[2020] **JMSC Civ. 193**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. CLAIM NO. 2018 HCV 03318

BETWEEN	**ANTOINETTE BROWN**	**CLAIMANT**
AND	**MARVIN REID**	**DEFENDANT**

IN CHAMBERS

Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co for the Claimant.

Jacqueline Cummings instructed by Archer Cummings & Co for the Defendant.

Heard: June 22, 2020 and October 2, 2020.

Division of Matrimonial Property – Occupation Rent – Relevant Considerations – Re-imbursement of Mortgage Payments – Settlement of Joint Loan.

T. HUTCHINSON, J

INTRODUCTION

[1] The matter before me is an Amended FDCF filed on September 27th, 2019 in which the Claimant seeks the following orders;

1. A Declaration that the Claimant is the legal and equitable owner of a fifty percent (50%) interest in the Claimant's and the Defendant's family home known as Lot numbered Twenty-Two of All that parcel of land

part of Tunbridge in the parish of Saint Andrew and being the lands registered at Volume 1483 Folio 429 of the Register Book of Titles.

2. An Order that upon the determination of the interests of the parties in the aforesaid property, the property be valued by a reputable valuator to be agreed upon by the parties within thirty (30) days of the date of this order, and failing an agreement being reached between the parties, to be appointed by the Registrar of the Supreme Court.

3. An Order that the Defendant be given first option to purchase any share or interest that the Claimant is adjudged to have in the said property. The Defendant is required to exercise this option within thirty (30) days of receipt of the valuation report;

4. An Order that if the Defendant fails to exercise the option and/or fails to complete the sale, the property be subject to a sale by private treaty to a third party;

5. An Order that Nunes, Scholefield, DeLeon & Co., Attorneys-at-Law is to have carriage of sale as Counsel for the Claimant as vendor, and such sale is subject to completion within ninety (90) days of the date of the agreement for sale being submitted to the Defendant or his Attorney-at-Law;

6. An Order that the Registrar of the Supreme Court be empowered to execute all documents necessary to effect the sale and transfer of the Claimant's adjudged interest to the Defendant or a third party in the event that the Defendant fails or neglects to do so within fourteen (14) days of the relevant documents being presented to him or his Attorney-at-Law for his execution;

7. An Order that all costs incidental to the sale of the Claimant's adjudged interest in the said property or the sale of the property, including but not

limited to the cost of the valuation, the payment of any transfer tax, stamp duty, registration and attorney's fee(s), to be borne by the Claimant and the Defendant equally;

8. Occupation Rent from October 31 2016 until the date when the Defendant acquires the Claimant's half interest in the property.

9. An Order that the Defendant take the required steps whether by loan repayment, refinancing or otherwise to have the Claimant's name removed from the credit and/or loan facility granted by The Bank of Nova Scotia Jamaica Limited to the parties and which is identified as Scotialine Acct #5443 1054 1006 1726.

10. An Order that time be extended pursuant to Section 13 of the Property (Rights of Spouses) Act to permit the Claimant to make this claim and to bring this action under the Property (Rights of Spouses) Act if the court finds that cohabitation has ceased more than 12 months prior to the commencement of this claim/ application Attorney's Costs;

11. Such further and/ or other relief as this Honourable Court deems fit

CLAIMANT'S CASE

[2] The evidence in chief of the Claimant was contained in two affidavits which were filed on the 31st of October 2018 and 30th of September 2019 respectively. She stated that she had been in a relationship with the defendant for 8 years 5 of which they had been living together. In 2012 they decided to purchase a home together and this was done in 2013. In order to make this purchase a loan of $13 million was obtained from JN and an additional sum was borrowed to do improvements on the property, bringing the loan amount to $15.4 million. The Claimant said that she also paid $589,891.40 towards the deposit. The parties also obtained a line of credit from Scotiabank in the amount of $1.2 million which was utilized to assist with the purchase and improvements.

[3] Upon taking possession, the Claimant said she assumed responsibility for purchasing grocery and paying the bills while the Defendant used his income to pay the mortgage. She said that the line of credit obtained from Scotiabank was repaid in full but the Defendant continued to utilize it for his personal affairs. She presented a bank statement bearing a date in June 2018 which showed a balance of $1,202, 687.47 and recent transactions in support of this assertion.

[4] She stated that the relationship between the parties was brought to an end by the Defendant on his birthday in September 2016 when he informed her that he was now interested in someone else. The Claimant remained in the property until the end of October 2016 when she moved out. She stated that she had been told by the Defendant that one of them had to leave but it would not be him. In addition to this she said she began facing challenges as his adult son would speak to her in a disrespectful manner and his mother would create strife between her niece and his daughter all of which the Defendant failed to address.

[5] She said that pursuant to the Defendant's instructions she retained an attorney to assist her as the Defendant had indicated a desire to purchase her interest. She also provided him with the Attorney's business card in September 2016 for him to make contact with her. She stated that inspite of this, she heard nothing from the Defendant and in February 2017 her attorney sent a demand letter to him. In March 30th 2017 he provided a response to which was attached a valuation report and a mortgage statement. Based on this valuation report, the value of the Claimant's interest was assessed at $3,196,522.72. In April 2017 the Defendant indicated that was making efforts to obtained a mortgage to purchase same.

[6] On the 26th of October 2017, Counsel for the Claimant sent a letter to the Defendant enclosing an agreement for sale, instrument of transfer and a statutory declaration. The Claimant stated that these documents were acknowledged by the Defendant but no further steps were taken until this suit was filed in 2018.

[7] The Claimant stated that after this suit was filed the Defendant returned the Agreement for Sale and Transfer Instrument both of which had been executed.

The Statutory Declaration which would have made the transaction exempt from transfer tax was not returned and no explanation was provided. The deposit of $1,050,000 which was required on signing was never paid.

[8] On the 29th of March 2019, the Claimant was contacted by an agent from JN in respect of a home equity loan which the Defendant had applied for in order to pay her for the value of her interest. She stated that she was asked to provide pay slips and other documents and was also required to co-sign on this account. She refused to do so on the basis that such an approach was contrary to her objective.

[9] In respect of the 10% deposit requested for payment from the Defendant, the Claimant indicated that it was her understanding that this was standard to cover transfer tax, stamp duty and registration fees which were 5%, 4% and .05% respectively. She also stated that the defendant's failure to sign the statutory declaration would have meant that transfer tax would be payable on the transaction.

[10] She said that at no time after the agreement was sent to him did the defendant raise an issue about paying the deposit required and it was not true that he did not know about the Court proceedings until April 2019. She outlined that he was in fact present in Court on the first date of March 18th 2019 when he was given time to have representation present.

[11] The Claimant highlighted that she had the opportunity to purchase another property but lost out on this as a result of the delay in having the Defendant purchase her interest and since October 2016 she has been residing in rental premises where she currently pays $45,000 per month for rent. She said up to September 2019 she had paid $1,665,000 and asked the Court to set off this figure against the mortgage which was paid by the Defendant as occupation rent.

DEFENDANT'S CASE

[12] Mr. Reid provided one affidavit in this matter which was filed on the 6th of September 2019. His evidence was amplified at trial and he was cross examined.

In his account he accepted that he had been involved with the Claimant since 2007. He stated that the property in issue was actually purchased in 2014 and he confirmed that the Claimant had made a payment towards the deposit and thereafter she contributed to the household bills.

[13] He stated that he had informed the Claimant from the outset that in the event the relationship ended he wished to retain possession of the house. He also added that when the Claimant moved from the house she did so without any prompting from him. He insisted that the Claimant never indicated that she wished to have the purchase of the house dealt with expeditiously but in cross examination he accepted that the letter sent to him by her Attorney in February 2017 had indicated that she did.

[14] He outlined that in 2017 it had been agreed that the property was valued at $21 million, the mortgage at $14 million plus and the Claimant's interest was worth just over $3 million. He stated that he was told by Ms. Minto to get a valuation done and did so and to this end he exhibited MR1. It was noted that this document bears a date in June 2016 and its purpose was stated as for property insurance. In cross examination he conceded that the letter sent to him about the valuation never instructed him to obtain one but said that that was his interpretation. He also agreed that the valuation report had previously been obtained for another purpose.

[15] Mr. Reid deponed that in addition to the valuation he submitted a mortgage statement, Exhibit MR2, to Ms. Minto after which he was told by her that the Claimant should be paid the sum of $3,196,522.72. He outlined that he did not seek legal advice but signed all documents prepared for the purposes of this transaction at Ms. Minto's instructions. He was asked whether he had agreed with the contents of the sale agreement when he signed it and he stated that he didn't but he signed it anyway. He also said that although he had these disagreements and concerns he never communicated them to the Claimant or her Attorney.

[16] He stated that he had no money to pay the deposit of $1,050,000 and as such he unsuccessfully sought to obtain a home equity loan but this effort failed as a result

of the Claimants refusal to co-sign same and also to provide him with the signed agreement for sale. He said he became aware of the court proceedings in April 2019 and retained his present Counsel. He was asked whether he had received the Claim Form before he returned the signed agreement and he indicated he had but stated that he did not understand that he was being sued and had believed he was merely agreeing to the terms of the sale. He outlined that additional efforts were made to obtain a new agreement for sale without the requirement for a deposit to be paid as no transfer tax would be payable and the stamp duty had been reduced but this was unsuccessful.

[17] He deponed that having been advised by his Attorney to seek to refinance the entire mortgage he obtained a pre-approval letter and sent this to the Claimant's Counsel along with a request for the agreement for sale but no progress was made. He asserted that the main reason for the delay was the refusal to provide him with the agreement for sale and he stated that over this period he paid $5,181,967.05 in mortgage payments. He was asked if he had outlined to Counsel for the Claimant that he was having difficulty paying the deposit and he indicated that he hadn't, he also agreed that it was on JN's communication with the Claimant that she would have become aware that he was seeking to take a loan to finance the deposit.

[18] In his amplified account, he told the Court that on his separation from his ex-wife he received $4.6 million from the sale of a property owned by them and used a portion of the sum received to clear a number of debts to include the Scotialine account thereby reducing the balance to $200,000. He asked that the agreement previously made with the Claimant be permitted to stand or in the alternative that the Claimant reimburse him for the monies spent for this mortgage period which she would have benefited from.

CLAIMANT'S SUBMISSION

[19] Ms. Minto submitted that there was no dispute that the property at Tunbridge, was the family home of the parties. She asserted that based on the evidence the

Defendant is not disputing the Claimant's entitlement to a 50:50 share in the property and she referred the Court to Section 7 of The Property Rights of Spouses Act (PROSA) as well as a number of local authorities on the point, namely, ***Carol Stewart v Lauriston Stewart [2013] JMCA Civ 47, Reid Campbell v Campbell 2007HCV2189*** and ***Getfield Stewart v Pearlena Stewart 2010HCV05190.***

[20] She submitted that the Defendant's contention in response to this claim is that he has borne sole responsibility for the mortgage payments, since the Claimant left the house in October 2016 and that this should be set off against her net share in the property. Ms. Minto argued that inspite of his utterances, the Defendant has not disputed that the Claimant left the property as a result of his conduct, promises and representations. She highlighted that as a result of this move the Claimant has to be paying rent for her new accommodations and would be entitled to be paid occupation rent. She submitted that this sum could be the equivalent of the interest portion of the mortgage payments. In support of this position she referred the Court to the decisions of ***Carol Stewart v Lauriston Stewart*** *supra* and ***Beverly Simpson v Anslyn Simpson El 29 of 2000.***

[21] She highlighted paragraphs 70 through to 71 of ***Stewart v Stewart*** *supra* where the Court of Appeal considered a similar situation. She asked the Court to note that in that decision, having reviewed the evidence which showed that the Claimant had been forced to leave the premises by the conduct of the Defendant, it was observed by the Court that retained occupation by one party may be regarded as a contribution by the other, non-occupying party.

[22] Ms. Minto submitted that in ***Simpson v Simpson***, the Court went even further, and ordered that the interest element of the mortgage should be treated as the occupation rent, which was due from the Defendant (occupying party) to the Claimant, who had voluntarily left the property and she asked the Court to note that the Claimant was seeking a similar order in this case.

[23] She commended to the Court an extract from 10 th edition of Bromley's Family Law, pages 177—178 under the caption Distribution of assets after sale: equitable accounting where it was stated:

> *'In Dennis v. Mc Donald the sum ordered to be paid was one-half of what would be a fair rent under the Rent Act. It has been subsequently held in the High Court that it is not necessary to establish that one party has been excluded from the property before the party remaining can be required to pay an occupational rent'.*

[24] In respect of the timing of this application which was filed in July 2018, Ms. Minto argued that the Claimant sought to have the Defendant acquire her interest in the family home within a short period after cohabitation had been terminated. She made reference to a number of emails and letters in this regard which went unanswered. Counsel also asked the Court to note that the Agreement for sale was sent to the Defendant under cover of a letter dated October 26th, 2017 and it went unsigned until September 21st 2018.

[25] She submitted that in addition to these delays, the Defendant failed to execute the Statutory Declaration which would have exempted the parties from transfer tax and also failed to pay the standard 10% deposit on the sale. She argued that it was not until seven (7) months later that the Defendant's mortgage company advised the Claimant that he was unable to pay the deposit and was seeking a "home equity loan" to finance the transaction. She highlighted that in those circumstances, the Claimant, would have to be a 'co-borrower' on the application, and would have to remain on the title.

[26] Ms. Minto asserted that if the Defendant had acquired the Claimant's interest expeditiously, he would not have been paying mortgage on a property jointly owned by the Parties and the Claimant would have acquired her own property and not be paying rent.

[27] In response to the defence position that the Claimant had not been forced out of the home and no occupation rent should be paid, Ms. Minto argued that this is the old law as the law has evolved beyond this and occupation rent can now be

awarded even if the Claimant left voluntarily, without any prompting or provocation whatsoever, from the Defendant. She asserted that occupation rent is not limited to the Claimant's rental payments, but to the burden borne by her to include having to purchase another property in an economic climate which has been impacted by an increase as a result of the delay occasioned by the Defendant.

[28] In respect of the computation of the payment, she submitted that the bulk of the monthly mortgage payment goes toward interest and she made reference to the July 29, 2019 statement exhibited by the Defendant at Exhibit MR7 where the "Summary Information" shown in the right column indicate that between October l, 2016 and July 29, 2019, the principal balance moved from $14,804,866.08 to $13,614,899.03 in spite of three years of mortgage payments.

[29] She submitted that in the event this course did not find favour with the Court an alternative ruling in keeping with the ***Carol Stewart*** decision could be made, that is, the Claimant be found 'not liable' to repay half the mortgage sum, given the Defendant's delay and no order be made for Occupation Rent.

[30] In respect of the Scotialine account Ms. Minto submitted that the Defendant had failed to challenge the Claimant's evidence that the initial Scotia Line credit facility of One Million Two Hundred Thousand Dollars ($1,200, 000.00) has been paid off but was still being used by him to cover his personal expenses. She also asked the Court to note that in an email sent by him March 30, 2017, the Defendant had indicated that he would be closing this account on receipt from the Claimant of a signed letter authorizing him to do so. She submitted that although the closure letters were provided the facility remains open to the prejudice of the Claimant.

[31] Ms. Minto also asked the Court to carefully consider what she viewed as the contradictory evidence of the Defendant in respect of this account. She highlighted portions of his evidence which she said raised serious questions as to his credibility and overall reliability. She submitted that the Defendant is unable to speak the truth, about simple things that he is educated enough to understand. She asserted that the Claimant, on the other hand, was not shaken in cross-examination, and

her evidence was corroborated by documents, and letters, which the Defendant has acknowledged receiving.

DEFENDANTS SUBMISSION

[32] In submissions made on behalf of the Defendant, Ms. Cummings submitted that the Parties jointly obtained the mortgage as well as the line of credit and as such they are jointly and severally liable to both the Jamaica National Building Society and the Bank of Nova Scotia Jamaica Limited.

[33] She agreed that the parties are equally entitled to a 50% interest in the property but asserted that they had parted company peacefully with neither being forced out. She argued that the Claimant always knew that the Defendant intended to purchase her interest in the property and he is still willing to do so but the requisite documentation had not been provided by her attorney.

[34] Counsel submitted that unnecessary hurdles were raised with the requirement that a deposit of $1,050,000 be paid in circumstances where the transaction would have been exempt from transfer tax. She also argued that at the time when the agreement was prepared, stamp duty was 2% which would have amounted to $210,000.00 on the sale price of $10,500,000.00 and the registration fee to register the transfer was 0.5% which would amount to $52,500.00.

[35] She stated that based on a valuation obtained in 2019, the current value of the property is now $26,000,000.00 and the current outstanding mortgage as shown in Exhibit MR 8 is now $14,798,442.46. She argued that when that figure is subtracted from the current value the net value of the property would be $11,201,557.54 which when divided into two, would be $5,600,788.77. She asked the Court to note that only the Defendant paid the mortgage from October 2016 and up to July 2019 an additional $5,181,967.04 was paid and asked that the Claimant be ordered to reimburse the Defendant half of this amount. On her calculation, with this deduction, the Claimant's net interest in the property would be $3,009,795.25.

[36] In relation to the Scotialine, Ms. Cummings argued that the Defendant should not be asked to clear this debt as it was incurred by both of them and the money was used on their property and thereafter on household expenses and the Claimant should be ordered to pay one half. She observed that although the Claimant testified that the Scotialine account was paid off at some point she could not give a specific date when this was done and produced no documentary proof in support. She asked the Court to accept the Defendant as a witness of truth that the sum has never been paid off and to award the Claimant the sum of $2,409,795.25 taking into account the additional deduction of $600,000.

[37] Miss Cummings asked the Court to order the Claimant or her Attorneys-at-Law to provide the Defendant with an agreement for sale and a registrable instrument of transfer, without the need for an exorbitant deposit, upon him providing a suitable letter of commitment or undertaking for the payment of the sum of $2,409,795.25. She submitted that in the event the Court did not make such an order the Claimant should be ordered to provide the Defendant with an agreement for sale setting out the terms of any court order made without the requirement for a deposit beyond the sum of $100,000.00. She also asked that that each party bear their own costs.

[38] In respect of the Defendant's perceived delay, Ms. Cummings contended that he was unaware that he was being sued until he attended Court in 2019. She argued that by March 29, 2019 the Claimant and her Attorney-at-Law were aware of his difficulty with paying the deposit of One Million Dollars but in spite of this, the Agreement for Sale was not provided to him for him to source funding.

[39] She submitted that although the Defendant was a Professor in the Department of Medical Sciences at UWI and should have realized that he was being sued, the Court can nevertheless accept him as a witness of truth that he wasn't aware, and had honestly believed that his ex-spouse's relative was assisting them to resolve their separation issues hence his failure to secure separate legal representation.

[40] In relation to the claim for occupational rent, Ms. Cummings insisted that the Claimant has failed to prove any conduct or representation on the part of the

Defendant that caused her to leave the premises prematurely. In support of this she pointed to her evidence that it was the Defendant's adult son and mother who made her feel uncomfortable and resulted in her desire to remove.

[41] She argued that the statement by the Defendant that "one of us have to leave it and it shall not be him" was not a statement that the Claimant had to leave the property immediately but a statement of fact that if either person is to vacate the property upon their separation he would prefer to remain in the property and this was said to alert the Claimant that she may eventually have to seek alternative residence at some point in the future.

[42] She submitted the case of ***Carol Stewart v Lauriston Stewart*** could be distinguished as the court found that it was Mr. Stewart's conduct which forced Mrs. Stewart to leave. In respect of the case of ***Simpson v Simpson***, Ms. Cummings contended that in that case the court ordered that the Claimant should pay the Defendant the principal mortgage sums paid since their separation and set off their claim for occupational rental against the interest payment of the outstanding mortgage at the time of separation.

[43] She argued that in the current matter, there is no evidence before the court on what constituted principal payment as opposed to interest payments on the mortgage as the statement shows that the monthly mortgage payments were $154,098.94 per month but these payments also included payments for life insurance, peril insurance and upkeep savings.

[44] In respect of the decision of ***Getfield Stewart v Pearlena Stewart,*** Ms Cummings submitted that this decision is also distinguishable as the Claimant in that case left the matrimonial home but continued paying the mortgage while the Defendant continued to reside there but in this case the opposite occurred. She asserted that in considering the monthly rental of 45,000 and the mortgage of $154,098.94 the Court should find that there should be no set off especially in the absence of proof that the Claimant resides at 4 Highland Drive, Havendale, Kingston 19 or pays rent

there as her wire transfer documents do not state the purpose of the transfer and the rent receipts do not state the premises.

ISSUES

[45] In respect of this application, the issues which I have identified as arising for consideration are as follows;

a. Was the application brought within the twelve-month period as required under Section 13(1) of PROSA? Should an extension be granted if it wasn't?

b. Should the Claimant be credited with/ paid occupational rent for the period during which she occupied rented premises while the defendant continued to occupy the home?

c. Is the Defendant entitled to reimbursement of half of the mortgage payment of $5, 181,967.04 which was paid by him between October 2016 and July 2019?

d. Should the balance on the Scotialine account be repaid by the Defendant and Claimant in equal payments?

ANALYSIS AND DISCUSSION

Was the application brought within the twelve-month period as required under Section 13(1) of PROSA? Should an extension be granted if it wasn't ?

[46] Although the Defendant did not raise an objection to the Court accepting jurisdiction to deal with this matter, Section 13 of PROSA stipulates a timeframe within which an application under this Act is to be brought and provides as follows;

13. (1) A spouse shall be entitled to apply to the Court for a division of property –

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) on the grant of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

(2) An application under subsection (1)(a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant (emphasis supplied)

[47] This provision has been judicially considered on a number of previous occasions, one of the earlier decisions in respect of same is ***Brown v Brown [2010] JMCA Civ 12***, where Morrison JA (as he then was) provided guidance as follows;

> *[77]"On an application under section 13(2),it seems to me, that all the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time,* ***taking into account the usual factors relevant to the exercise of a discretion of this sort, such as merits of the case(on a purely prima facie basis), delay and prejudice, also taking into account the overriding objective of the Civil Procedure Rules of 'enabling the court to deal with matters justly'(rule 1.1(1))".(emphasis supplied)***

[48] It has also been recognised that it is not impermissible for such an application to be made in the course of trial and was stated in ***Veronica Reid-Campbell v Rosevelt Campbell 2007HCV2189***.

[49] On a review of the evidence presented in the course of this trial, it is clear that Ms. Brown was a joint purchaser of property in Meadowbrook which became the family home and now falls to be divided by the Court. It is also evident that at the instigation of the Claimant the Parties had been engaged in discussions geared

towards the purchase of her interest from as far back as 2016/17 and numerous documents were sent to the defendant in this regard. In these circumstances it is apparent that although there was a delay in placing the matter before the Court this was as a result of good faith efforts to have it resolved without taking a step in that direction. In light of this explanation, it could not be said that the delay was unreasonable, neither could it be said that the defendant would be prejudiced by an extension of time to bring this claim. He had been fully aware of the Claimant's efforts to dispose of her interest and on his account he remains interested in securing same.

[50] In light of the foregoing factors, I am satisfied that although the application was filed almost two years after the Parties has ceased cohabitation, this is a proper case for the exercise of my discretion to extend the time for the bringing of the claim.

Should the Claimant be credited with/ paid occupational rent for the period during which she occupied rented premises while the defendant continued to occupy the home?

Is the Defendant entitled to reimbursement of half of the mortgage payment of $5, 181,967.04 which was paid by him between October 2016 and July 2019?

[51] Although identified as two distinct issues, these areas are so closely intertwined that I have elected to deal with them together. The case for the Claimant is that it would in effect be unreasonable and unjust for the Court to make orders for her to pay half of the mortgage payments without taking into account the fact that she had to leave her home and incurred expenses. It is her position that her rental payments should be credited to her against the interest portion of the mortgage payments made by the Defendant.

[52] The Defendant on the other hand, has rejected the argument that any such payment should be made to the Claimant and in support of this position he asserted that she was not forced to leave the home but did so of her own accord.

He contends that it is only right that she repays this sum as the property has increased in value and the equity is greater because of the payments made by him and he insists that she shouldn't receive the benefit without bearing some of the burden.

[53] In treating with this issue, useful guidance was provided by the *ratio* of the Court in ***Carol Stewart v Lauriston Stewart*** where the Court in examining both issues stated as follows;

> *[70] Regardless of the sum, if any, paid as mortgage repayment and any expenditure for maintenance, after Mrs Stewart's departure from the family home, it would not be fair to require her to repay any of that sum. Mr Stewart's behaviour is what forced her to leave. As the learned judge noted, Mrs Stewart was obliged to meet other expenses as a result of the separation. The learned judge said, in part, at paragraph 20 of her judgment:*
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> *"[Mrs Stewart's leaving the house] resulted in her having to bear additional expenses to maintain herself outside of the family home, thus reducing her ability to contribute to other expenses of the family home and of the children."*
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> *[71] Another factor to be considered in respect of the post separation period is that the party in occupation could be ordered to pay, what is referred to, in particularly the English authorities in this area, as an "occupation rent". One judicial approach to occupancy by one party of jointly owned property is set out in **Simon v Wright**, where Kós J said:*
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> *"Retained occupation by one party may be regarded as a contribution by the other, non-occupying party. Permitting retention of the family home gives the occupying party emotional and practical benefits. It also averts the financial and practical burden of having to relocate to alternative accommodation. That burden is borne instead by the non-occupying party until relationship property issues **are resolved**." (Emphasis supplied)*
>
> *[72] Considered in the way explained in that excerpt, it would be apparent that Mrs Stewart did make a post-separation contribution to the property. From another viewpoint, it may also be said that if Mrs Stewart is to be spared the cost of refunding to Mr Stewart one half of his post-separation costs, it would not be fair to require him to pay an occupation rent.*

[54] In that situation the Court recognised that the party who remained in occupation had in fact received an additional benefit even in circumstances where he had retained the burden of paying the mortgage as the party who had relocated could be properly regarded as having made a post separation contribution to the property.

[55] A more detailed examination of this issue was conducted by the Court ***in Mercedes Blake v Andrew Blake [2016] JMSC Civ.63*** in which a claim was made for occupation rent by one registered owner against another, on the basis that one spouse had taken exclusive possession of the house and had barred the other from the premises forcing him to seek alternate accommodations elsewhere. A comprehensive review of a number of authorities on the topic was conducted by Evan Brown J from which he extrapolated the principles which have been summarised below;

1. There is a prima facie entitlement to occupation rent by the spouse who left the matrimonial home following a breakdown of the marriage. However, if the co-owner who voluntarily left the property would be welcomed back and be in a position to enjoy occupation of the property, equity would not normally require an occupation rent of the occupying co-owner (In ***re Pavlou (a bankrupt) [1993] 1 WLR 1046)***

2. Some forms of occupation by a co-owner will make him liable to the other co-owners for an occupation rent for example, a contract making occupation subject to the payment of rent: (***M'Mahon v Burchell (1846) 2 PH 127).***

3. 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 WLR 436*** *and* ***Dennis v McDonald [1977] 1 WLR 810***. 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 [20031 EWHC 1276 (Ch).***

4. An occupation rent is due from the occupying co-owner where he lets part of the property: ***Jones v Jones***, supra.

5. A court of equity will order an enquiry and payment of an occupation rent in the absence of an ouster where it is necessary to do equity between the parties***: Re Pavlou (a bankrupt*****)** supra. 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. **(*Suttill v Graham [1977] 1 WLR 819).***

Having outlined these principles, Brown J went on to state as follows;

> *[30] So then, a claim may be made against a co-owner in sole occupation, as in the case at bar, in the absence of his exclusion or ouster from the property. Although ouster from the subject property is the typical case, it appears that the overarching endeavour of the court in levying an occupation rent is to do justice between the co-owners.*
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> *[31] In fine, the award of an occupation rent is not an arbitrary judicial gesture. An occupation rent only becomes chargeable to adjust the balance between co-owners. Mere occupation has never been a sufficient basis to levy an occupation rent. The balance between co-owners may require adjustment as a result of the unlawful or inequitable actions of one or more co-owners.*
>
> *[32] Since exclusion from the co-owned property is but one of the several possible transgressions by a co-owner, exclusion cannot be the indispensable conditionality to award an occupation rent. Hence, the co-owner who voluntarily gave up possession may also be eligible to make a claim for an occupation rent: **Beverley Simpson v Anslyn Simpson**, supra. However, if the insufficiency of bare occupation to ground occupation rent is to remain a valid proposition, a co-owner who voluntarily gave up occupation must establish that the equitable or legal balance has been disturbed. He does so by proving, for example, either the existence of a contract to pay rent or that the circumstances require an equitable accounting (emphasis supplied).*

[56] It was the Claimant's unchallenged evidence that the Defendant had formed a new relationship and no longer wanted to be involved with her. It was also her unchallenged evidence that he had been made aware of the disrespectful

behaviour of his son towards her and the issues in respect of his mother but failed to intervene to put an end to this. Additionally, it was accepted by him that the Claimant had been told that one of them had to leave and it would not be him.

[57] Applying the principles which have been outlined above, it is clear that the Claimant would be able to mount a claim for occupation rent on the ground of ouster by the occupying party and also on the basis that as a co-owner who voluntarily gives up occupation she would be eligible to make such a claim.

[58] In respect of the Defendant's assertion that he had sole responsibility for servicing the mortgage debt for this period and should be reimbursed for same, I have carefully reviewed the background that led the parties to this point and I find as follows;

1. In September 2016 in an effort to expedite matters, the Claimant presented the Defendant with a business card for her attorney in order for him to commence discussions in respect of the purchase of her interest.

2. No action was taken by the Defendant and in February 2017, correspondence was sent to him to ascertain his position. He acknowledged this correspondence and provided a response on the 30th of March 2017 in which he indicated his intention to close the Scotialine account and asked for a letter from the Claimant authorizing him to do so.

3. In the same correspondence, he indicated that he had procured a valuation report of his own initiative and at his sole expense and not at the instructions of Ms Minto as he later sought to persuade the Court. This report and a mortgage statement were sent by him to Ms. Minto in her capacity as Counsel for the Claimant and not in the capacity as a relative of the Claimant who was providing assistance to the Parties as the Defendant asserted.

4. Between the end of March 2017 and April 10th, 2017 emails were exchanged between the Defendant and Counsel for the Claimant and in an email dated the 10th of April 2017 the Defendant indicated that he was in the process of applying for an additional mortgage to purchase the Claimant's share. I found that this indication stood in stark contradiction to his evidence in chief and cross examination where he asserted that he had never been in a position to fund the purchase and had sought to communicate as much to the Claimant and her attorney.

5. On the 22nd of June 2017 the Defendant was informed by Counsel for the Claimant that an Agreement for Sale, Instrument of Transfer and Statutory Declaration were to be prepared and sent to him for his signature and he acknowledged receipt of this correspondence. On the 26th of October 2017 there being no further communication from the Defendant, these documents were sent to him along with a cover letter explaining the attachments.

6. The Defendant did nothing for almost a year and on the 12th of September 2018 he was informed of this suit and provided with documents related to the Claim. Subsequent to being served with the Court documents the Defendant signed and returned the agreement for sale and instrument of transfer, a fact which he accepted in cross examination.

7. At no point, to include his email of the 21st of September 2018 in which he acknowledged receipt of the Court documents, did the defendant raise an issue with the deposit required or his ability to fund same. He accepted this under cross examination and he also agreed that the first time that his inability to fund the deposit was indicated to the Claimant was in 2019 when she was informed of his home equity loan application by JN.

8. The Defendant made no serious efforts to secure the Claimant's interest as in the loan application she was being asked to co-sign on a loan to pay herself. I believe that the Defendant was always aware that the best course would have been to refinance the mortgage and pay the Claimant which he had stated he was endeavouring to do from as far back as the 10th of April 2017.

9. The delay which occurred in this matter was occasioned by the Defendant as he failed to deal with the matter expeditiously. His efforts to place the blame on his financial inability to pay the deposit combined with the refusal of Ms Minto to provide him with the Agreement for sale are undermined by the fact that he would have been fully aware of the contents of the document he had signed to and the need to pay the deposit on signing. The defendant was not an ordinary layperson, he was a medical doctor and professor of medicine who by his own evidence had previously purchased property and as such he would have been fully aware of what this entailed.

[59] In light of these findings, it is my conclusion that while this matter could have been completed within a reasonably short period, the refusal of the defendant to treat with the matter urgently created the situation where almost four years elapsed with no change in the status quo. As such, I am not persuaded that he should be rewarded for his conduct by any order being made that the Claimant should reimburse him half of the mortgage payments.

[60] On the other hand, while I am of the view that the Claimant would have been entitled to an award for occupation rent and has lost out on the opportunity to secure another property, I am persuaded that the better course is to adopt the approach of Brooks JA in ***Carol Stewart v Lauriston Stewart*** and make no order for such a payment. I believe that in adopting this course, the balance is preserved between the parties and the overriding objective is achieved.

Should the balance on the Scotialine account be repaid by the Defendant and Claimant in equal payments?

[61] In respect of this issue, the Claimant has asked to be relieved of this responsibility as she maintains that it is the Defendant's debt only. The Defendant on the other hand has argued that the repayment should be shared as the loan was jointly obtained and had been used for household expenses and towards the acquisition of the house.

[62] In support of her contention that it is the defendant's debt, the Claimant produced a statement which bore a date in June 2018 and reflected recent transactions. It also had a balance of just over $1.2 million. She asserted that the account had been cleared but the amount due had been 'run back up' by the Defendant who persisted in using it for his personal expenses. She failed however to produce any document to show that the account had in fact been cleared and she only produced one statement in respect of same.

[63] In considering her account however, I noted that it was not disputed by the Defendant that he had used the card for personal and professional reasons. Additionally, his contention that he had used the card for household expenses was seriously undermined by the fact that the Claimant would not have benefited from any such expense incurred beyond October 2016, but the statement produced showed current transactions.

[64] While the balance on the account showed that a debt of over $1.2 million was owed in June 2018, the defendant gave evidence that he had paid the account down to a balance of $200,000. In his email dated the 30th of March 2017, he said it was his intention to close the Scotialine account and only needed a letter of authorization from the Claimant to do so. He raised no objection to her request to close this account; neither did he demand to be paid half of the balance before this could be done.

[65] If the Claimant had in fact been responsible for this debt or a portion thereof, this would have been the opportune time to raise the issue of contribution but this was never done. From the Claimant's evidence it is clear that this letter was provided but the Defendant failed to honour his indication and chose instead to keep the line of credit open in order to utilise same.

[66] In these circumstances, I agree that it would be unreasonable and unjust to order the Claimant to bear equal responsibility for the settlement of this debt.

[67] In light of the foregoing conclusions, I make the following orders;

1. The Claimant is the legal and equitable owner of a fifty percent (50%) interest in the Claimant's and the Defendant's family home known as Lot numbered Twenty-Two of All that parcel of land part of Tunbridge in the parish of Saint Andrew and being the lands registered at Volume 1483 Folio 429 of the Register Book of Titles.

2. The property is to be valued by a reputable valuator to be agreed upon by the parties within thirty (30) days of the date of this order, failing an agreement being reached between the parties, the valuator is to be appointed by the Registrar of the Supreme Court.

3. The Defendant is given first option to purchase the Claimant's interest in the said property. He is required to exercise this option within forty-five (45) days of receipt of the valuation report;

4. If the Defendant fails to exercise the option and/or fails to complete the sale, the property shall be subject to a sale by private treaty to a third party;

5. Nunes, Scholefield, DeLeon & Co., Attorneys-at-Law shall have carriage of sale as Counsel for the Claimant as vendor and such sale is subject to completion within ninety (120) days of the date of the

agreement for sale being submitted to the Defendant or his Attorney-at-Law;

6. The Registrar of the Supreme Court is empowered to execute all documents necessary to effect the sale and transfer of the Claimant's interest to the Defendant or a third party in the event that either Party fails or neglects to do so within fourteen (14) days of the relevant documents being presented to him or his Attorney-at-Law for his execution;

7. All costs incidental to the sale of the Claimant's interest in the said property or the sale of the property to a third party including but not limited to the cost of the valuation, the payment of any transfer tax, stamp duty, registration and attorney's fee(s), is to be borne by the Claimant and the Defendant equally;

8. The Defendant is to take the required steps whether by loan repayment, refinancing or otherwise to have the Claimant's name removed from the credit/loan facility granted by The Bank of Nova Scotia Jamaica Limited to the parties which is identified as Scotialine Acct #5443 1054 1006 1726;

9. Time is extended pursuant to Section 13(2) of the Property (Rights of Spouses) Act to permit the Claimant to make this claim and to bring this action under the Act;

10. Costs awarded to the Claimant in the sum of $250,000 inclusive of GCT.