anything to interfere with the parties' occupation of the land and construction of the house. The defendant's mother has since died and there is no evidence that there had been, over the twenty years, any attempt by anyone to regain possession of this land prior to, or after the death of, the mother.

[66] The papers relating to the land that were given by the defendant's mother to him were never returned. The evidence reveals that the parties and their children have been in open, continuous and undisturbed occupation of the land for over twenty years. Furthermore, prior to the separation, both parties had

taken steps together to have the parcel of land, on which the house is built, surveyed. This was in an effort to have the land cut off from other portions of the family land for them to make an application for registered title.

[67] The surveyor was actually instructed to do so and the common intention of the parties at the time was that they would apply for registered title to be issued in the name of their son. The claimant said the son was elected as nominee because “he is a Cunningham” and the land was family land. So it appears that the intention was to retain the land in the name of the defendant’s family. As an aside, I will just say that that fact does serve in some way to disclose a possible reason for the claimant not seeking an interest in the land but only in the house.

[68] This conduct of the parties towards the land seems to have been an unequivocal acceptance on their part, and particularly of the defendant, that the portion of land on which the house was constructed belongs to the defendant and his family. The fact is that even if there is no registered title, the defendant has occupied the land with his family for well over 12 years with no interference from anyone and they have actually acted towards that portion of the property as the true owners. That shows not only the act of possession but an intention to possess the land to the exclusion of all others. There is, in them, at least possessory title for over 12 which places them in a strong position to establish title by adverse possession, at least, and to oust any other claim to that portion of the land.

[69] Even greater than any claim to the land based on adverse possession, however, is that the portion of land on which the defendant was placed by his mother would have formed part of the estate of the defendant's father. The defendant would have, on the face of it, a beneficial or equitable interest in the land as a beneficiary of his father's estate.

[70] The Act does not, at all preclude an entitlement to land if there is no registered interest or legal title. The definition of property in the Act is wide enough to cover an equitable or beneficial interest in land. The fact is that even if the defendant alone were to be taken as the owner of the land, once it forms part of the property that constitutes the family home based on the legal definition, it must be shared equally unless circumstances exist, in law, for a departure from the rule.

[71] Having closely scrutinized the evidence of the circumstances that obtained in this case, I find, in law and in fact, that the land on which the dwelling house is constructed was used wholly for the purposes of the household thus making it, together with the dwelling house built by the parties, the family home. I am therefore in agreement with Ms. McFarlane that the fact that the house was built on family land does not take away from its standing as the family home.

[72] Section 14(1) (a) of the Act states that where the application for division of property concerns the family home, then section 6 or 7 shall apply. Section 7 does not apply in this case and so only section 6 stands to be applied. Section 6 invokes the equal share rule in respect of the family home. It would stand to

reason then, without more, that the claimant would be entitled to half share or 50% in the family home which would mean the house together with the land.

[73] It is, however, noted that although this is so, the claimant, as pointed out before, has been specific in her claim for an entitlement to the house. She has clearly not made any claim for an interest in the land itself. The house itself, of course, stands as property within the meaning of the Act to which a spouse may claim entitlement. That she has done. I have found it necessary to say this again because Ms. McFarlane's closing written submission, on behalf of the claimant, seems to be suggesting that the claimant's 50% entitlement that should be declared should include the land. I am not prepared to view it in that way because there is no claim in respect of the land; the land was excluded from her claim. She is bound by her case as filed. She is thus entitled to 50% share in the dwelling house situated on the land, as claimed, based on the operation of section 6 (1) of the Act.

[74] However, I must state further that even if I am wrong to conclude that the house in question is the family home, I have, in any event, examined the claim also within the context of section 14 (1) (b) of the Act that provides for division of property that is not the family home. Having taken the relevant factors specified in subsection 2 as the factors to be taken into account in dividing property that is not the family home, I would still have concluded that the claimant would be entitled to a 50% share in the house, in any event.

[75] I find that nothing less than equal share would satisfy the ends of justice in this case having taken into account the following factors: (a) the union (combined common law and marriage) being one of long duration; (b) the financial and other contributions, directly and indirectly, made by the claimant to the acquisition, conservation and improvement of the property; (c) the *modus operandi* of the parties in operating jointly in economic activities, and otherwise, throughout the course of the union, for the overall benefit of the union; (d) the contribution of the claimant in the management of the household; and (e) the performance of household duties by the claimant to include, in particular, the rearing, nurturing and care of the children of the union.

[76] In disposing of the matter, I will say that when all the circumstances are considered, I see nothing that could prevent a separate valuation being done of the land, on the one hand, and the house on the other. The claimant would be entitled to her half-share interest in the house, itself, leaving the land to the 'Cunninghams'. This is what she had, obviously, intended to do, from ever since, when she agreed that the certificate of title they were applying for should be issued in their son's name. Her stance is interpreted to mean *'Let Cunningham land remain Cunningham land'*. I think that is only fair. The house constructed on it, however, is a different matter. She is entitled to a half- interest share in the house, on equal footing with the defendant. Her interest can easily be translated into monetary terms.

ORDERS

[77] In accordance with the terms of the Fixed Date Claim Form, I now proceed to make the following pronouncements.

(1) It is declared that the claimant is entitled to a 50% share and the defendant to 50% share in the dwelling house situated on land located at Green Hill, Alexandria, in the parish of St. Ann, subject matter of the claim.

(2) The said dwelling house is to be valued by a valuator to be agreed between the parties and the cost of the said valuation is to be borne by the parties equally. If the parties cannot agree to a valuator, the Registrar of the Supreme Court (the Registrar) is empowered to select one, at her sole discretion, upon the application of either party.

(3) The defendant is given the first choice to purchase the claimant's share in the said house, the option to be exercised within a time to be agreed on between the parties, failing which the house shall be sold on the open market and the net proceeds divided equally between the parties in accordance with their respective share allotment.

(4) In the event the property cannot be sold due to issues concerning the sub-division of the land and/or title, the defendant, in any event, is to pay to the claimant the monetary equivalent of her half interest in the said house, failing which the said sum shall be recoverable by the claimant against the defendant as a debt due and owing.

(5) The Registrar is empowered to sign all necessary documents to give effect to the orders made herein in the event of the failure or unwillingness of either party to sign.

(6) No order as to costs.

(7) Liberty to apply.