



[2019] JMSC Civ 10

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. 2013HCV00188**

<b>BETWEEN</b>	<b>VERNAL ERNEST PATTERSON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>MILLICENT ANN NELSON PATTERSON</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Deneve Barnett and Terry Joy Stephenson instructed by Brown and Shaw for the claimant

Charmaine Patterson, Kenesha Baker and Kerenia Marsh instructed by Charmaine Patterson and Associates for the defendant

September 29, 2014 and February 6, 2019

**Presumption that joint equitable ownership flows from joint legal ownership –  
Rebuttal of presumption a heavy burden but can be displaced by showing a  
different common intention – Common intention to be deduced objectively from  
parties words and conduct – The court should consider what is fair having regard  
to the whole course of dealing between the parties in instances where the intended  
shares are uncertain – Factors to consider in determining common intention  
include financial contribution and the purpose for which the property was acquired  
– Occupation rent – Central consideration is for the entitlements and  
responsibilities of the parties to be fairly balanced – First option to purchase family  
home given to spouse in possession – Preservation of the status quo – First option  
to purchase investment property given to other spouse – Common intention to  
acquire and share motor vehicle jointly**

## D. FRASER J

### INTRODUCTION

[1] The claimant Vernal Patterson and the defendant Millicent Patterson were married on December 31, 1986. During the subsistence of the marriage, they acquired the following properties:

- i) Lot 169 Fairfield Avenue, Fairview Park in the parish of Saint Catherine, registered at Volume 1211 Folio 58 of the Register Book of Titles (Fairfield Avenue property). The parties hold this property together as joint tenants;
- ii) Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine, registered at Volume 1322 Folio 85 of the Register Book of Titles (Fairfield Boulevard property). The parties also hold this property as joint tenants;
- iii) A number of motor vehicles the last being a Toyota Vista with registration number 5797 DX. The defendant is the sole registered proprietor.

[2] In 2007, the claimant filed a Petition for dissolution of the marriage on the ground that it had irretrievably broken down and the parties had separated since December 25, 2005. The Decree Absolute dissolving the marriage was granted on November 15, 2007.

### THE APPLICATION

[3] In an application brought by Fixed Date Claim Form under both the **Partition Act** and the **Property (Rights of Spouses) Act (PROSA)** filed January 11, 2013 the claimant sought the following relief:

1. An Order that the Joint Tenancy of premises situated at 169 Fairfield Avenue, Fairview Park in the parish of Saint Catherine, and more specifically described as **ALL THAT** parcel of land, part of **ANGELS, COLES PEN, EBONY PEN AND PENGELLY'S RUN, THE STEWARTY, CERMONA AND WYNTERS PEN** called **FAIRFIELD** in the parish of **SAINT CATHERINE**, being the Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan of **Angels, Coles Pen, Ebony Pen and**

**Pengelly's, The Stewarty, Cermona and Wynters Pen called Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles of which the Claimant is registered as a **JOINT TENANT** in conjunction with the Defendant, is to be severed and/or;

2. A Declaration that the Claimant and the Defendant each have a separate one-half share in the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the land **called Fairfield** and now being the whole of the land comprised in Certificate of title registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles and/or;
3. An Order that a Valuation of the premises registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail and/or refuse to come to agreement, the cost of the Valuation to be shared equally by both parties and/or;
4. An Order that the premises registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles be sold and the net proceeds of sale be divided equally between the claimant and the defendant and/or;
5. An Order that the claimant be entitled to first option to purchase the said premises registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles within thirty (30) days of the date of this Order and/or;
6. An Order that the claimant does advise the defendant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether he intends to exercise the option at paragraph 5 and/or;
7. An Order that should the claimant choose not to exercise the option in paragraph 5 hereof then the defendant is entitled within fourteen (14) days of the claimant's failure to exercise the option in paragraph 5 hereof, to purchase the said premises and/or;
8. An Order that should the Claimant choose not to exercise the option contained in paragraph 5 hereof and should the Defendant choose not exercise the option contained in paragraph 7 hereof, that the premises be sold by private treaty or public auction with the valuation being the reserve price. The claimant's Attorneys-at-Law shall have carriage of sale in any event and/or;
9. The defendant is to pay the claimant occupational rent with respect to the self-contained unit occupied residentially by the Defendant in the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan called **Fairfield** and now being the whole of the land comprised in Certificate of Title registered at

**VOLUME 1211 FOLIO 58** of the Register Book of Titles from December 2007 to the date herein and/or;

10. The defendant is to file and serve a Statement of account of all rent and outgoings from December 2007 to the date herein, in respect of the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan **called Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles and/or;
11. The Defendant shall pay to the Claimant one-half of all rent and/or income earned from the said premises situated at 169 Fairfield Avenue, Fairview Park in the parish of Saint Catherine and more specifically described as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan **called Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles and/or;
12. An Order that the Joint Tenancy of premises situated at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot numbered **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of Title registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles, of which the Claimant is registered as a **JOINT TENANT** in conjunction with the Defendant, is to be severed and/or;
13. A Declaration that the Claimant and the Defendant each have a separate one-half share in the said premises situated at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles and/or;
14. An Order that a Valuation of the premises registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail and/or refuse to come to agreement, the cost of the Valuation to be shared equally by both parties and/or;
15. An Order that the premises registered at **VOLUME 1322 FOLIO 85** of Register Book of Titles be sold and the net proceeds of sale be divided equally between the claimant and the defendant and/or;
16. An Order that the claimant be entitled to first option to purchase the said premises registered at **VOLUME 1322 FOLIO 85** of Register Book of Titles within thirty (30) days of the date of this Order and/or;

17. An Order that the claimant does advise the defendant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether he intends to exercise the option at paragraph 5 and/or;
18. An Order that should the claimant choose not exercise the option in paragraph 16 hereof, then the Defendant is entitled within fourteen (14) days of the Claimant's failure to exercise the option in paragraph 16 hereof, to purchase the said premises and/or;
19. An Order that should the Claimant choose not to exercise the option contained in paragraph 16 hereof and should the Defendant choose not exercise the option contained in paragraph 18 hereof, that the premises be sold by private treaty or public auction with the valuation being the reserve price. The claimant's Attorneys-at-Law shall have carriage of sale in any event and/or;
20. The Defendant is to file and serve a Statement of account of all rent and outgoings from December 2007 to date herein, in respect of the said premises situated at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot number **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of Title registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles. The Statement of account shall be from December 2007 to the date herein and/or;
21. The Defendant shall pay to the Claimant one-half of all rent and/or income earned from the said premises situated at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot numbered **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of title registered at **VOLUME 1322 FOLIO 85** of the Register of Titles and/or;
22. An Order that the joint ownership of Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** be severed and/or;
23. A Declaration that the Claimant and the Defendant each have a separate one-half interest in the Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** and/or;
24. An Order that a Valuation of the Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail and/or refuse to come to agreement, the cost of the Valuation to be shared equally by both parties and/or;

25. An Order that Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** be sold and the net proceeds of sale be divided equally between the claimant and the defendant and/or;
26. An Order that the claimant be entitled to first option to purchase the said Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** within thirty (30) days of the date of this Order and/or;
27. An Order that the claimant does advise the defendant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether he intends to exercise the option at paragraph 26 and/or;
28. An Order that should the claimant choose not to exercise the option in paragraph 26 hereof, then the defendant is entitled within fourteen (14) days of the claimant's failure to exercise the option in paragraph 26 hereof, to purchase the Toyota Vista Motor Vehicle and/or;
29. An Order that should the claimant choose not to exercise the option contained in paragraph 26 hereof and should the defendant choose not exercise the option contained in paragraph 26 hereof, that the Toyota Vista Motor Vehicle be sold by private treaty or public auction with the valuation being the reserve price and/or;
30. Further or other relief as this Honourable Court deems just and/or;
31. Costs; and/or
32. Liberty to apply.

#### **THE RESPECTIVE POSITIONS OF THE PARTIES IN SUMMARY**

**[4]** It is the contention of the claimant that:

- i) the parties agreed at the time of acquisition and at the time of the improvement of both Fairfield properties, that they were to be owned by the parties jointly and equally;
- ii) the claimant contributed financially and played an active role in the acquisition and improvement of the properties, including working on the construction of the Fairfield Avenue property;

- iii) there was no agreement between the parties for the claimant to abandon his interest in the properties and for the defendant to forgo claims for maintenance; he has in fact been paying maintenance;
- iv) the claimant is entitled to occupation rent and an account of rent received as he has been excluded from the properties which should also have been rented;
- v) the claimant and the defendant are each equally entitled to a one-half interest in the Toyota Vista motor car registered **5797 DX** as it was acquired from their joint funds;
- vi) the claimant should be given the first option to purchase the defendant's half interest in the respective premises and the motor car, with the option to pass to the defendant and then to open market sale if the options are not exercised.

**[5]** The defendant's position is that:

- i) the claimant should not be granted any interest in the properties because she financed the vast majority of the acquisition and extension of each of the properties, as well as having maintained the relevant child of the marriage on her own with little or no help from the claimant. Further, the defendant promised not to make a property claim in exchange for her agreeing not to claim maintenance for herself and her son. If however he was due any interest in them it would be no more than 20%;
- ii) the claimant should not be granted any interest in the Toyota Vista Motor car as it was purchased with her funds;
- iii) the claimant is not entitled to any occupation rent or any account for rent as he did not send enough funds to pay outgoings and the mortgage costs;
- iv) the defendant should be given the first option to purchase the claimant's half interest in the respective premises and the motor car, with the option to pass to the claimant if the defendant fails to exercise the option.

## THE ISSUES

[6] The broad issues for determination are therefore:

- i) What interests if any are the respective parties entitled to in:
  1. The Fairfield Avenue property;
  2. The Fairfield Boulevard property; and
- ii) Is the claimant entitled to receive from the defendant occupation rent from December 2007 to the present in respect of the Fairfield Avenue Property?
- iii) Is the claimant entitled to receive from the defendant half the proceeds of any rent received by the defendant from December 2007 to the present in respect of either or both properties?
- iv) If the interests of the parties are shared, which party should have the first option to purchase the interest of the other in the respective properties?
- v) What interests if any are the respective parties entitled to in the Toyota Vista Motor Car?

## THE DETERMINATION OF WHICH ACT GOVERNS THE APPLICATION

[7] Though the marriage was dissolved in November 2007, the claimant did not file the application to determine property rights between the parties until January 2013, long after the twelve month window allowed under s. 13(1) (a) and (2) of the **PROSA** had passed, following the dissolution of the marriage. At the commencement of the hearing counsel for the claimant attempted to pursue an oral application for extension of time to bring the application under the **PROSA**. Counsel for the defendant objected indicating that the application should be in writing and the defendant allowed time to file an affidavit opposing the application. The court having ruled in favour of the defendant's position, counsel for the claimant abandoned the application and indicated that the claimant would proceed under the **Partition Act**.



## **The Partition Act and Relevant Case Law concerning Division of the Parties' Property**

**[8]** Sections 4 and 5 of the **Partition Act** provide as follows:

4. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reasons to the contrary, direct a sale of the property accordingly, and give all necessary and consequential directions.

5. In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates, requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other party interested in the property, or some of them undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in the case of such undertaking being given the Court may order a valuation of the share of the property requesting a sale in such manner as the Court thinks fit, and may give all necessary or proper consequential directions.

**[9]** In ***Stephens v Stephens*** [2012] JMSC Civil 134, cited by counsel for the defendant, P. A. Williams J, (as she then was), relied on a passage from the judgment of Jessel M.R in ***Porter v. Lopes*** [1877] 7 Chan 356 where at page 363, in commenting on section 4 he said:

Now therefore, there is an absolute right in the owner of a moiety to require sale subject to this, unless it sees good reason to the contrary, the Court shall direct a sale... Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see good reason why there should not be a sale. I do not say there may not be some other good reason from the peculiar nature of the property, but it must be a good reason against the sale.

[10] There is happily no dispute on this point. Counsel for both parties agree that in accordance with section 4 of the **Partition Act** given the claimant's request, the court is required to direct a sale of the property and give all necessary and consequential directions, unless there is good reason to the contrary. A number of authorities were cited, some relied on by both sides. These provide guidance on the principles that the court should take into account when determining the share, if any, that should be awarded to each party and the nature of the consequential orders which should be made to give effect to the division ordered.

[11] Both Fairfield properties are registered in the names of the parties as joint tenants. As pointed out by counsel for the claimant, their legal ownership therefore reflects two principal features, namely, the right of survivorship as well as the 'four unities' of possession, interest, title and time. In **Stack v Dowden** [2007] UKHL 17, relied on by both parties, the court considered the principles to be applied in determining the beneficial ownership held by persons who share property as joint tenants. Baroness Hale who gave the leading judgment, after reviewing a number of cases stated at paragraph 56 that:

Just as the starting point where there is sole legal ownership is sole beneficial ownership, the starting point where there is joint legal ownership is joint beneficial ownership. The onus is upon the person seeking to show that the beneficial ownership is different from the legal ownership. So in sole ownership cases it is upon the non-owner to show that he has any interest at all. In joint ownership cases, it is upon the joint owner who claims to have other than a joint beneficial interest.

[12] In emphasising that the court is hesitant to displace the presumption that where there is joint legal ownership, there is also joint equitable ownership, the learned judge indicated at paragraph 68 that:

The burden will therefore be on the person seeking to show that the parties did intend their beneficial interests to be different from their legal interests, and in what way. This is not a task to be lightly embarked upon. In family disputes, strong feelings are aroused when couples split up. These often lead the parties, honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms. They also lead people to spend far more on

the legal battle than is warranted by the sums actually at stake. A full examination of the facts is likely to involve disproportionate costs. In joint names cases it is also unlikely to lead to a different result unless the facts are very unusual. Nor may disputes be confined to the parties themselves. People with an interest in the deceased's estate may well wish to assert that he had a beneficial tenancy in common. It cannot be the case that all the hundreds of thousands, if not millions, of transfers into joint names using the old forms are vulnerable to challenge in the courts simply because it is likely that the owners contributed unequally to their purchase.

- [13] In **Fowler v Barron** [2008] EWCA Civ 377, relied on by counsel for the claimant, the English Court of Appeal applying the House of Lords decision in **Stack v Dowden**, stated at para 32 that:

For the purpose of determining the parties' shared intentions about the beneficial ownership of the property, the court must consider the whole of the parties' relationship so far it illumines their shared intentions about the ownership of the property and the court must draw any appropriate inferences.

- [14] In **Jones v Kernott** [2012] 1 A.C. 776, cited by both parties, the United Kingdom Supreme Court that replaced the House of Lords, took the opportunity to revisit the decision of the House in **Stack v Dowden** and gave further guidance on how courts should approach the determination of beneficial interests in the context of joint ownership.

- [15] Highlighting that the burden of rebutting the presumption that joint legal ownership was usually complemented by joint equitable ownership was a heavy one, Lord Walker and Lady Hale in their joint judgment stated at paragraph 19:

The presumption of a beneficial joint tenancy is not based on a mantra as to "equity following the law" (though many non-lawyers would find it hard to understand the notion that equity might do anything else). There are two much more substantial reasons (which overlap) why a challenge to the presumption of beneficial joint tenancy is not to be lightly embarked on. The first is implicit in the nature of the enterprise. If a couple in an intimate relationship (whether married or unmarried) decide to buy a house or flat in which to live together, almost always with the help of a mortgage for which they are jointly and severally liable, that is on the face of things a strong indication of emotional and economic commitment to a joint

enterprise. That is so even if the parties, for whatever reason, fail to make that clear by any overt declaration or agreement. The court has often drawn attention to this. Jacob LJ did so in his dissenting judgment in this case: [2010] EWCA Civ 578, [2010] 1 WLR 2401, para 90.

**[16]** Having fully reviewed a number of authorities, academic writings and considered the facts of the particular case, at para 51 they summarised the approach the court should take in cases such as these as follows:

In summary, therefore, the following are the principles applicable in a case such as this, where a family home is bought in the joint names of a cohabiting couple who are responsible for any mortgage, but without express declaration of their beneficial interests.

(1) The starting point is that equity follows the law and they are joint tenants both in law and in equity.

(2) That presumption can be displaced by showing (a) that the parties had a different common intention at the time when they acquired the home, or (b) that they later formed the common intention that their respective shares would change.

(3) Their common intention is to be deduced objectively from their conduct: “the relevant intention of each party is the intention which was reasonably understood by the other party to be manifested by that party’s words and conduct notwithstanding that he did not consciously formulate that intention in his own mind or even acted with some different intention which he did not communicate to the other party” (Lord Diplock in *Gissing v Gissing* [1971] AC 886, 906). Examples of the sort of evidence which might be relevant to drawing such inferences are given in *Stack v Dowden*, at para 69.

(4) In those cases where it is clear either (a) that the parties did not intend joint tenancy at the outset or (b) had changed their original intention, but it is not possible to ascertain by direct evidence or by inference what their actual intention was as to the shares in which they would own the property, “the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property” : Chadwick LJ in *Oxley v Hiscock* [2005] Fam 211, para 69. In our judgment, “the whole course of dealing...in relation to the property” should be given a broad meaning, enabling a similar range of factors to be taken into account as may be relevant to ascertaining the parties’ actual intentions.

(5) Each case will turn on its own facts. Financial contributions are relevant but there are many other factors which may enable the court to decide what shares were either intended (as in case (3)) or fair (as in case (4))

[17] Lord Collins agreeing with Lord Walker and Lady Hale stated at paragraph 64:

I agree, therefore, that authority justifies the conceptual approach of Lord Walker and Lady Hale that, in joint names cases, the common intention to displace the presumption of equality, can in the absence of express agreement, be inferred (rather than imputed: see para 31 of the joint judgment) from their conduct, and where, in such a case, it is not possible to ascertain or infer what share was intended each will be entitled to a fair share in the light of the whole course of dealings between them in relation to the property.

[18] It would also be useful to place the reference in *Jones v Kernott* to *Oxley v Hiscock* in its full context, by quoting additional sections of para 69 to incorporate Chadwick LJ's amplification of the phrase 'course of dealing' between the parties. In considering how to determine what the beneficial interest of parties should be, in a case where there is no evidence of a discussion on beneficial interest, he stated the law as follows:

It must now be accepted that (at least in this court and below) the answer is that each is entitled to that share which the court considers fair having regard to the whole course of dealing between them in relation to the property. And in that context, 'the whole course of dealing between them in relation to the property includes the arrangements which they make from time to time in order to meet the outgoings (for example, mortgage contributions, council tax and utilities, repairs, insurance and housekeeping) which have to be met if they are to live in the property as their home.

[19] It is clear therefore that the task of this court is to determine the common intention of the parties regarding the beneficial ownership of the parties having regard to the whole course of dealing between them over the period they have been a couple. While the central principle is clear — the search is for the common intention — there are a whole host of situations that may have arisen within the affairs of a couple or which are alleged to have arisen, that can make the application of the principle fraught with difficulty. Difficulty caused either due to the common

tendency recognised in **Stack v Dowden** for parties who are battling over division of property after the love has gone, “*honestly but mistakenly, to reinterpret the past in self-exculpatory or vengeful terms*”, or because the course of dealing alleged by one party, requires that search to be conducted in the context of other legal principles.

- [20] It is important to bear this reality in mind given the facts of this case which will shortly be addressed. One issue that the court must bear in mind in considering the common intention of the parties and the operation of the presumptions that apply, relates to the purpose for which property is acquired. As submitted by counsel for the claimant, rebutting the applicable presumption in cases which involve property purchased by spouses for investment purposes is particularly difficult. In **Geary v Rankine** [2012] EWCA Civ 555, at paragraph 18 Lewison LJ stated as follows:

The starting point is the legal title. In this case legal title was in Mr. Rankine alone. Thus Mrs. Geary has the burden of establishing some sort of implied trust; normally what is now termed a "common intention" constructive trust. The burden is all the more difficult to discharge where, as here, the property was bought as an investment rather than as a home. The search is to ascertain the parties' actual shared intentions, whether express or to be inferred from their conduct. In *Jones v Kernott* it was pointed out that there are at least two exceptions. The first is where there is a presumption of a resulting trust. That presumption may arise where the partners are business partners as well as domestic partners. In the present case if it applies that exception would work in Mr. Rankine's favour since he provided all the money.

- [21] Other factors that will require close attention to determine whether they operate to vitiate a common intention that would otherwise be found, are the doctrines of unjust enrichment and proprietary estoppel, relied on by counsel for the defendant. In this regard she first cited the case of **McKenzie v Nutter** 2007 SLT (Sh Ct) 17 in which parties agreed that they would each sell their separate houses and apply the joint proceeds towards the purchase together of a new home. N's house was sold quickly but the proceeds were insufficient to cover the purchase price of the new one. By agreement a mortgage was taken out for the balance. The title to the new house was taken in the joint names of the parties as was the mortgage. There

was an expressed understanding between the parties that should things not work out and the house is required to be sold, each would recover proportionally what they put in.

[22] N was solely responsible for meeting the deposit, all mortgage payments, council tax and legal and estate agency bills. It was the intention that M would redeem the mortgage upon the sale of her own property but she did not in fact attempt to sell her property. M sought and obtained a decree for division and sale of the new property. However the sheriff found in fact and in law, which was upheld on appeal, that she had been unjustly enriched by the taking of a pro indiviso share in the new property, she having contributed nothing to the purchase but agreeing to take the property jointly; and that she was required to pay over to N her one-half share of the net proceeds of the sale.

[23] Also in respect of unjust enrichment counsel referred the court to the case of **Lloyds Bank PLC v Rosset** [1991] AC 107 at page 132 para (g) where the court stated:

The finding of an actual agreement, arrangement, or understanding, to share...can only...be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal estate to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or a proprietary estoppel.

[24] Concerning the doctrine of proprietary estoppel the case of **Gillet v Holt & Another** [2002] 2 All ER 289 was cited in which counsel submitted it was decided that the doctrine of proprietary estoppel could not be treated as subdivided into three or four watertight compartments. Rather the quality of the relevant assurances could influence the issue of a party relying on those assurances to his/her detriment. Further, that detriment was not a narrow or technical concept, and need not consist of monetary expenditure or other quantifiable financial detriment, provided it was something substantial. Ascertaining if there was

detriment had to be approached as part of a broad inquiry concerning whether in all the circumstances repudiation of an assurance was or was not unconscionable. Therefore, where proprietary estoppel was raised the court had to look at the matter comprehensively, in light of the fundamental principle of the doctrine that equity is concerned to prevent unconscionable conduct.

## **THE GENERAL EVIDENCE AND SUBMISSIONS RELEVANT TO DETERMINATION OF THE PARTIES' INTENTIONS AND INTERESTS**

### ***The statements made by the parties concerning their intentions***

- [25] There were a number of statements made by the defendant throughout her oral evidence that are relevant to the court's determination of what common intention, if any, was shared by the parties at the time the properties in dispute were acquired or extended. This in a context where the claimant has consistently maintained that the agreement then, which should translate into the present entitlement now, is that the parties hold everything jointly.
- [26] In cross-examination the defendant said she took her marriage vows seriously, she got married to share a family unit and that it was her intention to purchase things and share things together. She indicated that before they bought the property at Fairfield Avenue they were living good as husband and wife prior to his going on the farm work programme in 1987. They spoke about the farm work programme as husband and wife.
- [27] She stated that in 1988 or 1989 she introduced him to City of Kingston (COK) Credit Union where he is supposed to have an account. She said, "He was my husband. Everything I had I put him on it, for the two of us to share it because I thought he was mine at the time." She later indicated that in and around 1993 - 1994 the claimant and her were still operating as a family unit even though they had quarrels and at another point in her evidence that they were still wife and husband up to 2007.



[28] A major point of dispute concerns the defendant's assertion that the claimant said to her that he would not make a claim for any of the property, in exchange for her not making any claim for maintenance of herself or their son Matthew. A promise she says which she acted on to her detriment, as the claimant waited until Matthew reached the age of majority before bringing his claim. The claimant however steadfastly denies having made any such bargain.

***The existence of and contribution to joint funds***

[29] Another major bone of contention between the parties is the amount of financial support that the claimant provided to the defendant throughout the marriage and in furtherance of their acquisition and development of property interests. The claimant indicates that their funds were pooled and held jointly, most significantly in an account at the Premier Plaza Branch of the Bank of Nova Scotia that he used to send money to while he was working abroad. He also sent money using Western Union. It was a feature of the evidence of the defendant that she repeatedly denied receiving certain funds from the claimant via transfer and when shown the transaction records in respect of some transfers she accepted having received those funds while in respect of other amounts she maintained her lack of awareness.

[30] Counsel for the defendant however totalled the sums in United States Dollars received based on the remittances and transfers exhibited by the claimant, in an effort to demonstrate that the sums reflected were unsubstantial. The sums are indicated below:

**Money Sent Through Western Union to Defendant**

<b><i>Year</i></b>	<b><i>Amount US\$</i></b>	<b><i>Monthly Average US\$</i></b>
2008	375.00	31
2009	1,046	87
2010	1, 532	127
2011	400	33

2012 190 15

**Money Sent Through Western Union To Claimant's Son Jerome**

<i>Year</i>	<i>Amount US\$</i>
2005 (November)	120
2005 (December)	100.43

**Money Sent To Claimant's Account at Scotiabank**

<i>Year</i>	<i>Amount US\$</i>	<i>Monthly Average US\$</i>
2005	3,620	300
2006	2,550	200
2007	250	20
2008	300	25

[31] The evidence of the claimant is that he sent funds prior to 2005, but was advised those records were no longer available when he sought them from the bank. Counsel for the defendant asked the court to find that if in fact the claimant did send funds prior to 2005 the sums would have been likely similarly limited. The evidence from the defendant was that the claimant started to talk about divorce in 2005, and discussed with her his promise of forgoing any claim to the properties if she would not make any maintenance claim. Counsel for the claimant maintained that by his remittances and transfers from 2005 onwards, inadequate though they were to maintain a household, a child, pay mortgage, purchase motor vehicle, pay taxes and outgoings, the claimant was laying the foundation for his property claim.

***Sources of Income of the Parties***

[32] The claimant indicated that he earned funds through working at Jamaica Pre-Mix, travelling overseas to the United States of America on Farm Work and various stints working as a mason in Grand Cayman and Bermuda. When he worked overseas he had the requisite work permits. The defendant stated her sources of income as initially working with Dr. Depass as a caregiver for his two children, working on a visitor's visa in the United States of America as a Nurse's

Aide/Practical Nurse; doing some buying and selling which involved going to Curacao; and selling crochet pieces.

- [33] The parties both agree that there was also income from a section of the property at Fairfield avenue that was rented and that the Fairfield boulevard property was acquired as an investment to generate rental income. There are however differences between the parties concerning the profitability and success of the venture.

### ***The Operation of the Family Unit***

- [34] The claimant had a son and a daughter before his union with the defendant. The defendant indicated that the claimant's son resided with her from 1987 to 1998 and the daughter for a shorter period between 1993 to 1995. She indicated that she was responsible for providing for them with little or no assistance from the claimant.
- [35] The parties adopted a son in 1994. The defendant asserted that the claimant only periodically sent funds to cover some expenses and he never contributed to the development of their son financially or emotionally. The defendant's *viva voce* evidence did reveal however that on a number of occasions she received remittances from the claimant for their son and that this occurred even after the divorce.

**ISSUE I) (1): What interests if any are the respective parties entitled to in the Fairfield Avenue property?**

### ***The Acquisition***

- [36] In his evidence the claimant asserted they got married in 1986 and he purchased the land in 1987. He indicated he used money from his stints in Grand Cayman working as a Mason as well as a loan he was granted from a Credit Union. When he was challenged in cross-examination that in his affidavit he had said he purchased the land in 1990, he said that was when they started to build. It should be noted here that the copy Duplicate Certificate of this Title registered at Vol. 1211

Fol. 58 exhibited by the claimant shows that the land was transferred to the defendant and claimant on the 21<sup>st</sup> March 1990. When he was asked if he knew the company he purchased the property from he said he had the paper in his documents which he would be able to show. This property on which a house was constructed he said was the couple's primary residence while they lived together as husband and wife.

- [37]** He indicated he went on Farm Work to the States in 1986 and 1987. He stated he went to Cayman in November 1986 when he spent nine (9) months; November 1989 returning between July and August and in 1991 for a year when he got a year work permit. He maintained that while in Cayman in 1989 every two weeks he would send between \$200 and \$250 to the defendant through Moneygram or Western Union. When questioned about proof of these transfers he indicated that when he went to the bank, he was advised documents were not kept that long in the system.
- [38]** Concerning her sources of income the defendant indicated that she did crocheting from childhood both as a hobby and a business. She indicated that she worked for Dr. and Mrs. Depass for a period of six (6) months as a care-giver for their two children and that she began traveling to Curacao, buying and selling in 1987. She stated she also maintained the claimant including buying all his clothing, as he 'had nothing'. She indicated she went abroad as her crocheting business was not proving profitable and it was time consuming. She stated that she mainly did dresser pieces that would sell monthly for US\$120 to \$130. The tablecloths proved popular and would sell for US\$600 to \$700. She could make perhaps five table cloths per year. She was however unable to provide any documentation in support of these assertions.
- [39]** The defendant challenged several aspects of the claimant's assertions. She maintained in her affidavit evidence that it was she who acquired the land from Island Homes and this was in April 1988. She utilised a loan of \$37,000 from COK Credit Union. The claimant she said was not a member of the Credit Union at that

time and contributed nothing. She indicated that the claimant resided in the Cayman Islands between 1993 and 2001 and that the home was used by the claimant between 1992 and 2005 for only two weeks each year around Christmas time. All the transactions including the selection of the land was done for her by Ms. Haughton, her pastor's niece, an employee of Island Homes. The defendant also stated that the claimant went with her to visit the land after the acquisition.

[40] Counsel for the defendant submitted that the defendant is clear as to the details of purchase such as time, vendor and the source of funds evidenced by proof of a loan in her sole name from the COK Credit Union, and receipts for payment on the property, which indicate that she had been paying the loan for the mortgage from January 1989. Conversely, the claimant's inability to state from whom the property was purchased, the name of his credit union and the amount borrowed coupled with the fact that he never refuted the defendant's assertion that the land was chosen for her by Ms. Haughton, indicated that he did not know about the purchase of this property. Further there were letters written by the claimant and companies that had employed him in the Cayman Islands, exhibited by the defendant and not denied by the claimant, which demonstrated that during the period in which the mortgage was being paid the claimant had no money. On these bases it was submitted the defendant's account of how the land was acquired should be accepted.

### ***The Construction of the Residence***

[41] The parties are *ad idem* that it was the claimant who obtained the approved plan for the house and was the one in charge of a significant portion of the construction process. Further that the defendant was overseas during the construction of the house. There is however a sharp difference over which party provided the funding. The claimant asserted that he worked for nine months in Grand Cayman and returned with Eleven Thousand Cayman Island Dollars (CI\$11,000) which he used to begin construction of the house. Apart from the Cayman Islands he also worked in Bermuda. Counsel for the claimant submitted it was instructive both that he kept

returning to the Cayman Islands, which logically supported his case that he was getting work there and that it was the same company with whom he worked in the Cayman Islands that engaged him to work in Bermuda as well. When he was not employed overseas he worked at Jamaica Pre-mix. He maintained that both parties contributed financially to the construction of the house.

**[42]** In respect of the letters he wrote to the defendant indicating that he had limited financial resources and the letters he received from his employers stating that he was being laid off until further work was available, he explained that when he got laid off he would not be able to send any money until he got a new job. Further that he would be laid off perhaps once per year for two to three weeks and if he was laid off for more than a month he would come back home. Sometimes he would come home for two months before they called him back.

**[43]** The defendant denied knowledge of the claimant's financial contribution, stoutly maintaining that the claimant had no money during this period and had returned home from the Cayman Islands because he had no money. She relied on the letters earlier mentioned as being in support of her position. The defendant was adamant that she was the one who worked in the United States of America as a practical nurse and sent Thirty Thousand United States Dollars (\$30,000.00) to the Claimant to build the home.

**[44]** Her claim was challenged in that she had no work permit, could not remain in the United States for more than six (6) months at a time on her visitor's visa, and provided no documentary proof either that she worked consistently in support of her stated earnings, or that she sent funds to the claimant.

**[45]** Though the source of funding is disputed, the parties agree that the claimant worked on the construction of the house and was in charge of the building works. He indicated it was in 1990 to 1991 that he started to build the house and he was like the general contractor. He asserted that the only time they had a contractor was when he engaged a Mr. Fennell from Linstead to do the roof. He stated he

worked on the house for ten months then they went to live in the small side until the big side was finished and they moved into the big side. The small side was then let to tenants as a source of income. He indicated that by that time they were actually running out of money and he went to Cayman and sent money to the defendant to finish the house.

[46] He said that he put a value on and noted the work that he did as a labourer in order to assess the true cost and value of the house. His evidence was that even monies spent to buy lunch for the workers were entered and tallied in a book. When it was suggested to him that he had paid himself for his labour out of funds sent by the defendant responding with what the court interpreted as indignation he answered, "How could you cook a pot of food and pay yourself?"

[47] Given the overlap in the issues, I will conduct the analysis in relation to Issue i) (1) and (2) together.

**ISSUE i) (2): What interests if any are the respective parties entitled to in The Fairfield Boulevard property?**

[48] The defendant's evidence is that on the strength of a promise from the claimant in mid-1995 that he would send US\$400 to her each week she returned home to Jamaica from the United States of America with US\$10,000. She was therefore residing in Jamaica at the time of the acquisition of the Fairfield Boulevard property, while the claimant was working in Grand Cayman. The claimant indicated that his purpose for going to Grand Cayman was to earn funds for them to acquire another house as an investment to rent and as a source of income upon retirement. Though the defendant said she did not agree to this she did say she heard the claimant saying they would retire after twenty years. The claimant maintained that every two weeks he would send money to the defendant to be put towards the purchase price.

[49] The following is agreed between the parties in relation to this property. It was acquired as an investment for rental while the claimant was overseas in Grand

Cayman and the defendant was in Jamaica, not formally employed. The claimant granted the defendant a Power of Attorney to act on his behalf, as he was mostly out of the jurisdiction. The defendant indicates the agreement was signed and the deposit paid in 1997, but the title was not ready at that time. The claimant in his evidence stated that the property was purchased in 2001. The date of transfer on the copy Duplicate Certificate of Title registered at Vol. 1322 Fol. 85, exhibited by the claimant, shows the property was transferred to them on the 30<sup>th</sup> November 2001.

**[50]** The property consisted of one bedroom and a bathroom with a joined kitchen and living area. The deposit of \$97,956.89 was withdrawn from the account at Bank of Nova Scotia Premiere Plaza Branch, through which the claimant sent money to her. Both parties received loans from the National Housing Trust to assist in the purchase.

**[51]** While the source of the deposit was eventually agreed, initially in her viva voce evidence the defendant had denied that any money for the house came from this account. Her final position was consistent with her previous affidavit evidence in which she indicated that the claimant contributed to the deposit and legal fees associated with the purchase.

**[52]** The house was expanded over time from the original single self-contained unit, by the addition of two other self-contained one bedroom units. The claimant's evidence is that the expansion was in keeping with the agreement he had with the defendant to use the property as an income provider. To fund the additions, he indicated he again travelled to Grand Cayman to work and sent money to Jamaica every fortnight. He maintained that a contractor was employed and paid by him Two Hundred and Fifty Thousand Dollars (\$250,000.00) to supervise the renovations

**[53]** The defendant's evidence is that the first extension, (the back flat) was done between 2002 and 2004 utilising both her own income and funds sent by the



claimant. She indicated that she contracted two persons, first Mr. Rudy and then Howard Harrison to complete it. The windows cost \$40,000, the grill work \$40,000 and the overall cost was \$350,000. She maintained that nothing was earned from the rental of this unit because there was difficulty in getting tenants to pay their rent and utility costs. The defendant further indicated that as a consequence of the claimant's failure to send adequate funding she returned to the United States to work. She also contended that after the marriage broke down in 2010 she added another porch, a washroom and grilled the property with her own money after the claimant advised her that he had no interest in the property. The defendant contended that he only sent US\$1550 for the maintenance of his son. Counsel for the defendant therefore submitted that the claimant should only benefit to the extent of his contribution to this (second) unit.

- [54] Concerning the second added self contained flat the defendant indicated this was done and funded exclusively by her in 2006 to the tune of \$400,000 inclusive of \$40,000 for grill work. The defendant contended that the claimant failed to assist with mortgage payments for both the Fairfield avenue and Fairfield boulevard properties which at one point went into arrears, and which she had to clear. Counsel for the defendant therefore submitted that the claimant should not benefit at all from this (third) unit.

#### **ANALYSIS – ISSUE I) (1) & (2)**

- [55] Though there are discrete circumstances related to the acquisition and development of both properties, given that the same principles are to be applied in assessing the evidence, it is convenient to do one analysis with appropriate references to each property.

- [56] Applying the law as distilled in *Jones v Kernot*, as the parties are joint tenants, the presumption is that they hold their property equally. The court's quest is to determine if that presumption was displaced by any different common intention either at the time their property was acquired or that subsequently developed. Their

conduct whether by clear statements and/or actions from which inescapable inferences can be drawn, constitutes their course of dealings through which the court has to determine their common intention, to ascertain whether the presumption of equal entitlement remains intact.

[57] At the time of acquisition of both properties the parties were still actively pursuing the continuance of their marital union. There is a dispute as to who purchased the land at Fairfield avenue. Both parties claim it was from their resources. I find that both contributed. I do not accept that the claimant was as impecunious as the defendant has tried to make out. I did not find her to be credible in her attempts to minimise at every opportunity the contribution made by the claimant. Her responses in that regard seemed motivated by anger which in the words of Lady Hale in **Stack v Dowden** may have cause her "*honestly but mistakenly, to reinterpret the past in ... vengeful terms*".

[58] The claimant went on Farm work in the United States in 1986 and 1987 and had two stints working in Cayman in 1986 to 1987 and from 1989 to 1990 for nine months each and then worked in Cayman in 1991 for a year. The claimant indicated he was unable to obtain any bank records prior to 2005 as he was advised documents were not kept that long in the system. I consider that explanation reasonable especially as this court is aware of both national and international legislative frameworks that limit the period financial institutions are required to retain documents evidencing transactions such as wire transfers. It is also not clear that the claimant was able to obtain the records of every single transfer he made after 2005. I also accept his explanation for the letters exhibited by the defendant which show that at periods he was out of work. He was essentially between jobs and would be re-employed when another work project was identified. He would not have been able to stay overseas for such long periods if he did not consistently have work.

[59] I therefore find he did have financial resources and that he contributed to the purchasing of the land. However even if he didn't, the land was purchased during

the first blush of the parties' marital love. The defendant said they were living good as husband and wife prior to his going on Farm Work in 1987 and later that she had put him on everything she had to share, as she thought he was hers at the time. Based on the statements of the defendant and the principles from cases such as *Jones v Kernot* which indicate that financial contributions are not the only relevant factor to decide the shares intended, even if I had found that the claimant had not made a substantial financial contribution to the purchase, I would have been prepared to hold that the presumption that the parties hold a beneficial joint tenancy would not have been displaced.

**[60]** I am also satisfied that the claimant did regularly send money to the defendant and made substantial financial contributions to the construction of their family home at Fairfield avenue. It is common ground that he also contributed his labour as a mason and oversaw the construction process until he left and a contractor had to be engaged. He denied that he paid himself for his labour. He indicated a note was made even of the money spent to buy lunch for the workers. I observed the parties when they were giving their evidence. I noted his indignance that I found to be genuine and not feigned, when the suggestion was made to him that he paid himself. I accept his explanation that he kept a careful note of the work he did as a labourer in order to assess the true cost and value of the house. Masonry is his occupation. He would be aware of how he was paid when he worked on other sites. His colourful response said it all, "How could you cook a pot of food and pay yourself?"

**[61]** Concerning the financial contributions of the defendant to the purchase of the Fairfield avenue property the documentary evidence which shows the repayment of a loan to the COK Credit Union in 1992 does support her evidence that she took a loan to facilitate the purchase of the property. However, I also find that the defendant consistently exaggerated the extent of her earnings. She admitted that her travels to work in the United States as a practical nurse/nurse's aide was on a 6 months visitor's visa. I also consider that her estimates of earnings from her crocheting hobby were the result of an overly generous memory that did not accord

with reality. I therefore do not accept that the defendant was able to save and contribute as much as the US\$30,000 to the construction of their home, she said she did. In coming to this conclusion, I am also mindful of the fact that she said her living arrangements were such that she did not have to pay rent or find food. Surely however the level of her pay would reflect the fact that she was not working pursuant to a work permit and also that her maintenance needs were otherwise being met.

**[62]** I have carefully considered the evidence by the defendant that the claimant entered into an agreement with her not to pursue any interest in either of the properties in exchange for her not claiming maintenance for their son or for herself. The claimant has denied that evidence. I carefully observed the parties throughout the giving of their evidence and noted their demeanour. I reject the evidence of the defendant on this point. It does not seem to this court to have been a likely position that the claimant would have adopted having contributed his finances to the acquisition and development of both properties and his labour to building their home at Fairfield avenue. Further if that was the agreement why then would he have continued to maintain their son, as was admitted by the defendant even after the divorce? Having rejected that evidence no issue of unjust enrichment or proprietary estoppel arises for consideration.

**[63]** I therefore am satisfied that the presumption created by the parties entering a joint tenancy that they intended to share a beneficial joint tenancy in relation to the Fairfield avenue property has not been displaced. I find the intention continued throughout the stages of the construction of their home with both parties contributing to the project financially with the claimant additionally contributing his labour and management skills and the defendant monitoring the completion and expansion of the house when the claimant was overseas. I also find that the parties continued to jointly fund their lives together throughout the subsistence of their marriage and that funds from their joint resources addressed the needs for running the household and covering the mortgage payments. Accordingly, subject to the reasoning of the court under the section below that will address the question of the

payment of occupation rent, an account for rent received and responsibilities for the payment of mortgage after the divorce, both parties are entitled to a 50% share in the Fairfield avenue property.

- [64] Regarding the Fairfield boulevard property, it would also be subject to the general learning distilled in ***Jones v Kernot*** by the United Kingdom Supreme Court after a review of a number of authorities addressing how a court should determine common intention in circumstances such as these. In addition however, it should also be emphasised that as the property was purchased by both parties for investment purposes, it is particularly difficult to rebut the presumption that the common intention of the parties was that they should also hold the beneficial interest jointly. See ***Geary v Rankine***.
- [65] After initial reluctance, the defendant agreed that the deposit for this property was paid from the funds held in the parties' account at the Premier Plaza branch of Scotiabank. An account that the claimant sent funds to and to which both parties made deposits. It is also common ground that both parties obtained loans from the National Housing Trust towards the purchase price.
- [66] The extent of the ongoing partnership existing between the parties during the development of this property was evidenced by the claimant granting to the defendant a Power of Attorney to conduct the necessary transactions on the claimant's behalf. The claimant indicated that he sent money every two weeks towards the expansion of the property. The defendant denied this but agreed that the claimant contributed to the first addition (the back flat) which was completed at a total cost of \$350,000. She also indicated that after the marriage broke down in 2010 she added another porch, a washroom and grilled the property after the claimant advised he had no interest in the property.
- [67] I have already indicated that I do not find the existence of any agreement that the claimant would not seek any interest in the properties as alleged by the defendant. However the claim by the defendant that she made certain additions to the property

in 2010 has not been challenged by the claimant. As the parties' respective interests in the property would have crystallised at the time of their divorce in November 2007, the claimant would not be entitled to benefit from any increased value in the property based on any improvements made by the defendant after November 2007. See **Andrews v Andrews**, 1982 CarswellPEI 14 (1982).

[68] The defendant alleged in her evidence that she solely funded the second added self-contained flat to the tune of \$400,000 in 2006. The analysis of her income I conducted in relation to the home at Fairfield Avenue I adopt here as well in finding that I do not accept that the funding of this extension was exclusively from her resources. Also I find that the claimant was still, as is disclosed in the evidence, making contributions to the account at Scotiabank, even though by then relations between the parties had soured. I therefore find that in respect of this unit the parties are also jointly entitled. As in relation to the Fairfield avenue property, I have found that up to the time of the divorce the outgoings including the mortgage were being met through the joint resources of the parties, which in relation to this property would necessarily include some rental income.

[69] Accordingly, subject to the reasoning of the court under the section below that will address the question of the responsibilities for an account for rent received and the payment of mortgage after the divorce, both parties are entitled to a 50% share in the Fairfield boulevard property as it existed prior to the improvements made by the defendant in 2010. Steps will therefore have to be taken to quantify the value of those additions relative to the overall value of the property so that the respective final entitlements of the parties can be arrived at.

**ISSUES II & III: Is the claimant entitled to any occupation rent and an account for rent received from the defendant for rental proceeds paid to her?**

[70] The evidence from the defendant is that the claimant does not have keys to the locks and outer grills to be able to enter the house at Fairfield Avenue. Counsel for the claimant submitted that the claimant has therefore been excluded from the

Fairfield Avenue property and is entitled to be paid occupation rental by the defendant. See **Beverley Simpson v Anslyn Simpson** Claim No. E129 OF 2000 (November 28, 2008). Counsel also submitted that the claimant is also entitled to be paid a portion of the net income earned from both the Fairfield Avenue as well as the Fairfield Boulevard properties.

[71] The defendant in her evidence indicated that she was able to pay for food and bills from the proceeds of the rental from Fairfield Boulevard. She also stated that the claimant had not received any rental proceeds since the divorce and that was based on the agreement that they had that he would not pursue any property interest, the existence of which I have already rejected. At the time of the hearing she indicated that two of the three apartments at Fairfield Boulevard were rented.

[72] Counsel for the defendant submitted that the courts have taken a range of factors into account in determining whether to grant occupation rent including:

- i) whether under statute the non-occupying party has a right of occupation;
- ii) the intentions of the parties when the property was purchased and any responsibilities for children;
- iii) whether any other payments should be offset against the occupation rent, for example, expenditure for improvements or mortgage payments that increase the net capital value of the property; and
- iv) the parties respective beneficial interests in the property, if the property is beneficially owned on a 50/50 basis the level of rent should be determined and then reduced by 50% (see **Akhtar v Hussain** [2012] EWCA Civ 1762 only on this point).

[73] Counsel submitted that i) where the party in occupation is discharging the outgoings on the property, including any mortgage; and ii) the property was intended as a home for the parties' children and those children remain minors, the court may use its discretion and conclude that no occupation rent is payable. In

other cases the assessment of an occupation rent may only come into play once the property is sold to offset the occupying party's share of the proceeds of sale.

[74] Counsel additionally cited ***Dennis v McDonald*** [1982] 1 All ER 590 in which it was held that a woman who had left the jointly owned family home due to domestic abuse was entitled to be paid occupation rent by her former partner who had subjected her to the abuse and remained in the home. It was also decided that the appropriate method to determine the rent payable was to assess a fair rent under the **Rent Act** 1977 with an allowance to offset improvements that had enhanced the capital value of the property.

[75] In ***Marlene Davis v Hugh Ashley Davis*** [2018] JMSC Civ 99 at para 113 this court reviewed the case of ***Mercedes Blake v Andrew Blake*** [2016] JMSC Civ. 63 in which E. Brown J considered several authorities, and distilled a number of principles that informed his analysis at paras 24 to 32. Three of those principles are relevant here:

- i) An occupation rent is payable if the claiming co-owner was excluded from the property by way of an "ouster": ***Jones v Jones*** [1977] 1 W.L.R. 438; ***Dennis v McDonald*** supra. Actual or constructive exclusion of a co-owner is the typical case in which an occupation rent has been charged: (***Brenda Joyce Byford v Butler*** [2003] EWHC 1276 (Ch)). (Principle 3, para 27);
- ii) An occupation rent is due from the occupying co-owner where he lets part of the property: ***Jones v Jones***, supra. (Principle 4, para 28);
- iii) In declaring an occupation rent chargeable the court is "endeavouring to do broad justice or equity as between co-owners": ***Byford v Butler***, supra. This is particularly so where an occupying spouse wishes to be credited for solely amortizing the mortgage debt on the property without being chargeable for his or her sole use of the property. (See, for example, ***Suttill v Graham*** [1977] 1 WLR 819). (Part of principle 5, para 29).



[76] The central consideration emanating from all the cases cited and reviewed is that where there is a claim for occupation rent, for justice to be done, entitlements and responsibilities of the parties have to be fairly balanced. On the face of it, the claimant would be entitled to occupation rent as a consequence of having being excluded by the defendant from the residence at Fairfield Avenue. It should be calculated at 50% of the rent due in accordance with the **Rent Restriction Act**. For ease of reference I will deem the date of exclusion as being from December 1, 2007.

[77] The claimant would also be entitled to 50% of all net rental proceeds from both the Fairfield avenue and Fairfield boulevard properties, *(after the deduction of any expenses for maintenance, any other expenses associated with the rental of these properties and mortgage payments)*, also from December 1, 2007. I do not find it necessary to include an entitlement to rent concerning any period in which it was argued sections of either property could have been rented but were not because of a choice made by the defendant. I consider that would involve insuperable difficulties of certainty and proof of loss. Within the parameters indicated, an appropriate account would therefore be due from the defendant to the claimant to determine the extent of any obligations to him.

**ISSUE IV: Which party should have the first option to purchase the interest of the other in the respective properties?**

[78] In his claim the claimant asked the court to grant him the first option to purchase the defendant's interest in the respective properties. No submissions were however advanced on his behalf indicating why the balance of equity would favour this course.

[79] Counsel for the defendant however submitted that the first option should be granted to the defendant for the following reasons:

- i) The claimant had not demonstrated any interest in these properties for so many years;

- ii) The Fairfield avenue property is home to the defendant and her son and has been so since 1993;
- iii) The Fairfield boulevard property has been the responsibility of the defendant since 2000;
- iv) There would be no injustice to the claimant by paying him for any interest that he would have received in a sale.

[80] In **Annette Rose Page v Lester George Page** [2018] JMSC Civ 151 this court relied on the case of **Patsy Powell v Courtney Powell** [2014] JMCA Civ 11 to make a decision on which party should be granted the first option to purchase the family home. At paragraph 98 I stated:

In **Patsy Powell v Courtney Powell** the appellant had owned a piece of land on which she had commenced minor construction, prior to her marriage to the respondent. After marriage both parties with the help of family members and others contributed to the completion of the structure which became the family home. The marriage lasted from 1999 until 2005 at which point the appellant excluded the respondent from the family home. One of the issues on appeal was whether the learned trial judge having found that the parties were each entitled to a 50% interest in the family home properly awarded the first option to purchase to the appellant. In upholding the learned trial judge's order on that point, at paragraph 29 Brooks JA had this to say:

It is not unusual for the court, in cases such as these, to give the spouse in possession of the former matrimonial home an option to purchase the former matrimonial home. These orders are sometimes supplemented by orders allowing for sale on the open market in the event that the spouse given the option either refuses or is unable to purchase the remaining interest in the property.

[81] As I was in the **Page v Page** matter, I remain persuaded by that position. The defendant has been living at Fairfield Avenue since they moved in and the child of the couple when he joined the family has known only Fairfield Avenue as his family home. Based on the claimant's work overseas for extensive periods, the defendant has always spent more time than the claimant living at the property. The

unchallenged evidence coming from the defendant is that the claimant lived in Cayman between 1991 and 2003 and that between 1992 and 2005 the claimant used to spend approximately two weeks per year at home. The defendant is also the party who remained in possession after the divorce. This is therefore an appropriate case for the status quo to be preserved.

**[82]** Accordingly I will grant the first option to purchase the property at Fairfield avenue to the defendant who is in possession of the family home with the proviso that if for any reason she is unable to complete the purchase within the period to be stipulated in the final order, that option will determine and pass to the defendant. If neither is able to purchase the share of the other within the requisite time allowed, the property shall be sold on the open market and the net proceeds after any outstanding mortgage or other relevant debt has been satisfied paid to the parties in equal shares.

**[83]** The determination of who should be granted the first option to purchase the Fairfield boulevard property is more difficult. Both parties agree that the property was acquired for investment purposes, though the retirement dream it should have afforded seems to have been embraced primarily by the claimant. I have found it has been developed through the joint financial contribution of the parties, but the defendant had to undertake a lot of the arrangements due to the fact that the claimant was often overseas. The defendant has put forward the argument that she has been responsible for Fairfield boulevard since 2000. The court also has to consider that the parties through their joint efforts developed two properties and the defendant has already been awarded the first option to purchase one. Looking at the equities "in the round" I reckon that the claimant should be awarded the first option to purchase the defendant's interest in the Fairfield boulevard property.

**[84]** Accordingly I will grant the first option to purchase the property at Fairfield boulevard to the claimant with the proviso that if for any reason he is unable to complete the purchase within the period to be stipulated in the final order, that option will determine and pass to the defendant. If neither is able to purchase the

share of the other within the requisite time allowed, the property shall be sold on the open market and the net proceeds after any outstanding mortgage or other relevant debt has been satisfied paid to the parties in equal shares.

- [85] It should of course be noted that the sums ultimately due to each party for their respective interests that will be sold to the other party will be subject to any set offs that may be required as against occupation rent, rental and mortgage payments addressed earlier. See the case of *Andrews v Andrews*, 1982 Carswell PEI 14 (1982) reviewed at paragraph 108 of *Page v Page* in this regard.

**ISSUE v:      What interests if any are the respective parties entitled to in The Toyota Vista Motor car?**

- [86] The claimant indicated the first car he bought when he and the claimant were together was a Lada. It was purchased from his mandatory savings on the farm work programme. After it was sold he maintains the money from the sale was used to purchase another car. In evidence I have him recorded as saying the Nissan Sunny, but given the sequence of events I believe he meant the Toyota Corolla. He stated that in all he and the defendant purchased five cars in their joint names, and he would normally return home to Jamaica to pay the fees to transfer and insure them. They would both drive the vehicles. He would also provide money to service the vehicles. He however stated that the defendant purchased the Nissan Sunny and Toyota Vista in her name only. He indicated that sometime in 2003 they traded their Toyota Camry motor car valued \$350,000 and bought the Toyota Vista for \$650,000 with him providing the additional \$300,000.

- [87] The defendant contradicted aspects of the claimant's account. Regarding the claimant's first car the defendant indicated it was a Lada purchased for the family in 1993 with money from her account and registered in both their names. It was no good and was disposed of within three months. She denied knowledge of five vehicles purchased between them. She contended that after the Lada was sold she purchased a Toyota DX in 1993 to 1994 for \$70,000 in both their names, using

her cash she had in the house. That car was stolen and no insurance money was received. The next car purchased was the Nissan Sunny in 1994 to 1995 for \$280,000 to \$300,000 also from her cash she had in the house. The Nissan was destroyed in an accident and she purchased a Toyota Camry in her name only. She was adamant that no money was taken from the Scotiabank account to purchase either of these cars. The Toyota Camry was sold and she purchased the Toyota Vista in 2005 in her name only. In respect of the Lada and the Toyota DX she indicated she made sure the claimant's name went on the insurance. However her evidence was that the Nissan, the Camry and the Vista were all insured in her name.

**[88]** I do not accept the evidence of the defendant that she purchased all the cars from her own resources totally independently of the claimant. It is particularly difficult for the court to accept that in a time when there were the usual household bills to pay, children to maintain and a mortgage to be serviced, the defendant would have that amount of cash on hand to purchase motor vehicles. The inescapable inference the court finds is that the defendant gave that evidence in a bid to deny the claimant any interest in the Toyota Vista which is the vehicle that remains. I find that as with the real property the parties pooled their funds to purchase the motor vehicles they owned.

**[89]** It appears both parties are mistaken as to when the Toyota Vista was acquired with the claimant saying it was 2004 to 2005 and the defendant settling on 2005. In fact counsel for the defendant asked the question why would the parties be buying a motor vehicle together if as the claimant's petition for divorce states the marriage had broken down by 2005? The motor vehicle title however discloses that the Vista was acquired in 2002 not 2005 which makes their joint purchase at that time fit logically within the common intention to share property jointly which I find was still operating between the parties at that time.

**[90]** Accordingly, I find that each party contributed to the purchase of the Toyota Vista motor car registered 5797 DX and in keeping with the common intention which I

find existed between the parties they are each entitled to a one-half interest therein. As the evidence is that the defendant is the party who is more often in Jamaica to benefit from the use of the car, I will award the first option to purchase the car to the defendant, with the option to pass to the claimant and then the open market if the respective options are not pursued in the times allowed.

## DISPOSITION

[91] The court accordingly grants the following relief:

1. An Order that the Joint Tenancy of premises situated at 169 Fairfield Avenue, Fairview Park in the parish of Saint Catherine, and more specifically described as **ALL THAT** parcel of land, part of **ANGELS, COLES PEN, EBONY PEN AND PENGELLY'S RUN, THE STEWARTY, CERMONA AND WYNTERS PEN** called **FAIRFIELD** in the parish of **SAINT CATHERINE**, being the Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan of **Angels, Coles Pen, Ebony Pen and Pengelly's, The Stewarty, Cermona and Wynters Pen** called **Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles of which the Claimant is registered as a **JOINT TENANT** in conjunction with the Defendant, is severed;
2. A Declaration that the Claimant and the Defendant each have a separate one-half share in the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the land called **Fairfield** and now being the whole of the land comprised in Certificate of title registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles;
3. An Order that a Valuation of the premises registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail to come to agreement within 30 days of the date of this order, the cost of the Valuation to be shared equally by both parties;
4. An Order that the premises registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles be sold and the net proceeds of sale be divided equally between the claimant and the defendant;
5. An Order that the defendant be entitled to first option to purchase the said premises registered at **VOLUME 1211 FOLIO 58** of Register Book of Titles within thirty (30) days of the date of this Order;

6. An Order that the defendant shall advise the claimant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether he intends to exercise the option at paragraph 5;
7. An Order that should the defendant choose not to exercise the option in paragraph 5 hereof then the claimant is entitled within fourteen (14) days of the defendant's failure to exercise the option in paragraph 5 hereof, to purchase the said premises;
8. An Order that should the defendant choose not to exercise the option contained in paragraph 5 hereof and should the claimant choose not exercise the option contained in paragraph 7 hereof, that the premises be sold by private treaty or public auction with the valuation being the reserve price. The defendant's Attorneys-at-Law shall have carriage of sale in any event;
9. The defendant is to pay the claimant occupational rent of 50% of the rent that would be due calculated under the Rent Restriction Act with respect to the self-contained Unit occupied residentially by the Defendant in the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan called **Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles from December 1, 2007 to the date herein;
10. The defendant is to file and serve a Statement of account of all rent and outgoings from December 1, 2007 to the date herein, in respect of the said premises known as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan called **Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles;
11. The Defendant shall pay to the Claimant one-half of the net proceeds of all rent and/or income earned, from the said premises situate at 169 Fairfield Avenue, Fairview Park in the parish of Saint Catherine and more specifically described as Lot numbered **ONE HUNDRED AND SIXTY-NINE** on the plan called **Fairfield** and now being the whole of the land comprised in Certificate of Title registered at **VOLUME 1211 FOLIO 58** of the Register Book of Titles, after deductions for maintenance, other expenses related to the rental and any payment of mortgage since December 1, 2007;
12. An Order that the Joint Tenancy of premises situate at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot numbered **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of Title registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles, of which the Claimant is registered as a **JOINT TENANT** in conjunction with the Defendant, is severed;

13. A Declaration that the Defendant is solely entitled to the increase in value of the premises situate at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles occasioned by the improvements carried out by the defendant in 2010.
14. A Declaration that the Claimant and the Defendant each have a separate one-half share in the said premises situate at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles, in the state it was in immediately prior to the improvements carried out by the defendant in 2010;
15. An Order that a Valuation of the premises registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail to come to agreement within 30 days of the date of this order, the cost of the Valuation to be shared equally by both parties. The Valuation shall indicate the total value of the premises as well as the amount of the value of the premises represented by the improvements of 2010;
16. An Order that the premises registered at **VOLUME 1322 FOLIO 85** of Register Book of Titles be sold and the net proceeds of sale, less the value of the premises represented by the improvements of 2010 which is solely due to the defendant, shall be divided equally between the claimant and the defendant;
17. An Order that the claimant be entitled to first option to purchase the said premises registered at **VOLUME 1322 FOLIO 85** of Register Book of Titles within thirty (30) days of the date of this Order and/or;
18. An Order that the claimant shall advise the defendant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether he intends to exercise the option at paragraph 17;
19. An Order that should the claimant choose not exercise the option in paragraph 16 hereof, then the defendant is entitled within fourteen (14) days of the Claimant's failure to exercise the option in paragraph 17 hereof, to purchase the said premises;
20. An Order that should the claimant choose not to exercise the option contained in paragraph 17 hereof and should the defendant choose not exercise the option contained in paragraph 19 hereof, that the premises be sold by private treaty or public auction with the valuation being the reserve price. The claimant's Attorneys-at-Law shall have carriage of sale in any event;
21. The Defendant is to file and serve a Statement of account of all rent and outgoings from December 2007 to date herein, in respect of the said premises situated at



Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot number **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of Title registered at **VOLUME 1322 FOLIO 85** of the Register Book of Titles. The Statement of account shall be from December 2007 to the date herein;

22. The Defendant shall pay to the Claimant one-half of the net proceeds of the rent and/or income earned from the said premises situate at Unit 1, Fairfield Boulevard, Fairview Park in the parish of Saint Catherine and more specifically described as Strata Lot numbered **ONE** on the Strata Plan numbered Nine Hundred and Seventy-two and Two undivided 1/172 shares in the common property therein and being Part of the Land comprised in Certificate of title registered at **VOLUME 1322 FOLIO 85** of the Register of Titles after deductions for maintenance, other expenses related to the rental, and any payment of mortgage since December 1, 2007;
23. An Order that the joint ownership of Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** is severed;
24. A Declaration that the claimant and the defendant each have a separate one-half interest in the Toyota Vista Motor Vehicle bearing Registration Number **5797 DX**;
25. An Order that a Valuation of the Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** be effected by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be agreed by all parties, or by a reputable Valuator to be appointed by the Registrar of the Supreme Court should the claimant and defendant fail to come to agreement within 30 days of the date of this order, the cost of the Valuation to be shared equally by both parties;
26. An Order that Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** be sold and the net proceeds of sale be divided equally between the claimant and the defendant;
27. An Order that the defendant be entitled to first option to purchase the said Toyota Vista Motor Vehicle bearing Registration Number **5797 DX** within thirty (30) days of the date of this Order;
28. An Order that the defendant shall advise the claimant's Attorneys-at-Law within fourteen (14) days of the date of this Order whether she intends to exercise the option at paragraph 27;
29. An Order that should the defendant choose not to exercise the option in paragraph 27 hereof, then the claimant is entitled within fourteen (14) days of the defendant's

failure to exercise the option in paragraph 27 hereof, to purchase the Toyota Vista Motor Vehicle;

30. An Order that should the defendant choose not to exercise the option contained in paragraph 27 hereof and should the claimant choose not exercise the option contained in paragraph 27 hereof, that the Toyota Vista Motor Vehicle be sold by private treaty or public auction with the valuation being the reserve price;
31. If either party fails or refuses to sign any documents which are necessary to effect the transfer of any real or personal property within fourteen (14) days of being required so to do, the Registrar of the Supreme Court is empowered to sign any such documents;
32. Liberty to Apply;
33. As ordered on November 27, 2014, costs occasioned by the adjournment on February 11, 2014 to the defendant to be agreed or taxed;
34. In respect of all other costs, each party shall bear his/her own costs.