[2014] JMSC Civ 78

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011 HCV 06240

BETWEEN	**JOYCE WRIGHT**	**CLAIMANT**
AND	**CURTIS BERNARD**	**DEFENDANT**

Mr. Samuel Smith for the claimant

Mrs. Verleta Green for the defendant

Heard: 1st, 2nd and 3rd May, 2013 and 14th May, 2014

Property – Common law union – Dispute as to property ownership – Whether union recognised under PROSA – Whether spouses under 5.2(1) of PROSA - Constructive trust

IN CHAMBERS

E. BROWN, J

Introduction

[1] Joyce Wright and Curtis Bernard met each other either on the eve of the twentieth or the dawn of the twenty-first century. At that time Mr Bernard was living with a partner, Jacqueline McPherson (now McPherson Smith since 2003), and Miss Wright was the paramour of Reginald Bennett, a married man. The bond between them grew and their relationship followed the well established trajectory of many Jamaican families into the realm of a visiting relationship then to sharing the same household. Their journey however didn't take them into the next stage of a traditional marriage before the

relationship terminated in. Over the course of these years two children were born to the couple. There were also two 'children of the family' as a result of the union with the claimant and Mr Bennett as well as another gentleman. As may be expected, the question of the ownership of the home in which the parties resided and other properties acquired during the currency of the relationship has become a live issue between them. This is therefore a claim to resolve the property disputes which have arisen in the wake of the termination of their cohabitation.

The Claim

[2] The claim was commenced in the Resident Magistrate's Court for the parish of St. Elizabeth on the 20th October 2008. On the 29th November 2010 Her Hon. Mrs. Sonya Wint-Blair, one of the Resident Magistrates for the parish, made an order transferring the claim to the Supreme Court. The claim is framed under the Property (Rights of Spouses) Act, 2004 or in the alternative, in equity. The Particulars of Claim is reproduced below:

> 1. *The Plaintiff and the defendant shared a common law relationship, between the years 2000 and 2008, as if they were in law man and wife.*
>
> 2. *At all material times the Plaintiff was a spinster and the Defendant a bachelor.*
>
> 3. *The aforesaid common law relationship produced 2 children ages 3 and 7 years for whose care and the care of the Defendant, the Plaintiff devoted most of her time and effort without assistance of any domestic help.*
>
> 4. *Notwithstanding the Plaintiff's hard work in the home, her commitment to the family life and contribution directly and indirectly to the acquisition of vast amount of assets, the defendant treated the plaintiff with exceptional cruelty.*
>
> 5. *That in or around July 2007, the Plaintiff in the face of the Defendant continuous physical and mental abuse went to spend time with her mother in Parotee in the parish of St. Elizabeth. However when she returned in the latter part of October the Defendant's behaviour deteriorated further with the level of abuse becoming unbearable.*

6. *As a consequence of the Defendant's cruel and abusive behaviour the Plaintiff had to spend various period with her mother until finally on or around the 16th of February 2008 the Defendant indicated that he wanted to end the relationship as he needed a younger woman in his life. Consequently the Plaintiff deemed the relationship as at end (sic) and vacated the family home after only managing to take some of her furniture with her.*

7. *Despite the termination of the said common law relationship the defendant fails or refuses to amicably address positively or at all the issue of her entitlement to share in such assets notwithstanding her contribution hereto.*

8. *The parties cohabited in a dwelling house built with their joint efforts with pooled resources on a parcel of land situated at Burnt Savannah in the parish of Saint Elizabeth, containing by estimation ¼ of an acre more or less which land was purchased during their relationship but prior to and in anticipation of their living together in the aforesaid common law union.*

9. *That said dwelling house which is a six (6) apartment, 2 bedroom concrete structure was so built with the Plaintiff's contribution as it was the common understanding and intention of the Plaintiff and the Defendant that the house was to belong to them both as their family home.*

10. *That further, the Plaintiff with her own resources built a shop on the said land and operated her business there but has been deprived of access thereto resulting in loss of benefit and income from her said shop.*

11. *Other properties jointly acquired by the Plaintiff and Defendant and in which the Defendant is bent on depriving the Plaintiff of a moiety or any other interest are as follows:*

REALTY

One lot of land containing by estimation 2 square chains more or less, situated at Burnt Savannah in the parish of St. Elizabeth.

PERSONALTY

i. *One 10 Wheeler* ***International Truck*** *Licence #* ***CD 9704***
ii. *One* ***Isuzu Truck****, Licence #* ***4730 FA***

12. *That all property so acquired have been titled in the sole name of the Defendant.*

13. *Notwithstanding the Plaintiff's contribution as aforesaid to the acquisition of the said assets and the repeated requests made by the Plaintiff, the Defendant has been unrelenting in his conduct to prevent the said Plaintiff from deriving any or any proper benefit from the aforesaid properties or from realising her rightful and just share in said properties.*

The claimant seeks the following orders:

i. *That the family home in which the parties cohabited aforesaid be divided equally between the parties or in such other proportion as the Honourable Court deems just and equitable.*

ii. *That all other properties referred to in paragraph 10 and 11 hereof be apportioned between the parties equally or in such other proportion as the Honourable Court deems just and equitable.*

iii. *That all the properties subject of the court order be subject to valuation by a reputable valuator approved by the Parties and that the Defendant pay to the Plaintiff her declared share based on the value of said properties, failing which the properties to be sold and the respective shares be paid to the parties from net sale proceeds.*

iv. *That the Defendant makes a just and true account to the Plaintiff of all income generated by the trucks referred to in paragraph 7 hereof between August 2007 and the date hereof and continuing up to determination of this matter and that a moiety of such income, net of cost be paid by the Defendant to the said Plaintiff.*

v. *Such further and other Order as this honourable Court may deem fit.*

The Defence

1. *The Defendant admits that the parties shared a relationship but denies that it was between the years 2000 and 2008 as alleged in Paragraph 1 of the Particulars of Claim.*

2. *The Defendant avers that the parties met in 2000 at a time when they were both involved in other relationships. The parties became intimate in 2001.*

3. *The Defendant admits that the relationship produced two children born on December 15, 2001 and July 31, 2003 respectively.*

4. *The Defendant avers that the parties began living together in 2003 shortly before the birth of their second child. The relationship ended in the later part of the year 2006.*

5. *At the time of the birth of their first child in 2001, the Defendant was residing at Dumbarton Avenue in Saint Andrew. He stayed at his family home in Burnt Savannah on weekends while he attended to his business. The Claimant spent the week-end preceding the birth of their first child at the said family home to make it easier for him to take her to the hospital. After the birth she returned to her home at Hill Top, Parottee.*

6. *Paragraph 2 of the Particulars of Claim is admitted.*

7. *Paragraph 3 is denied.*

8. *The Defendant says that he provided domestic help to assist with the laundry on weekends. At times when the help was not available he did his own laundry while the Claimant did the laundry for herself and the children. Later in the relationship the Defendant acquired a washing machine.*

9. *Save and except for her contribution to the construction of a shop the Defendant denies that the Claimant contributed directly to the acquisition of any assets. The Claimant denies that there was any acquisition of any vast amount of assets.*

10. *The Defendant admits that the Claimant is entitled to a share of the shop.*

11. *The Claimant contributed to the construction of the shop by the purchase of materials such as cement, steel, nails and binding wire. On completion of the shop the Claimant operated a bar and grocery.*

12. *The Defendant denies that he was physically and mentally abusive to the Claimant.*

13. *The Defendant says that the relationship deteriorated and finally broke down due to the Claimant's intolerable behaviour. The Claimant's continued use of foul language in the presence of the children, excessive drinking and smoking of substances led to the breakdown of the relationship.*

14. *The relationship came to an end after a number of incidents three (3) of which made the Defendant fearful.*

    i. *The customers at the bar which the Claimant operated on the premises were often boisterous and used indecent language. On one occasion, a neighbour protested at the indecent language. The Defendant told the Claimant that the "bar thing would not work on the premises" particularly as the children were being exposed to the indecent language.*

    ii. *On another occasion the Defendant discovered a list with a number of items and the items themselves in the house. The discovery led the Defendant to believe that the Claimant was engaging in occult behaviour. The Claimant admitted that the items were hers and accused the Defendant of being fast. She told the Defendant to give her back her things. The Defendant will refer to the list at the trial.*

    iii. *The day following this incident the Defendant discovered that his tested eyeglasses were missing from the house. He found them broken up and thrown into an outside toilet tied up in a bag with one of the Claimant's panties, his diary and some of his business cards.*

    iv. *In the presence of neighbours, the Claimant admitted that she had broken the glasses and thrown them away to blind the Defendant because he "sees too much". The Claimant promised to replace the glasses but she never did so.*

    v. *On another occasion the Defendant found a bag with a pregnancy test kit in the kitchen. The kit indicated a positive result. As the parties had not been intimate for some time, the Defendant asked the Claimant about her pregnancy and asked where she and that baby were going to stay. The Claimant responded that the kit belonged to a friend. The Defendant inquired if she had brought a friend's "piss" to throw away in their kitchen.*

15. *About one week after this incident the Claimant removed from the home taking all her stock and fittings from the bar. From the house she removed her belongings including a bed and a chest of drawers. She left a stove which she later removed.*

16. *The Defendant categorically denies that the allegations in paragraph 6.*

17. *Until she finally removed from the home any time that the Claimant spent away from the home was spent renovating and expanding her shop at Parottee. After those visits she returned home.*

18. *The Defendant denies that she returned after she left the home. The Defendant denies that she vacated the home in February 2008 as alleged or in the circumstances alleged.*

19. *Save and except for a share in the shop the Defendant denies that the Claimant is entitled to a share in the assets set out in the Particulars of Claim.*

20. *The Defendant says that between 2003 and 2006 they resided in a dwelling house at Burnt Savannah in the parish of Saint Elizabeth.*

21. *The Defendant denies that the house was built with their joint efforts or from pooled resources as alleged in Paragraph 8 of the Particulars of Claim.*

22. *The Defendant further denies that the land was purchased during their relationship in anticipation of their living together as alleged in the said paragraph 8.*

23. *The Defendant says that he purchased the land on which the house is built in 1999 before he knew the Claimant. The land was purchased from the proceeds of the Defendant's mechanic business which he operated at Cassia Park Road in Kingston.*

24. *The title to this land has not yet been settled as relatives of the Vendor are claiming the land.*

25. *The Defendant will at the trial produce the documents including the counterfoil of the Manager's Cheque dated in 1999 relating to his purchase of the land.*

26. *The Defendant started to build on the land and the house was already framed out and blocked up and decked before the Claimant moved there.*

27. *In 2003 when the Claimant was expecting their second child the Defendant completed one room so they could move in.*

28. *The Claimant brought her two children from a previous relationship and the parties' first son and they all shared the one room.*

29. *After our second son was born the parties continued to share the one room.*

30. *On one occasion the Claimant inquired if the Defendant was not going to finish the house. The Defendant asked her why she did not help him with it. The Claimant responded that she had her house already and it was for the Defendant to build one for himself and his children.*

31. *The Defendant later completed another bedroom by rendering the walls, tiling the floor and putting in doors and windows. Since the Claimant left, the Defendant has added grills to the front bedroom and completed the living room side by tiling the floor, putting in French windows, roughcasting and rendering the walls and painting it.*

32. *At the time that the parties met the Claimant operated a bar at Parottee in the parish of Saint Elizabeth. She complained that it was not earning anything. The Defendant assisted her in starting a bar at Knoxwood in the said parish of Saint Elizabeth. The Claimant claimed that this too was not viable.*

33. *The Defendant has had plans to construct a hardware store on the land and had started to purchase and store material for the construction. The Claimant contributed to the construction as stated in Paragraph 11 thereof.*

34. *On completion of the building the Claimant's(sic) requested that she be allowed to operate a bar and grocery in the building instead of the hardware store.*

35. *The Defendant at the time continued his block-making business on the land.*

36. *The Claimant operated the bar and grocery as her own business. The Defendant at times assisted her in the purchase of stock and paid for electricity but the business was treated as belonging solely to her. She kept the proceeds of the business for herself. The Defendant paid the Claimant for items which she used from the grocery for the household. The shop has not been in operation since the Claimant left the premises.*

37. *Save for one occasion when the parties made a joint purchase, the Defendant denies that the parties pooled their resources. They both kept separate accounts. On one occasion the Defendant took documents to the Claimant so that she could co-sign on his account at the Bank of Nova Scotia in Santa Cruz. The Claimant refused to sign the documents.*

38. *To the best of the Defendant's recollection, the only time that the parties joined together in a purchase was for the purchase of a cow for*

the children from the Claimant's father. The purchase price of Nine Thousand Dollars ($9,000.00) was provided, Five Thousand Dollars ($5,000.00) by the Defendant and Four Thousand Dollars ($4,000.00) by the Claimant. The Claimant both (sic) the cow and a calf which was born after the purchase for the sum of Seventy Thousand Dollars. The Claimant kept the funds to and for herself.

39. *The Defendant denies that the Claimant contributed to the acquisition of the realty or the personalty set out in Paragraph 11 of the Particulars of Claim.*

REALTY

The lot of land at Burnt Savannah referred to in Paragraph 11 was purchased from the proceeds of sale of a lot of land in Angels in the parish of Saint Catherine which the Defendant had acquired in 1992 for the sum of Ninety Thousand Dollars ($90,000.00). The Defendant deposited Fifty Thousand Dollars on the land and thereafter paid the balance. The land was transferred to the Defendant in 2002.

In 2003 the Defendant sold the land for the sum of Five Hundred Thousand Dollars ($500,000.00) receiving net proceeds of approximately Four Hundred Thousand Dollars ($400,000.00).

The Defendant used part of the proceeds to assist in completion of the one room of the home and a portion of the balance to purchase the lot of land at Burnt Savannah. At the time of purchase of the land by the Defendant, Fifteen Thousand Dollars of the money which he had in the house was missing. The Claimant claimed that the money had been taken by the parties' children.

The Defendant will at the trial produce the documents relating to his acquisition and sale of the land at Angels and his purchase of the land at Burnt Savannah.

PERSONALTY

i. ***10 Wheeler International Truck***
The 1987 International Truck was purchased in 2001 as a truck head between September and October 2001. The Defendant purchased parts converted it to a tipper truck. At the time of purchase the parties were not living together. At first the Defendant kept it at his former home in Burnt Savannah. Later he took it and the parts to the home which he shared with the Claimant. The Claimant inquired why he had brought old iron to throw down in the yard.

ii. ***Izuzu Truck***

The Izuzu truck was purchased by the Defendant in 2005 for the sum of $225,000.00 without an engine with the intention of fixing it up. Upon learning that the cost of an engine was $270,000.00 the Defendant decided that the truck was not worth fixing up. The Defendant sold the truck for the same money he had paid for it.

40. *Paragraph 11 is denied.*

41. *After the Claimant removed from the home the relationship was amicable. Both children of the parties had remained with him and they spent weekends and holidays with the Claimant. Orders have been made in the Resident Magistrate's Court for the maintenance and custody of the children.*

42. *In March 2007 the Defendant requested a receipt for the sum of Twenty Thousand Dollars ($20,000.00) which he had given to her to buy animal feed for her shop. The Defendant requested the receipt because of remarks made by the Claimant. At the date of the receipt the parties were not living together.*

43. *In January 2008 due to remarks made by the Claimant that the Defendant owed her for her shop he told her that he had already given her $50,000.00 to put in her business. He then requested a receipt from her. A friend wrote a receipt in the sum of One Hundred Thousand Dollars ($100,000.00) being the $50,000.00 which he had previously given her and $50,000.00 which he gave her on the 31st of January 2008. The Claimant signed the receipt. The Defendant will at the trial produce and tender the said receipts.*

44. *By Order of the Resident Magistrate for the parish of Saint Elizabeth a valuation was done on the property. The Defendant is unaware of the value assessed.*

45. *Save and except for her share in the shop erected on the land, the Defendant denies that the Claimant is entitled to the relief sought in the Particulars of Claim.*

Case for the Claimant

Commencement and Duration of Relationship

[3] The claimant alleged that she and the defendant were previously engaged in a common law union. She stated that the relationship commenced as a visiting relationship on the 30th of January 1999. Her assertion was that she would visit the defendant at his apartment at Dumbarton Avenue, Kingston 10 and that he would also

visit her in St. Elizabeth. She admitted that she was aware that the defendant had previously been in a relationship with Jacqueline McPherson. However, she stated that whenever she visited the defendant in Kingston there was no indication that he was still involved with Jacqueline McPherson or that he was involved with any other woman at that time.

[4] The claimant's contention is that, on or around 1st of October 1999, she and the defendant decided to live together as common law husband and wife. Consequently, the claimant moved to Kingston to reside with the defendant at his apartment. She stated that while there she was responsible for doing all domestic chores within the residence at Dumbarton Avenue, including taking care of the laundry for herself and the defendant.

[5] The claimant further alleged that their living arrangements changed on or around the 18th May 2000, when she and the defendant left Kingston and relocated to Hope River at a home belonging to the defendant's adopted grandmother (hereinafter referred to as the "family home"). The claimant stated that between 2000 and 2002 the "family home" at Hope River was the sole and permanent address of herself and the defendant.

[6] It is the contention of the claimant that she devoted most of her time to caring for the defendant and their two children without the assistance of any domestic help. Nonetheless, she alleged that on or around the 16th of February 2008 the defendant indicated that he wanted to end the relationship because he needed a younger woman in his life. She claimed that it was at this time that the relationship between them ended and as a result she left the home. Her reason for leaving the home and the relationship was that the defendant treated her with exceptional cruelty. She claimed that when the relationship came to its end in February the defendant beat her mercilessly and burnt some articles of property which belonged to her.

Affidavits in Support of Claimant's Case

[7] Lloyd Myers gave an affidavit in support of the claimant's allegations. He stated that he actually met the defendant in 2000 and claimed that the defendant had been introduced to him as the person with whom the claimant had been living with in

Kingston. He also stated that he had been informed that the claimant and defendant had relocated to Burnt Savannah, St. Elizabeth in the latter part of 2000. He went on to say that in or around the latter part of 2001, the claimant had informed him that she and the defendant were building their own house in Burnt Savannah. He alleged that the claimant had requested that he and some other men assist with the construction of the house, but he was unable to attend on the days required. However, he stated that he was informed that the other men had gone to help the claimant. Finally, he asserted that in or around early June 2002 he was invited to the claimant's and defendant's house. As such, it was on that basis that he confirmed that the claimant and defendant were in fact living together in the house they built together at Burnt Savannah.

[8] Curtis Smith also gave an affidavit in support of the claimant's case. He claimed to have met the defendant in early 1999 after being introduced to him by the claimant, with whom he alleged the defendant had a relationship. He stated that the defendant was actually residing in Kingston when he met him but that the defendant would visit St. Elizabeth every weekend. He admitted that the claimant was in another relationship during the early part of her relationship with the defendant. As such, he claimed that she and the defendant were discreet in visiting each other. He alleged that the claimant would visit the defendant in Kingston and whenever she did so he would keep her pick-up truck at his home until she returned. He stated that the claimant went to live with the defendant in Kingston possibly late September or early October of 1999. He also claimed that she and the defendant would leave St. Elizabeth and return together.

[9] He asserted that he was sure that the claimant was living with the defendant in Kingston because he maintained contact with her by telephone while she was living there. Furthermore, he stated that he visited the defendant at his house at Hope River and the defendant "made no bones about the fact that they (the claimant and defendant) were both living together in Kingston". He alleged that the claimant and defendant returned from Kingston and began living together at the house in Hope River sometime between May and July of 2000. Finally, he stated that to the best of his knowledge the claimant did not return to live at Hill Top Parottee until 2008.

Contentions Relating to the Assets

[10] The claimant alleged that she made contributions, directly and indirectly, to the acquisition of a vast amount of assets over the course of her relationship with the defendant.

Firstly, the claimant asserted that the defendant bought a ¼ acre of land in Burnt Savannah during the course of their relationship prior to and in anticipation of their living together in a common law relationship. The claimant did not claim that she contributed to the purchase of the said land and she admitted that it belonged to the defendant solely. She did allege however that she and the defendant pooled their resources to build the home in which they lived together on the land in Burnt Savannah.

[11] The claimant stated that the dwelling house was lined out by her friend Keith Satchwell, a contractor. She also claimed that she made direct contributions to the construction of the home including contributing money to purchase cement, steel, marl and to pay workers. Furthermore, she claimed that she contributed indirectly to the construction of the said house based on the fact that much of the work was done by her family and friends without charge and the fact that some of the materials used in the construction were donated to her by friends. Finally, the claimant alleged that the defendant insisted that she provide one-half of the cost for all other payments for work that was done and for all other materials that were purchased.

[12] It was the claimant's contention that she single-handedly built the shop that was erected on the property in Burnt Savannah. She stated that she even had to purchase the materials used in making the blocks that were used in the construction of the shop. She claimed that the defendant only ever contributed $20,000 to assist with paying the workmen. However, she qualified this by saying that the defendant only gave her that money because he had removed the tyres from her car which prevented her from going to the bank to get the money to pay the workers. She stated that disquiet had erupted among the workmen when they became aware that there was no money available to pay them. Consequently, this was what compelled the defendant to make the contribution.

[13] The claimant asserted that the shop was built for the sole purpose of operating a bar. She stated that, contrary to the allegations of the defendant, no grocery shop was ever operated at the shop by her or any other person. She claimed that the only other items sold in the shop were farm materials and animal feed. Furthermore, she declared that the defendant played no role in the operation of the business at the shop. She stated that his claim that he purchased stock and paid for utility bills was false. The claimant also declared that other properties were jointly acquired by her and the defendant. These are a vacant lot of land situated in Burnt Savannah, St. Elizabeth, a 10 Wheeler International Truck and an Isuzu Truck.

[14] The allegation made by the claimant is that the vacant lot of land was purchased jointly by herself and the Defendant. In addition, she stated that the 10 Wheeler International Truck was also a joint purchase and that furthermore she had contributed to paying a welder for work he had done on the truck. Finally, she stated that the Isuzu Truck was jointly purchased by her and the defendant. She alleged that, contrary to the statements made by the defendant, the truck was never sold by the defendant and the defendant has been operating, said truck from the time it was repaired up to the present time.

Case for the Defendant

Commencement and Duration of Relationship

[15] The defendant asserted that he met the claimant in the year 2000. He emphasized that in 1999 he did not have an intimate relationship with the claimant. On the contrary, he stated that in 1999 he was in a live-in relationship with Jacqueline McPherson (now Jacqueline McPherson-Smith). He contended that at the time he met the claimant he resided at an apartment at Dumbarton Avenue, Kingston 10 and the claimant resided at Hill Top District, Parottee in St. Elizabeth. He alleged that when he met the claimant they were both involved in other relationships and that they both ended these other relationships and became intimate in 2001.

[16] The defendant's assertion is that he and the claimant began living together in 2003. He stated that in or about March 2003 the claimant moved in with him in the

unfinished house at Burnt Savannah. He emphasised that at no time did the claimant ever reside with him at his apartment in Kingston. He also stated that the claimant never visited him at his apartment in Kingston.

[17] The defendant admitted that the claimant would sometimes visit him at the "family home" in Burnt Savannah. He noted that they stayed at that home for one week preceding the birth of their first child. However, the defendant was adamant that, aside from that one week, he and the claimant never resided at the said "family home" together.

[18] The defendant also asserted that, contrary to the statements made by the claimant, he did provide domestic help to assist with the laundry on the weekends. Furthermore, he claimed that he sometimes did his own laundry and that later in the relationship he acquired a washing machine. Additionally, the defendant denied that the claimant was responsible for any domestic chores at Dumbarton Avenue in Kingston.

[19] It was the defendant's allegation that his relationship with the claimant ended in the latter part of 2006. He denied that he was ever physically or mentally abusive to the claimant. On the contrary, he alleged that the reason for their breakup was the fact that the claimant's behaviour was intolerable in that she used foul language in the presence of the children, she drank excessively and she smoked substances. The defendant also claimed that there were a number of incidents involving the claimant that caused him to become fearful for his safety.

Affidavits in Support of Defendant's Case

[20] The affidavit of Jacqueline McPherson-Smith supports the defendant's contentions. Mrs. McPherson-Smith admitted that she and the defendant had been living together from 1994-2000. She stated that their relationship ended in July 2000 when she left the house in Kingston. She claimed that, as far as she was aware, the defendant and the claimant never resided together at the apartment in Kingston or anywhere else in Kingston at any time during or after her own relationship with the defendant.

[21] The affidavit of Dave Anthony Williams also lends support to the defendant's assertions. Mr. Williams stated that he moved into the "family home" in Burnt Savannah in about 1997. At that time he asserted that the defendant was living in Kingston. He said that he would sometimes visit the defendant at his home in Kingston but that up to 2000, whenever he visited Kingston, the defendant was living with a lady known to him as Jackie McPherson. He claimed that when he visited after 2000 he no longer saw Ms. McPherson and that the defendant had been living alone in Kingston. He stated that he first met the claimant at his own wedding in September 2000. He noted that at no time during his visits to Kingston did he see the claimant. He alleged that though the claimant sometimes visited the defendant at the "family home" at Hope River she never lived there on a regular basis.

[22] Mr. Williams asserted that he knew when the defendant had purchased the land on which the defendant's house in Burnt Savannah was built and that at the time when the land was purchased, he did not know the claimant. He also alleged that he assisted the defendant with building the house. In addition, he underscored that at the time the house was being built the claimant was not living in Burnt Savannah and that she only went to live there after the bedroom side of the house was finished shortly before the birth of her second child for the defendant. He alleged that when he left Jamaica in 2008 the claimant was no longer living in Burnt Savannah and she had in fact left the home about a year and a half before he left Jamaica.

Defendant's Response to Affidavits in Support of Claimant's Case

[23] In response to the affidavit of Lloyd Myers, the defendant denied meeting Mr. Myers in 2000 and he alleged that Mr. Myers' affidavit was filled with lies and hearsay.

In response to the affidavit of Curtis Smith, the Defendant also denied meeting Mr. Smith in 1999 as alleged. The Defendant stated that to the best of his recollection he met Curtis Smith in or about 2004 at Hill Top, Parottee at the Claimant's home.

Contentions Relating to the Assets

[24] The defendant stated that he purchased the ¼ acre of land in Burnt Savannah prior to meeting the claimant. He also emphasized that he and the claimant never

pooled their resources in the manner alleged by the claimant. He noted that he only ever pooled resources with the claimant in two instances. That is, when the shop was being built on the land in Burnt Savannah and to purchase a cow for the benefit of their children.

[25] The defendant alleged that the house in Burnt Savannah was built by his sole efforts (that is, without any assistance from the claimant). He claimed that he started the construction in late 2002. He stated that he had the help of his family and friends to frame out the building and he used blocks from his own block shop. The defendant denied that the house was lined out by Keith Satchwell as alleged by the claimant. Rather, his assertion was that the house was lined out by Sonny Dunstan with the assistance of Dave Williams and himself. However, he did mention that Keith Satchwell did work on the house such as laying blocks and preparing for decking but he (the defendant) had paid him for the said work. The defendant was resolute in his declaration that the claimant and her family did not contribute to the building of the house.

[26] The defendant stated that after the claimant came to live with him in the house at Burnt Savannah he later completed another bedroom by rendering the walls, tiling the floor and putting in doors and windows. He further stated that since the claimant left the home he also added grills to the front bedroom and completed the living room side by tiling the floor, putting in French windows, roughcasting, rendering the walls and painting it.

[27] The defendant claimed that the shop that was erected on the land at Burnt Savannah was built by the joint efforts of the claimant and himself. He stated that the claimant contributed to the construction by assisting with the purchase of materials and that he also contributed to the construction by supplying blocks from his block shop, purchasing materials and paying workmen. The defendant alleged that the shop was operated by the claimant as a bar and grocery. He stated that he sometimes assisted the claimant to purchase stock and that he also paid for electricity and water. Nonetheless, he stated that the business was considered as being solely hers.

[28] The defendant denied that the vacant lot of land located at Burnt Savannah was jointly purchased as alleged by the claimant. He outlined that this land was purchased from the proceeds of the sale of a lot of land in Angels, St. Catherine, the latter being acquired by him in 1992. Regarding to the 10 Wheeler International Truck, the defendant claimed that he purchased this truck as a truck head between September and October 2001. He also stated that he purchased the chassis, truck body and other parts and worked on the truck himself. He maintained that at the time of purchasing the truck he and the claimant had not been living together.

[29] With regard to the Isuzu Truck, the defendant contended that this truck was purchased solely by him in 2005. The truck was bought without an engine with the intention of fixing it up. The defendant claimed that the cost to fix up the truck exceeded the amount which he had paid for it. As such, he decided not to fix it up any further and he sold it in 2007 for the same amount he had paid for it. The defendant was adamant that, contrary to allegations of the claimant, the claimant did not contribute to the acquisition of a vast amount of assets during their relationship. He stated that, save and except for her share in the shop erected on the land in Burnt Savannah, the claimant is not entitled to the relief that she seeks.

Claimant's submission

[30] Learned counsel for the claimant submitted that should there be a finding of fact that the claimant was the defendant's spouse, the claim would fall to be determined under the ***Property (Rights of Spouses) Act (PROSA*)**. Counsel submitted that the law places each spouse on an equal footing as regards property that they have acquired. Counsel adverted to the definition of property under section 2 of the ***PROSA*** then opined that the court may determine the entitlement of the respective spouse in each property, including the trucks.

[31] Learned counsel argued that based on the contribution of the claimant to the building of the family home, it would be reasonable to make an order that each spouse's entitlement is one half share. Indeed, that was the entitlement contended for by the claimant's counsel in respect of all the other properties in question, except the shop

which it was said was built solely by the claimant. In respect of the shop, the court was asked to award full value to the claimant.

[32] Alternatively, counsel advanced, if the claim is not well founded under the ***PROSA***, the court should have resort to the principles under the Law of Trusts. In this vein, learned counsel relied on all the classic cases in the area: ***James v Holmes*** (1862) 31 Law Journal Rep, Ch 567; ***Pettit v Pettit*** [1969] 2 All ER 385; ***Gissing v Gissing*** [1971] AC 886; ***Cook v Head*** [1972] 2 All ER 38 C.A.; ***Richards v Dove*** [1974] 1 All ER 888; ***Hazel v Hazel*** [1972] 1 WLR 301; ***Grant v Edwards*** [1986] 2 All ER 426. Of all the cases cited by the claimant's counsel, the greatest emphasis was placed on ***Cook v Head*****.**

[33] Counsel summarised the applicable principles as follows:

1. When two people acquire properties to be used for their joint purpose the court may impose or impute a constructive or resulting trust so as to give effect to their respective shares in the property.
2. The use of the concept of Trust applies to a man and his mistress as much as a man and his wife.
3. The size of the beneficial interest of each party does not depend solely on the monetary contribution each had made towards the property, one can look at the matter broadly.
4. The claimant's contribution to the acquisition of the property need not be directly related to the cost of acquiring or maintaining it. It is sufficient if the contribution (including indirect contributions) are substantial and such as to relieve the defendant from expenditure which he otherwise would have had to bear. (Vide ***Richards v Dove*** [1974] 1 All ER 888, 893-4); (see also ***Eves v Eves*** [1975] 3 All ER 768).

[34] Learned counsel for the claimant concluded his legal submissions with three points. First, there is no requirement that the parties had any agreement regarding the property as notwithstanding this, the court may imply or impute a common intention for the parties to benefit. The dictum of Lord Denning in ***Hazel v Hazel***, *supra*, was cited as

authority for this proposition. Secondly, relying on ***Gissing v Gissing***, *supra*, common intention that the spouse should have an interest may be arrived at based on the conduct of the owner with paper title, which induced the other to act to her detriment. Thirdly, ***Azan v Azan*** (1988) 25 JLR 301 was referenced for the applicability of the foregoing principles in this jurisdiction.

Defendant's submissions

[35] Two sets of closing submissions were filed on behalf of the defendant, the first on the 19th April and the second on the 17th May, 2013. In the former, after rehearsing the affidavit evidence, learned counsel for the defendant asked the court to accept that the parties never cohabited as man and wife for the statutory five year period. In this regard, counsel commended to the court ***Kimber v Kimber*** [2000] 1 F.L.R. 383 which was considered in ***Millicent Bowes v Keith Alexander*** 2006 HCV 05107.

[36] On the question of the contributions allegedly made by the claimant, counsel said that the claimant is not a truthful witness. The defendant's counsel characterised the claimant's evidence in respect of the house, the two squares of land and the trucks as "contradictory, a packet of lies and figments of an overactive imagination." These submissions were further developed in the latter filing.

The Law and analysis

[37] The first issue for my determination is whether the claimant was the defendant's *de facto* spouse? That is, was the claimant a single woman who cohabited with the defendant, he being a single man, as if she were in law his wife, for the requisite statutory period?

[38] The relevant statute in these circumstances is ***the Property (Rights of Spouses) Act, 2004*** (***PROSA***). ***PROSA*** defines who is to be considered a common law spouse and the entitlements that such a spouse may claim. Under section 2 (1), the interpretation section, *"spouse" includes* –

"(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;

(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years, immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be."

[39] The interpretation section renders "cohabit" as living together in a conjugal relationship outside of marriage. Thus, once it is established that a man and woman are living together in this manner for the requisite five year period the issue of their beneficial interest and entitlement to all relevant property can properly be considered. By virtue of section 13(1) (a) of ***PROSA,*** *a spouse shall be entitled to apply to the Court for a division of property ... on the termination of cohabitation*." That application is to be made within twelve months of termination of cohabitation or such longer period as the Court may allow after hearing the applicant (see section13(2)).

[40] Where such an application is made the Court has the power to make an order for the division of the family home and, or to divide such property, other than the family home, as it thinks fit (section 14(1)). In relation to property other than the family home, S.14(2) sets out certain factors the Court must take into consideration including contributions to the acquisition, conservation or improvement of the property, the period of cohabitation, whether there is an agreement with respect to the ownership and division of property and any fact or circumstance the justice of the case requires to be taken into account, in the opinion of the court (section 14(2)). Subsection 14(3) gives the word "contribution" an amorphous meaning, encompassing monetary and non-monetary contributions and reaching like tentacles into nigh every aspect of spousal interaction. Further, both monetary and non-monetary contributions are accorded equal value under subsection 14(4).

[41] Section 6 of ***PROSA*** establishes what is commonly known as the "half-share rule" or synonymously, "equal share rule" (see ***Millicent Bowes v Keith Alexander Taylor*** 2006/HCV05107 delivered 19th January, 2009 para 31) that each spouse shall

be entitled to one-half share of the family home on the termination of cohabitation. However, the Court has the power to vary that rule where it is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half of the family home: ***PROSA***, section 7(1).

Under section 2(1), the "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 or 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 the donor who intended that spouse alone to benefit."*

[42] Once it has been established that a dwelling-house is or was the family home, the division of that property is first approached upon the principle of the presumptive equal share rule. In accordance with general principles of law, he who asserts that the court should invoke its powers under section 7(1) and depart from the presumption must prove that it would be unreasonable or unjust to apply the presumptive equal share rule.

[43] It will be observed that ***PROSA*** is concerned with property disputes arising from a union of spouses only. That is, ***PROSA*** reflects the recognition of two of the three classifications of national family patterns acknowledged by demographers: the traditional legally married and the common law union. The latter is demographically recognised to exist where a man and a woman, not legally united, share a sexual union and a common residence. The visiting relationship, where a man and a woman are sharing a sexual union but are neither legally united nor sharing a common residence, is a social construct unknown to Jamaican family law, existing as it does, without legislative approbation, notwithstanding its national ubiquity and apparent social palatability. Indeed, as the evidence in this case shows, the visiting relationship is often a precursor to the common law union and part of the mating pattern evident among many Jamaican families: ***The Jamaican Family: Continuity & Change*** Dr Elsa Leo-Rhynie.

[44] The clear legislative intent is for the court to come to the aid of persons involved in stable family unions, whether traditional or common law, not transitional arrangements. Hence, visiting relationships and residential relationships of durations shy of the legislative five year period are beyond the pale of statutory protection. Decided cases have sought to give expression to the concept of cohabitation contemplated by ***PROSA*** and other similar family law statutes. In ***Kimber v Kimber*** [2001] FLR 383, 389, Tyrer J identified an inexhaustive list of eight (8) criteria which characterize the union of an unmarried couple living together as if they were in law husband and wife. These have all been judicially considered in a comprehensive and scholarly discussion of the meaning of cohabitation by my learned sister, McDonald-Bishop J in ***Bowes v Taylor***, *supr*a.

[45] The indicia of cohabitation identified by Tyrer J are:

(i) Living together in the same household.

(ii) A sharing of daily life.

(iii) Stability and a degree of permanence in the relationships; that is not a temporary infatuation or passing relationship such as a holiday romance.

(iv) Finances, that is to say, is the way in which financial matters are being handled an indication of a relationship.

(v) A sexual relationship.

(vi) Children.

(vii) Intention and motivation.

(viii) The ‘opinion of the reasonable person with normal perceptions’.

[46] As Tyrer J observed, and as was said above, the foregoing criteria do not represent a complete and comprehensive list. While I agree with Tyrer J, generally, that no one factor is necessarily conclusive, where that factor is part of the legislative ingredients, its absence is fatal to the success of a claim under ***PROSA***.

[47] So that, if criteria number three is taken to encapsulate the quality of stability and permanence that the legislature purposed to recognise under PROSA, that stability and

permanence can only be given weight if it meets the statutory minimum of five (5) years. Therefore, if the period of cohabitation falls short of the five year threshold, a court need look no further for the presence of the other criteria for however abundant the evidence may reveal them to be, the claim must inexorably fail.

[48] For present purposes, a common law union is one in which a single man and a single woman are sharing or have shared a residential conjugal relationship for a period of not less than five (5) years. In other words, a common law union in the eyes of ***PROSA*** is more than the demographic acknowledgement of shared sexual relationship and residence. Whatever stability and permanence are envisaged by the demographers, the law says that dichotomy is collectively reflected in the longevity of the union, that is, it must survive for a minimum period of five (5) years.

[49] However, before considering the length of the period of cohabitation, an initial finding of fact concerning the condition of the parties at the time of the alleged cohabitation must be made. That is was the claimant a single woman and the defendant a single man? That the claimant was a single woman and the defendant a single man was averred in statement of case of the claimant. Paragraph two of the Particulars of Claim alleged that at all material times the claimant was a spinster and the defendant a bachelor. The defendant did not traverse this averment in his defence. Indeed, the case was not conducted in a manner to suggest that this was an issue between the parties. That is, neither side adduced any affidavit evidence about his or her marital status or the marital status of the other party. In cross-examination, Miss Wright asserted that Mr Bernard was a single man, in explaining why she wished to end her affair with Mr Bennett and, as she put it, to see where the relationship with Mr Bernard was going. This was left unchallenged.

[50] I conclude that Mr Bernard's status as a single man was part of what fed the claimant's interest in him. That assertion having been seemingly accepted by the defendant, I adjudge it a fact proved. Equally, I infer from the weight the claimant placed on this fact, that she was a single woman at the material time. In other words, a woman

who wants to end a relationship with a man who is handicapped by the condition of being married in favour of one unencumbered by that legal disability, would most likely be similarly free to marry as the latter gentleman. Wanting to see where things would go with the defendant suggests a desire to see if the infant relationship could mature into the permanence of the common law union it became then to the traditional marriage, the hope and aspiration of the average unmarried woman.

[51] Having decided that the parties were a single woman and man and there being no question that they lived together, I turn now to consider the question of the period of their cohabitation. There is no accord in respect of either the date of commencement or the date of termination of cohabitation. On the claimant's assertion, the parties would have lived together continuously for a period of approximately nine (9) years, commencing on the 1st October 1999 and terminating in or around February 2008. She said on the 1st October 1999 she moved into the defendant's rented apartment at 41 Dumbarton Ave. Kingston 10, relocating to Hope River in Burnt Savannah St. Elizabeth at the defendant's family home. For his part, the defendant asserted that their cohabitation lasted three (3) years, beginning in or about March 2003 and ended in 2006. According to the defendant, the couple cohabited at one location only, that is, in an unfinished house in Burnt Savannah.

[52] The chasm that this six (6) years difference represents as existing between the parties is remarkable and puts the court on notice that each may very well be exaggerating the position in their anxiety to succeed. Fortunately there is more that the respective party's say so to assist the court in ferreting out the truth. Without chronicling the several inconsistencies, it is sufficient to say that the claimant was impeached beyond redemption on the point. The claimant admitting giving her address as Hilltop, Parottee, St. Elizabeth in a civil claim in the St. Elizabeth Resident Magistrate's Court in the year 2000. The claimant again gave Hilltop, Parottee as her address in 2001 both at the hospital and when she registered the first child born to the parties. In fact, Hilltop, Parottee was where she had her house before she met the defendant. The claimant sought to explain these discrepancies but I found her explanations unconvincing.

[53] The claimant's nephew and supporting witness, Mr Lloyd Myers, was equally unconvincing on the point. While his retentive capacity allowed him to support the claimant on the alleged time the parties relocated to St. Elizabeth, he was wholly unhelpful when it came to the length of time the parties lived in Kingston. That detail was beyond his recall. Neither could Mr Myers remember if that living arrangement started in 1999 or the year 2000.

[54] On the other hand, I was impressed with Mr Curtis Smith, the second witness for the claimant. He was frank and honest. Mr Smith said he facilitated many assignations between the parties, as has been said before, the claimant was then involved in another relationship. He was the claimant's very close friend and confidant. All of these factors converged to give Mr Smith a nigh perfect vantage point on matters pertinent to the relationship between the parties.

[55] That notwithstanding, Mr Smith's evidence suffered from a number of weaknesses. First, and perhaps most remarkable, Mr Smith did not speak to the termination of cohabitation of the parties. Secondly, on the critical question of the commencement of cohabitation, certainly in respect of what transpired at 41 Dumbarton Avenue, he didn't speak from his personal knowledge. He did not visit the parties there but relied on the word of the claimant when she told him in September or October of 1999 that she was then living in Kingston. However, he visited them in Burnt Savannah when they returned to the parish in May 2000.

[56] When the evidence of Mrs Jacqueline McPherson Smith is juxtaposed with that of Mr Curtis Smith I find that I prefer the evidence of Mrs McPherson Smith. In vain learned counsel tried to impeach her. I accept her evidence that her live-in relationship with the defendant spanned the years 1994 – 2000 and that she lived with Mr Bernard from 1998 to around July 2000. This was strong support for the evidence from the defendant that he paid rent for his occupation of 41 Dumbarton Ave for June to July, 2000. So, in spite of my assessment of Mr Curtis Smith for the claim, the credibility of

his evidence was severely eroded by that of Mrs McPherson Smith. Further, the evidence of Dave Anthony Smith provided solid support for the defendant's contentions that the claimant did not cohabit with him at Dumbarton Ave, and that cohabitation between the parties cease in or about 2006.

[57] I therefore reject the evidence of the claimant and her witnesses that cohabitation between herself and the defendant began in October 1999. I find as a fact that cohabitation between the parties commenced no earlier than 2003. The few questions that were asked of the defendant on the point in cross-examination left him unshaken. Further, the claimant having been discredited in relation to the origin of their cohabitation I find myself unable to accept her unsupported evidence of the date of its termination. I am therefore left with the unimpeached evidence of the defendant and the reasonable and inescapable inference drawn from the evidence of Dave Anthony Williams that the claimant ceased living in Burnt Savannah sometime in 2006. That is, since Mr Williams left the country in 2008 and the claimant ended cohabitation, about one and a half year before Williams migrated, she must have done so in 2006. I therefore find that cohabitation between the parties ended in 2006.

[58] I conclude therefore that although the claimant and defendant were a single woman and a single man respectively, who lived together as if in law they were husband and wife, the period of their cohabitation did not reach the statutory five year threshold. As a result, neither can be regarded as a spouse in a common law union in the eyes of ***PROSA***. The consequence of this is that the claimant falls beyond the pale of the statutory protection and her claim therefore falls to be considered under the principles of equity and trusts. To that task I now turn my attention.

[59] There is a *prima facie* inference in law that a purchaser of land, having paid the purchase price and taken a conveyance and granted a mortgage in his sole name, intends to acquire both the legal estate in fee simple and the beneficial interest: ***Gissing v. Gissing*** [1971] AC 886,910. To establish a claim to an entitlement to a portion of the beneficial interest, that inference has to be rebutted. To rebut that inference, it must be

established that the beneficial interest is held on trust by the defendant trustee for the benefit of the claimant as a *cestui que trust* (literally, 'he for whose benefit the trust was created'; the beneficiary). According to the authors of ***Snell's Equity*** 31st ed. at page 463:

> *"The underlying rationale is that the conscience of the trustee is bound to give effect to the entitlements of the beneficiary or to carry out the purposes for which the property was vested in him or which the law imposes on him by reason of his unconscionable conduct."*

By imposing a trust upon the trustee, the law effects a division of the ownership of the property between the trustee and the beneficiary. Equity thereby treats the trustee as taking the property subject to the entitlements of the beneficiary.

[60] In ***Gissing v. Gissing***, *supra* page 902, Lord Pearson was of the view that the validity of the respondent's claim rested on a resulting trust in her favour, by virtue of her contributions towards the purchase of the property. However, at page 905 of the same case, Lord Diplock thought it was unnecessary to distinguish between resulting, implied or constructive trusts. Kodilinye and Carmichael in **Commonwealth Caribbean Trusts Law** 2nd ed. at page 136 say the new model constructive trust is 'virtually indistinguishable from a resulting trust.' By whatever name called, the principle is of appreciable antiquity. In **Wray v. Steele** 2 (1814) 2V&B 388,390 the Vice Chancellor said it had been settled from the time of Charles II that "where one man advances the money to purchase an estate, but the purchase is made in the name of another, a trust arises for him, who paid the money."

[61] So then, the trust, whatever its characterisation, rests on a rebuttable presumption that the claimant made a contribution to the acquisition of the property, in the absence of an expressed agreement to share the beneficial interest. Therefore, the court has to resolve the predicate question of whether there was an expressed agreement between the parties that the claimant should take a share of the beneficial interest; if there was no agreement, was there an initial contribution to the cash deposit and legal charges; any contribution to the mortgage instalments; any contribution to other expenses which are referable to the purchase and expansion of the house.

Indeed, where both spouses contributed to the acquisition of the property, the presumption is that they intended to be joint beneficial owners, irrespective of the fact that both or one is the legal owner: ***Pettitt v. Pettitt*** [1970] AC 777, 815.

[62] However, as Lord Diplock said in ***Gissing v. Gissing***, *supra*, page 908, even if no contribution is made to the initial deposit and legal charges, if 'regular and substantial direct contribution' is made to the amortization of the mortgage, it may be reasonable to infer a common intention from the beginning to share the beneficial interest. It is this common intention that the court seeks to give effect to, but it must be co-existent with the acquisition of the property. If the parties did not consider the vesting of the beneficial interest at that time, a claim having common intention as its substratum must fail, per Viscount Dilhorne in ***Gissing v. Gissing****, supra,* page 900.

[63] In seeking to establish common intention, the conduct of the parties is relevant. In other words, there must be evidence from the parties' conduct from which it is reasonable to infer a common intention for the non-legal owner to take a beneficial interest. The defendant must have so conducted himself, in relation to the acquisition of the property, that it would be inequitable to allow him to deny the claimant a beneficial interest in the property. To hold the defendant as having so conducted himself, it must be demonstrated that by his words and conduct he induced the claimant to act to her own detriment in the reasonable belief that by so acting she was acquiring a beneficial interest in the premises**:** ***Gissing v. Gissing***, *supra*, page 905.

[64] Although the facts in ***Pettitt v. Pettitt***, *supra*, page 777 were dissimilar, the law declared therein was not. To quote from the head note:

> *"In the absence of agreement and any question of estoppel, one spouse who does work or expends money upon the property of the other has no claim whatever upon the property of the other."*

In this case the former husband's claim was based on redecoration and improvements he had made to property owned solely by his ex-wife, increasing its value. The property was a cash purchase, financed without any input from Mr. Pettitt.

[65] The improvements made by Mr. Pettitt were characterized as 'ephemeral' by Lord Reid. The learned law Lord opined that it would be unreasonable for a spouse to obtain a permanent interest in the property in consideration of improvements of such a transient nature: ***Pettitt v. Pettitt***, *supra,* page 796. It was a short step from there for Lord Reid to go on to say:

> *"But if a spouse provides, with the assent of the spouse who owns the house, improvements of a capital or non-recurring nature, I do not think it is necessary to prove an agreement before that spouse can acquire any right."*

So, the statement in the head note has to be qualified when juxtaposed with Lord Reid's dictum.

[66] The law appears to be, in the absence of an agreement or estoppels, where the spouse who isn't the legal owner makes capital improvements to the property of which the other spouse is the legal owner, with the acquiescence of the legal owning spouse, the non-owning spouse can thereby obtain an interest in the property. However, where the improvements are of a temporary nature, unless there is an agreement or estoppel, the spouse making the improvements does not by that fact acquire any interest in the property solely owned by the other spouse. So qualified, the argument appears to sound in the vein of the detriment to which the claimant was exposed. If that is correct, the House of Lords seems to be saying ownership of property requires a substantial capital outlay and consequently, a trust will not be imputed unless the claimant can show detriment, into which the defendant acquiesced, which permanently affects the property. That is of course, in the absence of any agreement to the contrary.

[67] The decision of the English Court of Appeal in ***Burns v. Burns*** [1984] 1 Ch 317 appears to support this view. The plaintiff did not in any way contribute to the purchase of the house. From her income she paid the utility bills, bought fixtures and fittings and certain domestic chattels for the house. Her claim for a beneficial interest in the house was dismissed in both courts. The Court of Appeal held, applying ***Pettitt v. Pettitt***, *supra* and ***Gissing v. Gissing***, *supra*, that Mrs. Burns had failed to demonstrate the existence of a trust in her favour. That was predicated on the fact of not having made a

substantial contribution to the acquisition of the house, disentitling her to an inference of common intention to share in the beneficial interest; and, the acts described above fell short of the detriment threshold.

[68] The three preceding decisions were applied in ***Grant v. Edwards and Another*** [1986] 1 Ch.638. Allowing the plaintiff's appeal, it was held:

> *"That where a couple chose to set up home together and a house was purchased in the name of one of the parties, equity would infer a trust if there was a common intention that both should have a beneficial interest in the property and the non-proprietary owner had acted to his or her detriment upon that intention; that there had to be conduct from which the common intention could be inferred and conduct on the part of the non-proprietary owner, whether directly or indirectly referable to the purchase of the property, that could only be explained by reference to a person acting on the basis of having a beneficial interest in that property."*

[69] Two premises supported the conclusion that the plaintiff was entitled to a beneficial interest. First, the excuse the defendant had given to the plaintiff for not putting her name on the title was construed as a common intention that the plaintiff should have a share in the property. Secondly, there was conduct which showed that she acted on that common intention to her detriment by making what the court described as in excess of normal contribution to the household expenses.

[70] ***Grant v. Edwards and Another*** was said to represent that rare class of cases in which oral declarations emanated from the parties evincing their common intention. Having so classified it, Nourse L.J. was in no doubt that the earlier decision in ***Eves v. Eves*** [1975] 1 W.L.R. 1338, was the authority to follow to arrive at a just decision: ***Grant v. Edwards and Another***, *supra*, page 650. Both cases involved unmarried couples in which the conveyance was taken in the name of the male only and an excuse given to the female as to why her name was not being placed on the title. Further, both women thereafter conducted themselves in relation to the property in ways which made the inference irresistible that they were acting on the strength of having an interest in the property.

[71] According to Nourse L.J.:

> *"First … if the work had not been done the common intention would not have been enough. Secondly, if the common intention had not been orally made plain, the work would not have been conduct from which it could have been inferred. Thirdly, and on the other hand, the work was conduct which amounted to acting upon the common intention by the woman."*

A distinction is therefore to be made between two types of conduct. The first gives life to the allegation of a common intention and the second demonstrates that the common intention was acted upon: ***Edwards v. Grant and Another***, *supra*, page 648.

[72] The cases of ***Edwards v. Grant and Another*****,** *supra*, and ***Eves v. Eves***, *supra*, represent cases in which the 'first and fundamental question' of whether there was 'any agreement, arrangement or understanding' between the parties that the beneficial interest in the property should be shared, was answered in the affirmative. Any such finding must be 'based on evidence of expressed discussions between the parties." The evidence of that agreement, or its terms need not be precise or perfect. As my noble and learned brother, Anderson J, expressed it in ***Etla Anderson v Geraldine Reynolds and Others*** HCV 00364/2007 delivered November10, 2010 at paragraph 43:

> *While the evidence of common intention may vary from case to case, it must show that the question of whether the parties were intending to share was discussed although it is not necessary to show that a decision was arrived at. Such decision may then be inferred from the parties subsequent conduct.*

[73] Once the claimant establishes that, the outstanding question would be the reliance placed on the agreement. That is, to demonstrate that the claimant acted on the agreement to her detriment, or significantly altered her position in reliance thereon. That is the learning to be distilled from ***Lloyds Bank plc v Rosset and another*** [1990] 1 All E.R. 1111, 1118.

[74] The search for the common intention of the parties, to be inferred from the conduct of the parties, will be embarked upon only in the absence of any evidence of an agreement, arrangement or understanding. In the thinking of Lord Bridge of Harwich, direct contribution to the purchase price by the non-legal owner, whether to the deposit or amortization of the mortgage, justifies the necessary inference to impose a

constructive trust on the legal owner: ***Lloyd Bank plc v Rosset and another***, *supra*, page 1119. Lord Bridge's understanding of the authorities led him to express doubt as to the sufficiency of anything less than this to establish the creation of a constructive trust.

[75] Lord Bridge's approach was politely disapproved in ***Stack v Dowden*** [2007] UKHL 17. According to Lord Walker of Gestingthorpe, the law has move on since then. The inquiry is to discover "the parties shared intentions, actual, inferred or imputed, with respect to the property in the light of their whole course of conduct in relation to it" per Lord Harwich and Baroness Hale in ***Stack v Dowden***, *supra*, adopting the approach of Chadwick LJ in ***Oxley v Hiscock*** [2005] Fam 211. It is to be noted however, that ***Stack v Dowden*** and ***Oxley v Hiscock*** were concerned more with quantification rather than the predicate question of whether the claimant had a beneficial interest.

[76] The law remains as it was declared by the Law Lords from the lofty heights of ***Pettitt v Pettitt*** and ***Gissing v Gissing*****.** The principles therein distilled have been consistently applied in this jurisdiction by the Court of Appeal. According to McIntosh JA in ***Eric McCalla et al v Grace Mc Calla*** [2012] JMCA Civ. 31:

> *"It is settled law, approved and applied in this jurisdiction in cases such as* **Azan v Azan** *(1985) 25 JLR 301, that where the legal estate is vested in one person (the legal owner) and a beneficial interest is claimed by another (the claimant), the claim can only succeed if the claimant can establish a constructive trust by evidence of a common intention that was to have a beneficial interest in the property and by establishing that, in reliance on that common intention the claimant acted to his or her detriment. The authorities show that in the absence of express words evidencing the requisite common intention, it may be inferred from the conduct of the parties."*

[77] It appears that however substantial the contribution, the conduct which it evidences may be capable of another rational explanation, and if that is the case, since these are matters for a tribunal of fact, a court of appeal may be loathed to interfere. That seems to have been the position in ***Thomas v. Fuller-Brown*** [1988] 1 FLR 237, 246. The defendant who lived rent free in a house bought and owned solely by the

plaintiff, designed and constructed a ‘valuable’ two-storey extension, made major alterations and other improvements to the house. He contended that it was unrealistic that all this was done for the consideration of room and board, along with pocket money. Or, as the trial judge found, that he was a kept man and had agreed to do the work in return for keeping him. Although the force of the submission was not lost on Slade L.J., he was unable to accept it. Slade L.J. was content to rest his decision on the explanation accepted by the judge at first instance, saying both parties’ conduct was ‘perfectly capable of being rationally explained in the manner in which the judge thought.

[78] As was said earlier, counsel for the claimant appears to have placed greater emphasis on the English Court of Appeal decision of ***Cooke v Head,*** *supra*. However, ***Cooke v Head*** did not revolutionise the law in the area. It was a case of unusual facts, concerning as it did, a man and his mistress and the proceeds of a home in which the parties never cohabited. It established that the principles of constructive or resulting trust are applicable to common law unions where the parties by their joint efforts acquired properties to be used for their joint benefit. In those circumstances, the legal owner would be bound to hold the property on trust for them both. Further, ***Cooke v Head*** is authority for the proposition that the beneficial interest in the case of common law spouses is to be assessed as at the time the parties separated, as is done with a married couple.

[79] The case concerned one Mr. Head and his mistress, Ms. Cooke. Over the course of their relationship, the parties decided to acquire land and build a bungalow on it in hope that Mr. Head and his wife would get divorced and thereafter he and Ms. Cooke would be married. Evidence was given which showed that Ms. Cooke made significant contributions to the construction of the bungalow which included monetary contributions and manual labour. Upon termination of the relationship the Court of Appeal gave due consideration to Ms. Cooke’s contributions and awarded her one-third share of the bungalow even though the couple never resided there together.

[80] Lord Denning emphasised that in dividing up the beneficial interest according to the parties contributions the matter should be looked at more broadly than the money contributions of each. He was of the view that some of the things to be considered include the background of the parties with their earnings and their contributions; the statements made to third parties; the method in which they saved; the amount of the direct cash contributions of each; the amount of the work each had done on the property; the part each had taken in the planning and the design of the house; and the steps by which the transactions were carried out.

[81] In the case at bar the defendant is the sole legal owner of the properties in dispute. In consequence of that, I must consider the evidence to see whether there was an expressed agreement between the parties that the claimant should take a share in the beneficial interest. If the answer to that question is in the negative, I will look for evidence of any initial contribution to the cash deposit or other legal charges in respect of properties other than the family home. Further, I will look for evidence of contribution to the amortization of the mortgage or other expenses properly referable to the purchase of the properties.

[82] It is appropriate to commence with family home. The claimant alleged at paragraph 8 of the Particulars of Claim that the land upon which the family home is sited was bought during the visiting stage of the relationship but in anticipation of their cohabitation. If this had truly been the case I would have expected to find some evidence of discussions prior to the acquisition of the land concerning the issue of the claimant's name being place on the title.

[83] On the contrary, the defendant urged the court to believe that he bought that parcel of land prior to meeting the claimant. The claimant admitted that this lot of land was bought solely by the defendant but alleged that the land was purchased in contemplation of the defendant and herself living there together as man and wife. This contention cannot be substantiated.

[84] The defendant stated that he did not meet the claimant until 2000 and Jacqueline McPherson-Smith swore to the fact that she had been living with the defendant in 1999 and up to 2000. Thus, on the basis of these statements, the truth of which I accept, the land (which was purchased in 1999) could not have been bought with the intention that the claimant and defendant would reside there together as man and wife since the claimant and defendant had not even met at that time.

[85] Turning now to the house that the claimant and defendant shared, the claimant stated that much of the work in constructing the house was done by her family and friends without charge and some of the materials used in the construction were donated to her by friends. However, no affidavit evidence was given by any of these persons to corroborate those allegations. This is not to say that corroboration is required in proof of the claim. However, in circumstances where the claimant was not an impressive witness a disinterested person may have carried the day.

[86] If in fact persons gave unpaid labour and materials towards the construction of the house on behalf of the claimant, this would have been powerful evidence to suggest that the claimant marshalled all of this upon the basis that she was to take a share in the beneficial interest. Indeed, what may have been said to these friends and relatives of the claimant to get them to so contribute on her behalf would have been highly relevant for my consideration: ***Cooke v Head***, *supra*. Had all these persons migrated or died? Were they all unwilling to come and speak to their contribution on behalf of the claimant or were they all just ghosts?

[87] What then of the evidence of the claimant's direct contribution to the erection of the dwelling house? Although the claimant alleged that the defendant insisted that she bore half the cost of all materials bought and payments made for work done, she did not advance even an approximate figure of what this sum was. Of course that may have raised questions of her ability to obtain those funds but since she had an independent source of income the proof of her ability to do so may not have been unassailable. In

any event, I would not have been left to wonder what was the amount of her direct cash contribution to the building of the dwelling house?

[88] If the claimant was as involved in the erection of the house as she would have me believe, is it unreasonable to expect that she would have played some part, however small, in the planning and design of the house? I think not. Since this was to be their family home, even if the claimant was not the most fastidious of females, wouldn't she have made an input the design of those areas jealously guarded by the typical female partner such as the kitchen and bathroom? Yet the claimant gave no evidence whatsoever concerning her involvement in this phase of the building of the dwelling house.

[89] The claimant said the house was constructed from their pooled resources. I therefore looked for other evidence which might support a finding that this was how the parties were accustomed to conducting themselves. That search was a fruitless exercise. On the contrary, the evidence disclosed that these two persons, so far as their finances were concerned, resided together but lived separate lives. This is perhaps best exemplified by their attitude towards operating a joint bank account. The defendant said the claimant rebuffed his entreaty for them to operate a joint account. Likewise, the claimant declared she "had no intention of keeping a joint bank account" with the defendant.

[90] Against this background the claimant seeks to urge the court to accept that she was willing to enter upon joint ventures with the defendant of a more permanent nature. However, there is no evidence apart from the claimant's say so that the claimant actually contributed to the acquisition of the properties. It is far too easy and convenient to allege that the defendant destroyed all tangible evidence of her contribution. In ***Cooke v Head*** evidence was adduced on Ms. Cooke's behalf which irrefutably established that she had made significant contributions to the construction of the bungalow. That way, it was clear to the court that she was entitled to a share of the property.

[91] The claimant alleged that the vacant lot of land situated in Burnt Savannah, St. Elizabeth, the 10 Wheeler International Truck and the Isuzu Truck were jointly acquired by herself and the defendant. Moreover she claimed that she had contributed to paying a welder for work he had done on the 10 Wheeler International truck. These may conveniently be addressed together. The first question I ask myself is why wasn't the claimant's name place on any of the titles to these properties? This is a pertinent question for two reasons. First, the claimant was a businesswoman of some experience, owning and operating two bars. In business she was no neophyte. Secondly, the claim to joint acquisition rests not on a subsequent contribution to the purchases but to the initial cash deposits.

[92] The evidence disclosed no answer to that question. There is no evidence that the issue was raised before or after the purchases. Had it been raised, assuming the allegation of joint acquisition to be true, the defendant might have given excuses from which the common intention could possibly have been inferred as in ***Grant v Edwards and Another***, *supra* and ***Eves v Eves***, *supra*. Bearing in mind the claimant's unwillingness to hold a joint bank account with the defendant, which evidences her distrust of the defendant in financial matters, I find it incredible that she would have proceeded in the manner she said without securing to herself legal title in the properties.

[93] Notwithstanding the absence of any such discussion, the claimant alleged that she contributed cash $100,000.00 to the purchase price of the lot. This sum the claimant said was from a partner draw of $170,000.00. Needless to say, this stands or falls on the credibility of the claimant. The court was deprived of the evidence of the banker, Miss Wendell, who might have attested to the fact of the partner draw if nothing else. Although the claimant said Miss Wendell lived in the same district of Burnt Savannah, the evidence disclosed no further whether Miss Wendell's whereabouts were known to the claimant, if she still walked this earth.

[94] Towards the purchase of the tractor head the claimant said she contributed cash $80,000.00 of the total cash price of $220,000.00. The claimant also said she contributed towards the later purchase of the truck body. All told, she contributed $150,000.00. All the receipts for the payments are in the defendant's name. The reason given for this is that the defendant handled the transaction on account of her being in an advanced state of pregnancy at the material time.

[95] However, I find this an implausible reason and accordingly reject it. I have already made reference to the absence of trust in financial matters. That is juxtaposed with the lacuna in the evidence in respect to the period over which the transaction was conducted. To be credible, it would have to be shown, not merely implied, that the transaction was confined to that delicate stage of the claimant's pregnancy, especially in the absence of any medical evidence speaking to her incapacity to undertake the task of bill payment.

[96] The claimant contented that she made a contribution of $70,000.00 to the unspecified purchase price of the Isuzu truck. This money was taken withdrawn from her Scotia Bank account. Yet not a slip of paper was placed before me in support thereof. I addressed above the convenience of the assertion that the defendant burnt all the claimant's documents. Such an assertion does not avail the claimant in my judgment. Was this account closed, active or dormant? If it was closed, when was that closure effected? If it was dormant or active, what efforts were made to obtain records from the bank? With all these unanswered questions, I cannot find that the claimant in fact made the contribution she said she did.

[97] The upshot is I find that there was no antecedent discussion between the parties concerning the beneficial ownership of these properties. Indeed, there was no agreement that the claimant should take a share of the properties. I find that the claimant made no contribution to the acquisition of these properties, whether to the initial deposit or the subsequent liquidation of the outstanding balances. There is therefore no evidence from which I may go on to infer that from the beginning there was a common intention for the claimant to share in the beneficial interest. I am firmly of the

view that the vesting of the beneficial interest was never an issue between the parties until their bonds of cohabitation ruptured. And on the authority of ***Gissing v Gissing,*** *supra*, that is much too late in the day to be of legal significance.

[98] The claimant would like the court to make an order in her favour granting her a share of the house, the vacant lot of land and the two vehicles. However, the only evidence which she has laid before the court to support her contentions of entitlement to these properties is her own testimony. Therefore, it comes down to solely her word against that of the defendant. However, it is the claimant who bears the burden of proof, albeit only on a balance of probabilities

[99] The defendant was able to clearly outline in his evidence how he came to acquire the two lots of land; how the house came to be constructed; and also how the two vehicles were acquired. Furthermore, Dave Williams gave affidavit evidence that he knew when the defendant had purchased the land on which the defendant's house in Burnt Savannah was built. He also stated that he assisted the defendant with building the house.

[100] The entire claim, excepting the part affecting the shop, has not been proved on a balance of probabilities. I did not find the claimant to be a credible witness on whose evidence it was safe to rely without more. I therefore rejected her evidence that she made any contribution, whether in cash or kind, to the acquisition of the items in question. That is, I found no evidence to support a contention that the defendant by his words and conduct induced and or commanded the claimant to act to her detriment. Having already answered the 'first and fundamental question' of whether there was 'any agreement, arrangement or understanding' between the parties concerning a share in the beneficial interest of the disputed items in the negative, the question of a constructive trust does not arise.

[101] The shop erected on the premises in Burn Savannah appears to represent a departure from the usual way in which the parties conducted their financial affairs.

Although the extent of their respective contributions was hotly contested, I find that the erection of this structure was as a result of the joint efforts of the parties. Further, from the defendant's description of absolute terms in which the claimant operated the shop, I infer that there was no common intention for the defendant to have a beneficial interest therein. That the shop was on land legally owned solely by the defendant seemed not to have factored into their consideration.

[102] I therefore give judgment for the defendant in respect of the dwelling house situated in Burnt Savannah, St, Elizabeth on a lot of land approximately one ¼ acre; the lot of land containing by estimation 2 sq chains situated in Burnt Savannah, St. Elizabeth; one 10 wheeler International truck licensed CD 9704 and one Isuzu truck licensed 4730FA. I give judgment for the claimant in respect of the shop and award her 100% of the value. There shall be no order as to costs.