[2020] JMSC Civ 94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. M2982/2017

BETWEEN STEVE ST. CHRISTOPHER CESPEDES APPLICANT/RESPONDENT

AND AUDREY THERESA CESPEDES RESPONDENT/PETITIONER

IN CHAMBERS

Ms. Marjorie Shaw and Ms. Deneve Barnett instructed by Brown and Shaw for the Applicant/Respondent.

Mr. Gordon Steer, instructed by Chambers, Bunny and Steer for the Respondent/Petitioner.

Division of Matrimonial property - Both party's names endorsed on the certificates of title of real estate - whether there is a presumption of equal share - The Petitioner and 3rd party's names endorsed on the certificate of title to other property -Third party not made a party to the proceeding - whether the Applicant/Respondent is entitled to a declaration of interest in the said property - Request for division of moneys in bank accounts not specifically pleaded in the application - Whether the court is precluded from making declarations and orders relating to the Applicants/Respondent's interest.

Heard: 11th and 12th of November 2019 and the 27th of February 2020

THOMAS, J.

INTRODUCTION

[1] The parties to this application were married on the 7th of August 2004. They separated in May 2014. This application is brought by the husband Mr. Steve St Christopher Cespedes under the Property Right of Spouses Act for a declaration of his interests in certain properties in which the parties are registered as joint proprietors on the certificate of titles and one property registered in the joint names of the Applicant's mother and his wife Mrs. Cespedes.

[2] On the 10th of January 2019 orders were made by Justice Nembhard with respect to certain aspects of the application. By virtue of those orders the application having been filed after 12 months after the marriage had been broken down, and being outside of the time stipulated for the filing of under the Property (Right of Spouses) Act' the Applicant Mr. Cespedes was granted an extension of time for the filing of the application in this regard. Additionally, orders were granted in relation to the account of rental of properties by the parties; disclosure of bank balances, withdrawals, transfers, acquisitions by the Petitioner/Respondent; details of acquisitions, cost, maintenance, and purse money collected in relation to race horses and possession of motor vehicles held by the Applicant.

[3] The aspects of the application which remain for determination by this hearing are the claim by the Applicant for a declaration that he is entitled to half interest in:

(a) the following properties in which the parties are registered as joint owners:

(i) 37A and 39 Upper waterloo Road Kingston 8 registered at Volume 1076 Folio 481.

(ii) 205 Tower Street Kingston registered at Vol. 1275, Folio 770.

(iii) Premises at the corner of Luke and Tower Street registered at Vol. 1275 Folio 771 (203 ½ Tower Street).

(iv) Premises at 207 Tower Street registered at Volume 1275 Folio 772.

(b) Lot 1 Marverly Mountain St Andrew registered at Volume 976 Folio 551 which is registered jointly to his mother Innes Hinds Davison and his wife Audrey Cespedes.

[4] He is also seeking the following consequential orders following upon any declaration made in relation to these properties:

(i) An order for the determination of the market sale value and annual rental value of each property for the period between 2014 to the date hereof.

(ii) Rental income from June 2014 for use and occupation of 37A and 39 Upper Waterloo, Lot 1 Marverly Mountain, 205 Tower Street, Premises at the Corner of Luke Lane and Tower Street (referred to as 203 ½ Tower Street, 207 Tower Street), and in the alternative an order that the Petitioner pays one half of the assessed market rental value of each of these premises.

(iii) An order that the Registrar of the Supreme court is empowered to sign and all documents to effect a registerable transfer if either of the parties is unable or unwilling to do so.

(iv) He is also asking the court to make a determination with regards to the relative interest of the parties in account balances in certain financial institutions.

The grounds on which the application is brought are:

(i) the properties are jointly owned

(ii) the Defendant has enjoyed almost exclusive enjoyment, control, use and benefit of these properties and has diverted much of the party's joint assets to her own use.

(iii) The marriage between the parties has irretrievably broken down.

The Evidence of the Applicant

[5] I will state from the outset that in relation to the evidence of both parties. I will only highlight aspects of the evidence that I find relevant to the issues that I am required to determine. The evidence of Mr. Cespedes is contained in two affidavits signed on the 20th of April 2018 and filed on the 25th of July 2018, and signed and filed on the 15th of March 2019. Both were permitted to stand as his evidence in chief.

[6] He states that:

> At the time of the marriage the parties lived at 1 Farrinton Way, they lived at that address for 9 years. Around the year 2004 they moved to 2-4 Canterbury Road Kingston 10. Farrindon Way became the principal residence until the separation in June 2014. During the marriage they acquired several properties.

[7] These he lists as 37A and 39 Upper Waterloo Road, one Marverly Mountain, 205 Tower Street, premises at the corner of Luke and Tower Street and 207 Tower Street.

[8] He further asserts that:

> The Petitioner forcibly ejected him from the family home in or about June 2014. He testifies that the Petitioner has been responsible for the collection of rent from the premises at 203½ ,205 and 207 Tower Street (the Tower Street Properties), and 37A and 39 Upper Water Loo Road (Upper Waterloo). Prior to the separation the monthly rental in relation to the Tower Street properties was US $800 for 2031/2 Tower Street and $1200.00US for 205 Tower Street.

[9] He says that:

> 37A and 39 Upper Waterloo Road was rented in 2015 for $235,000 which was collected only by the Petitioner. He has never collected rent for that property. He has been advised and believe that in March or April of 2016 the tenants were given notice to quit and the Petitioner started operating a nursery for herself on the compound. She failed to account for the rental of these premises. His evidence in relation to the property at Marverly Mountain (Marverly Mountain) is that it is vacant land which is registered in the names of his mother and Mrs. Cespedes. No rent has ever been collected from this property.

[10] He further alleges that**:**

> In 2008 he and Mrs Cespedes opened Scotia DB and G Investment Account. They invested USD $100,161.11 In 2010 they opened an investment account at the National Commercial Bank with the sum of US$ $1,038,653.56. On October 12, 2010 the Petitioner closed the account and transferred the funds to the business account. The business account was held at Scotia Bank Portmore in the name of A and S Cespedes trading limited. The account number was 509568. It was the Petitioner who managed this account and generally made withdrawals from the account. His wife has transferred, withdrawn and depleted the principal and interest from these accounts to other accounts at the said institutions and elsewhere

[11] His evidence on cross examination is that:

> In July 2002 he left the United States of America (USA). He used to be in the music business, recording, before 2002. When he came to Jamaica he did not continue the music business. When he came to Jamaica he was not doing any business**.**

[12] He agrees that when he came to Jamaica his wife was running a business which he describes as a small business that was selling bulk rice and peas to wholesalers

in downtown Kingston. He asserts that he came to Jamaica with US$4000 and that between 2004-2006, he invested US$12,000 in the business. He further accepts that between 2004 to 2006 he did not earn that much US dollars, but states that he and his wife earned it together. That is between 2004-2006 he and his wife earned US$1,000,000, both of them working together, because he opened a company.

[13] In response to Counsel's question, if in his affidavit he stated that he invested US $12,000 in the business, he states that he did not say that in his affidavit but he knows he invested $12,000. He admits that has not produce anything to show that he invested the $US 12,000.

[14] He has also given the following responses:

> He was the one who opened the NCB account and put the US$1,000,000 in it. It was not too long after that he put his wife's name on it because she complained that it was both of them business so he put her name on it. That $US1,000,000 account his wife closed it in August 2010. The US $1,000,000 was lodged into a Jamaica Money Market Account in her name and the name of her daughter Kishauna Harley. After he found out the money was moved he asked her and she said that the money was safe and she will carry him to the bank where the money is because he's supposed to get his interest.

[15] He further states that:

> After three years his wife finally took him to the bank, and then he realised his name was not on the account it was two different names. She said that she put the money in an old account that was in her and her daughter's name in New Kingston. She told a bank worker that he was her husband and that she wanted his name to go back on the account. This happened in 2014. He separated from his wife in May 2014. The name went on the account before the separation. His name went on the account 4 months before the separation**.** He opened the NCB account in 2006. He is

absolutely sure it was not in 2010. His affidavit says that but it must be a typo error.

[16] He agrees that he and his wife lived at 2-4 Canterbury Road at a townhouse, belonging to his wife for a short while. He describes it as having two (2) bedrooms upstairs and helpers' quarters downstairs. He agrees that the business money helped her to buy this house for herself. He admits that at the time of marriage, they had moved from Canterbury to Farrington Way, a property his wife had bought property prior to him knowing her. He describes this property as a nice house. However, he disagrees that the money from the small business could have bought a nice house because it was before the business got crowded and had more people in that market.

[17] He admits that he purchased race horses during the marriage. He states the money to purchase the horses came from his salary out of the business; he and Mrs Cespedes were paid $50,000 each per week. He admits that he collected the money for the business but he disagrees that he never handed it over.

[18] He also admits that before he and his wife separated, he was collecting the rentals for the properties on Tower Street. He agrees that he did state that prior to 2014 when he and his wife separated the monthly rental sums due was US$800 for 203½ Tower Street and US$1,200 was due for 205 Tower Street.

[19] However, he denies saying that:

> Since their separation the rent continued to be collected by the Petitioner and that she was responsible for the collection of the monthly rental for all 3 premises on Tower Street. If that is in his affidavit it is a lie.

[20] He states that the rental for the Tower Street Premises was US$4,350. His wife would get half and he would get half. He would get US$3050. He agrees that half of $4000 is $2000. He however, asserts that his wife collected rent not just for the Tower Street properties but other places. She would collect all the rent for Water

Loo. All together the rent it is $6,300. He denies saying in his affidavit that his wife was treating the properties as if all of them are hers.

[21] He admits that:

> Between 2010 - and present, he has owned eight (8) cars. He has owned a Toyota Hiace up to 2013. He had in his sworn document state that between 2010-2015 he has owned two (2) vehicles and went on to say he purchased them for immediate resale or in operation of the business. He said he had said that but is wrong.

[22] He states that:

> The business closed in 2013 because his wife had closed all the accounts and when he went to bank the account was closed. She told him that she gambled and lost the $7 million which he collected for the business and gave her to go to the bank in 2013. It was not her money; it was business money. It is not in his affidavit to say that she gambled away the seven million dollars nor is there any document saying that. She was treating the business as if it was hers, because she was hiding and doing things behind his back.

[23] He further states that:

> He provided money for the purchase of 1½ Marverly Mountain. That property is purchase in his mother's and wife's names. He wants his mother's half not his wife's. He got an audit from the tax office for $58,000 which he was challenging in the courts, so his wife told him to put his mother's name to the purchase. He has not taken his mother to court.

[24] His evidence on cross continues as follows:

> The company was formed in 2004. He does know if his wife had savings before coming to Jamaica. He was not working but he came home with US$4000 from his account in prison in the USA. In relation to the business, his wife had the responsibility to pay the suppliers. He was the one to collect

the money. Every weekend he collected money on a Saturday. Sometimes Jamaican $10 million, up to $12 million. After collecting the money, he would not go to Caymans Park. They would meet at the station. He would give her the money in a bag for her to go home with. He would give her Jamaican $10 million every week and she would gamble some of it. He did not go to the banks because he doesn't go to the bank on Saturdays. She does not gamble all. Out of the 10 million dollars she would gamble perhaps $500,000. He does not gamble.

[25] He further states that:

When he realised that the Jamaica $10 million he gave her on a Saturday was finished or nearly finished, he would give her whatever he collected. She would go to the gambling house and spend up to Jamaican $1 million. The suppliers were being paid up until 2012. She was responsible for paying the suppliers and not him. She stopped paying in 2012/2013. She would also gamble with his credit card. The bank would write to him to say he owed money. Between 2010-2013 there was excessive gambling by Mrs. Cespedes. He is not doing any business now.

[26] His evidence continues:

The money that purchased Waterloo came from the business. He agrees that he has provided no evidence of the purchase of the properties. Tower Street was purchased in 2006. The money came from the business. The business started to make money in 2003 because he invested his money. He invested his US$12,000. His wife would do most of the orders for the company. She had customers before he came.

[27] He denies that the Tower Street and Water Loo properties were bought by his wife without any contribution from him. He states that he does not know if the business was making good money prior to him coming to Jamaica. He agrees that his wife already owned two (2) expensive properties when he came to Jamaica. He also

agrees that he has not denied what his wife had said in any document that he made no financial contributions to the properties in issue.

[28] He admits that he owns a 2002 Escalade which was purchased in March 2003, for USD $90,000 cash by his wife. He claims that he was not aware that his wife spent money to fix up the Water Loo Property. However, he asserts that she only fixed the windows and put some zinc on the back. Her further admits that his friend was living there but it was on the Petitioner's permission and that his friend moved out in 2014, before the separation.

[29] He also states that:

> He was aware that repairs and renovation were done to Waterloo. In 2014 he got a tiler and tiled it. After the tenant moved, the Petitioner did not do any renovation work. He called pre mix and they did the top. In 2013 he started renovation. He was told he had to buy the sink and everything in there. Mrs Cespedes chased away the plumber and electrician. After she kicked him out and the lock was changed, he went somewhere else. In May 2014, his friend was living there. He moved 2 months after he was there. He didn't share the one room that they fixed. He moved in 2014, July. He spent two months there. She did renovations in the place. He has not denied that she spent 15 million there in his affidavit.

[30] On re-examination he states that:

> Of the eight (8) vehicle that he states that he owned, six (6) were in the business name. The truth is that he would buy the vehicle and sell it back to the Chinese after using it for a couple months

<u>The evidence of the Petitioner</u>

[31] The evidence of Mrs Cespede is as follows:

> When she met the applicant she was an established business woman operating an import and whole sale business at 31 Beeston Street in

Kingston. She returned to Jamaica in 1995 with US$3,300 which she earned while working as an incarcerated person in the prison system in the USA. The Applicant returned to Jamaica December 19, 2002 after himself being in confinement for fifteen (15) years. He had nothing of value. When he returned she had already acquired over US$500,000 in a US account at JMMB and 4 properties, namely,1 Farringdon Way, Kingston 6, 31 Beeston Street, 2-4 Canterbury Road, Kingston 6, and 10 Braemar Avenue Constant Spring. Farrindon Way was purchased in the name of herself and her daughter Kishana Harley. The transfer was registered on the 22nd of January, 2003. She did not take a mortgage on that property. She and the Applicant were married on the 7th of August 2004.

[32] Her evidence continues as follows**:**

37A and 39 Upper Waterloo Road is one title and was purchased on the 1st of February 2007 in the names of herself and the Respondent/Applicant for US$200,000 which came from the business which she operated. The Applicant place his friend Lance Malcolm to live in the property between 2007 and 2014 rent free. After his friend moved out she spent 15 million dollars on repairs and renovation. The property was not rented until 2016. The tenant moved out owing (six) 6 months' rent. The rent was $235,000 per month. She took the tenant to court. She is receiving $40,000 per month out of a $840,000 balance. Since September 2018, the premises is rented to students. She collects $200,000 per month. She had to spend $5,000,000 to get it ready to be rented. She is to be repaid the $20,000,000.

[33] She further states that:

Marverly Mountain was purchased in the names of Innes Hinds Davidson and herself as joint tenants. She is not aware of the Applicant/Respondent having any interest in this property. The three properties on Tower Street were purchased in their joint names. They were improved upon with money provided by her alone. They are rented out for US$4,300. That is,

approximately Jamaican $559,000. She would be entitled to $279,500. The Applicants collects US$3050, approximately Jamaican $396,500. She only collect US$1,250, approximately Jamaican $162,500. Therefore, she would be entitled $117,000 more per month. She states that she "is supposes to receive half of the US$4,300".

[34] Her evidence also continues as follows:

> The Applicant came and saw her operating a business which was generating huge profit. The reason for incorporating A and S Cespedes Trading was to facilitate the Applicant obtaining a licensed firearm. Mr. Cespedes would collect her business money and use it to purchase race horse and motor vehicles. He also collected rental income from three (3) properties located at 10 Breamar Avenue, 2-4 Canterbury Road, Town House 10 and 31 Beeston Street. He purchased more than ten vehicles and several race horses. She is claiming interest in these.

[35] In relation to the bank accounts she states that the Scotia DBG investment account bearing account number 0250c837015 was transferred to the business Account in 2010 to facilitate payment in the business. The NCB cash money market fund account No. 724527 was closed between 2009 to 2010 and transferred to JMMB account 40001580 in the names of Audrey Laing, Kishana Harvey and Steve Cespedes. She also has JMMB account 5704072 in the names of Audrey Laing, Steve Cespedes Marlon Laing and Steve Cespedes

[36] On cross-examination, Mrs Cespedes' evidence is as follows:

> She agrees that she doesn't have any proof that she took home money when she returned home from the USA. She learnt word processing and how to utilise the computer. She does not have any proof that she had acquired half million dollars at JMMB before the marriage. 21 Beeston Street is not registered in her name. It is true that she acquired four properties as listed in her affidavit. The property at Beeston Street was her childhood home that her family died and left for her and the rest of the family.

She does not own but pays taxes for that property. Acquire means to her "to live in the property, maintain the property, pay the taxes for the property and bills for the property. She doesn't understand acquire to mean owning.

[37] She also states that:

She would not describe her marriage before as a good marriage. She considered it a good marriage from 2004-2007. Between 2004-2007, she did not work alongside the Applicant in a business. She imported goods as her work during 2004-2007. A&S Cespedes Trading was incorporated in 2004. In 2004, she did not establish a bank account in the business name. It was the Applicant who did so. She was a signatory on that bank account. She did not make deposits to that account, the Applicant did.

[38] She does not agree that:

She has not provided any evidence to support the assertion that the purchase price for Waterloo Road came from her business. She has not provided evidence to show that she improved Tower Street. Her JMMB, NCB and Scotia bank accounts would reflect that.

[39] She insists that when the Applicant came her business was generating huge profits. She agrees that the Applicant formed the company in 2004. She asserts that she doesn't know if the company was formed before the Applicant got the firearm license. She then agrees that A and S Cespedes trading LTD was not her brainchild. She is not familiar with the account held by A and S Cespedes Trading Ltd. When asked even though she was a signatory to it, her response is that she was bullied to sign it. She states that she cannot recall if the NCB capital Market Account #724527 was in the name of A and S Cespedes Trading Limited account.

[40] She further states that:

There was a Scotia Account and an account at JMMB. She closed that investment account and moved the money to an account to pay the bills of the business. The NCB Capital Market Account is in the name of Mr.

Cespedes and her name alone. Her daughter, Ms. Harley is not in Jamaica. Between 2004-2014, she never lived in Jamaica. Marlon Laing does not live in Jamaica. Between 2004-2015 he did not live in Jamaica. There were four (4) accounts at JMMB The JMMB Account #40001850 her daughter's name is not on that account. The account with her daughter's she was bullied to put Mr. Cespedes name on it. She brought him to the bank and put his name on it in 2013, not 2010 at the Portmore branch.

[41] She would agree that:

JMMB Account number 1300544 was used for business purposes. It was used to pay bills. In August 2010, her NCB Capital Market Limited Account had over USD 1 million dollars in it. There is a US bond settlement account at JMMB, but that it is her money in it. There is a JMMB account #5704072. She agrees that there were two accounts in the history of relationship 0250C83715 Scotia DBG and the NCB Capital Market Account #724527

[42] She disagrees that the US bond settlement account had a principal payment of $650,000She explains that the $650,000 is part of the investment that was borrowed from the US$1,000,000. The $650 was payment toward the loan borrowed against the $1,000,000 at the bank and the amount borrowed was $500,000. and brought to JMMB to pay bills. She disagrees that the only loan that has been shown to this court is the loan for her 2013 Ranger Rover. She has exhibited a loan with First Global which was to purchase a 2013 Land Rover.

[43] She disagrees that:

She has no document to support the loan of US$500,000. She is raising this loan to account for the US$1,000,000 which was lodged for both of them. The account 724527 is where the US$1,000,000 originated from.

[44] She disagrees that she has not provided proof to this court that she spent money to rebuild and renovate Upper Waterloo. She has bag and bags of bills at home. She also disagrees that there were accounts a JMMB in both names.

[45] She states that:

> She has a JMMB account 9206839 in her name alone. She has JMMB 1389432 NCB account #066405516. She has two other accounts at First Global bank. She agrees that she has 5 accounts in her name. She agrees that there is a lot of transfers from account number 9389412 to account 13902 in 2017 and it is her money. She would disagree that she was not telling the truth when she said that she doesn't put or withdraw money from the account. She agrees she placed a caveat against the Tower Street properties even though they are in both names because Mr. Cespedes stole all the titles and vehicle papers so she had to put a caveat.

[46] In respect to Waterloo she states that:

> It had been rented to Katherine O. Sullivan. She did not rent to her between February 2004-2016. She rented her for 1 year and 6 months and she left with 6 months' rent. She rented her for US$2,500 a month.

[47] She further states that:

> She has taken the tenants at Tower Street to court. Her application is for them to get out, because she wanted it for her importation business. The money to purchase the properties came from her business with his name on it. She denies that Mr. Cespedes was very active in the operation of the business A & S Cespedes Trading Limited. Her business was successful until he Mr. Cespedes tore it down.

ISSUES

[48] The issues in this case are:

(i) Whether the Applicant has any beneficial ownership in the properties in question namely: **37A and 39 Upper Waterloo Road, one Marverly Mountain, 205 Tower Street, premises at the corner of Luke and Tower Street and 207 Tower Street.**

(ii) If it is found that the Applicant has any beneficial ownership in any of these properties, whether there is any outstanding income due to him in relation to the rental of these properties.

(iii) Whether the Applicant has any interest in balance of moneys if any in relation to Scotia DB and G account and The National Commercial Bank account that were in the names of the parties.

The LAW

[49] In light of the fact that the Applicant is making no Claim to the family home the relevant law as it relates to his application for the division of Matrimonial Property are Section 13, 14 and 15 of the Property Right of Spouses Act.

Section 13 reads:

"(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 or 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

(3) For the purposes of subsection (1) (a) and (b) and section 14 the definition of "spouse" shall include a former spouse".

[50] Section 14 reads:

"(I) Where under section 13 a spouse applies to the Court for a division of property the Court may -

(a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or

(b) subject to section 17 (2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2), or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

(2) The factors referred to in subsection (1) are -

(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has,

since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) that duration of the marriage or the period of cohabitation,

(d) that there is an agreement with respect to the ownership and division of property; (e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

(3) In subsection (2) (a), "contribution" means -

(a) the acquisition or creation of property including the payment of money for that purpose;

(b) the care of any relevant child or any aged or infirm relative or dependant of a spouse;

(c) the giving up of a higher standard of living than would otherwise have been available;

(d) the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which-

(i) enables the other spouse to acquire qualifications; or

(ii) aids the other spouse in the carrying on of that spouse's occupation or business;

(e) the management of the household and the performance of household duties;

(f) the payment of money to maintain or increase the value of the property or any part thereof

(g) the performance of work or services in respect of the property or part thereof;

(h) the provision of money, including the earning of income for the purposes of the marriage or cohabitation;

(i) the effect of any proposed order upon the earning capacity of either spouse.

(4) *For the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution"*

[51] Section 15 reads:

"(1) In any proceedings in respect of the property of the spouses or of either spouse (other than the family home), the Court may make such order as it thinks fit altering the interest of either spouse in the property including: -

(a) an order for a settlement of property in substitution for any interest in the property;

(b) an order requiring either or both spouses to make, for the benefit of either or both spouses,

such settlement or transfer or property as the Court determines; or

(c) an order requiring either or both spouses to make, for the benefit of a relevant child, such settlement or transfer of property as the Court determines.

(2) The Court shall not make an order under subsection (1) unless it is satisfied that it is just and equitable to do so.

(3) Where the Court makes an order under subsection (1), the Court shall have regard to:

(a) the effect of the proposed order upon the earning capacity of either spouse;

(b) the matters referred to in section (14)2 in so far as they are relevant; and

(c) any other order that has been made under this Act in respect of a spouse".

Submissions

[52] I will at best as possible attempt to summarize the submissions of counsel for both parties on the issues that I am required to determine.

[53] Ms. Shaw's submission on behalf of the Applicant/Respondent are summarized as follows:

(i) Where the real estate is registered in the joint names of the parties, the issue is solely matter of law and not one of credibility. The Respondent has confirmed her presumption of equal share ownership by asserting her entitlement to half of the rental from the properties and reimbursement for alleged improvement There is no compelling evidence for an award other than that claim by the

Applicant (She refers to the case of ***Carlene Miller v. Ocean Breeze Suites and Inn Ltd.*** (2015 JMCA Civ 42). There is evidence that the parties are sharing almost equally the income generated from these properties.

(ii) As to whether the court can make an order for declaration of the relevant interest, of the parties in accounts in financial institutions and consequential orders for payment in the absence of specific pleadings, she submits that there is implicit in the application and supporting affidavit a request for these remedies. She points to the Applicant's request for disclosure in relation to bank balances and that he states that he wishes to liquidate his assets and savings jointly held with the Petitioner.

(iii) She further submits that even in the absence of an implicit application the court has the statutory power to make orders that are just and reasonable given the evidence before it. In support of this point she relies on Section 48 (c) and (g) of the ***Judicature (Supreme Court) Act.***

[54] Mr. Steer Counsel for the Petitioner/Respondent submits that:

(i) There is no application or claim brought by the husband for moneys standing in any account. Application for disclosure was sought, ordered and disclosed, fulfilling paragraph 6 of the Notice of Application filed by the husband. He relies on Rule 11.13 of the Civil Procedure Rules of Jamaica (the Rules) which states that:

> *"An Applicant may not ask at any hearing for an order which was not sought in the application unless the Court gives permission."*

No application for permission was sought and none was ever given. No order for the division or entitlement of these monies can be given.

(ii) The husband has failed to indicate how he contributed to the generation of the monies nor did he state, whether in his affidavit or under cross-examination, that the divested sums from the accounts bettered the properties or the union". The Notice of Application for Court Orders concerns only the interests of the parties in respect of 37A and 39 Upper Waterloo Road, Kingston 8, in the parish of St. Andrew, Lot 1 Marverly Mountain in the parish of St. Andrew, 205 Tower Street in the parish of Kingston, premises situated at the Corner of Duke and Tower Street in the parish of Kingston, 207 Tower Street in the parish of Kingston and rental collected in respect of these premises.

(iii) There has to be evidence of some form of contribution whether monetary or non-monetary, direct or indirect from the husband to the wife whether to the properties or to the home life of the parties.
The provisions of Act have replaced the rule and presumptions of the common law and equity. Contribution is not required insofar as the Family Home is concerned, but in respect to other property there has to be some element of contribution to substantiate a claim. The fact of one's name on a Certificate of Title as a joint tenant does not in and by itself give a person an automatic 50% share in the property. (He relies on the case of ***Goodman v Gallant [1986]*** **1 All ER 311).**

(iv) Section 15 of the ***Property (Rights of Spouses) Act*** a gives the Court the power to alter the interests of spouses, but any such alteration has to be 'just and equitable'. There is no evidence in the affidavit of the husband as to where the money came from to purchase the properties or where the money was earned to invest in financial institutions. The wife however supplied this evidence in her affidavit. It is not just and/or equitable to alter the wife's interest or entitlement to the whole.

(v) The husband has failed to state why he is entitled to the rentals from the properties and accounting to him in respect of the rental collected. The only evidence of involvement in the business the husband gave under cross-examination was that he would collect some rental income, which he stated he gave to his wife immediately because he rather not bear the risk of walking around with such great sums of money.

When asked about his affidavit evidence of July 25, 2018 in which he stated the wife collected the rental, the husband stated that such evidence was a lie and he in fact collected the sums and the rental amount was Four Thousand, Three Hundred United States Dollars. He stated he collects Three Thousand Three Hundred which is half of the total rental income. When asked how that sum could represent half, the husband turned on his evidence once again by stating that the total rental income was Six Thousand Three Hundred United States Dollars.

(vi) The husband has also failed to adduce any evidence that he contributed in any non-financial manner. He was never a homemaker nor did he perform any household duties that could be considered an invaluable contribution. He failed to assist in the business in any material way, having only collected rent on behalf of the wife for one of the properties which he squandered and utilized for his own benefit. He cannot rely on such a fact to assert that he contributed to the acquisition, conservation or improvement of the properties. Though the marriage would not be deemed a short one by our jurisprudence, reliance ought not to be placed on such a fact solely, to substantiate the husband's claim and allow for an award of the orders sought.

(vii) Though the Court may be minded to draw inferences and make assumptions in the absence of the evidentiary the Court ought to find

that any possible contribution made by the husband, was drastically insufficient to substantiate his claim. Further, the benefit he gained, as was admitted under cross examination, the wife had bought him an Escalade Motor Vehicle for a purchase price of Nine Million Dollars, numerous race horses and monies divested otherwise, is sufficient to offset what he added to the union. He refers to the decision of Justice P J Callinicos at paragraphs 61 to 64 in the case of o ***ACS v RJP FAM 2005-342 [2007] NZFC 5***: in which the court stated:

> *"In undertaking the assessment of contributions to the marriage by each party the evidence adduced can only take me so far. It leads to a determination that there were contributions, of varying kinds by each party but such is the inadequacy of evidentiary detail that I am hamstrung in being able to venture into any degree of quantification. In such situation I considered whether I was able to undertake a quantification of contributions and division by drawing any inferences from the evidence so presented, in the manner undertaken by Ronald Young J. I stood back and attempted to look at matters 'in the round' in the manner adopted in* ***Stapleton****. The quality of the evidence presented fell well short of enabling me to reach the conclusion sought by the applicant.*

(viii) The husband cannot lay claim to a one-half share of the property at Marverly Mountain where there has been no severance and the Court is in no position to order such upon the facts or evidence before it at present. There should be evidence of his distinct and unambiguous interest in the property in question and the joint owner

made a party to the proceedings. (He refers to the case of ***Camille Greenland v Glenford Greenland. Naomi Greenland and Andre Greenland Claim No.2007 HCV 02805.)***

Discussion

[55] I note that there have been allegations of abuse and threats of violence on both sides. However, I find that these allegations are relevant only in so far as there is no disagreement on the issue that the marriage has irretrievably broken down. Consequently, I find that this is an established fact. Therefore I deliberately omitted these allegations in my summation of the evidence and will make no further reference to them in the determination of the issues before me.

The Tow*er Street and Waterloo Properties*

[56] In relation to the Tower Street and Waterloo properties, I take note of the following:

(i) Both parties' names appear on the registered titles.

(ii) Mrs. Cespedes has admitted that the three properties on Tower Street and that at Waterloo were purchased in their joint names

[57] However the fact of a party's name appearing on title to land is only prima facie but not conclusive evidence of ownership. Common law and equitable principles have established that the court can in fact find that the party whose name appears on the title is simple holding the title on trust for the individual who is entitled to the beneficial interest. (See cases such as ***Gissing v Gissing*** *[1970] 2All ER 780****,*** Grant ***v Edwards*** [1986] 2 All ER 427, ***Goodman v Gallant*** [1986] 1 All ER 311).

[58] This court is also aware of the common law principle expounded on in the case of ***Jones v. Jones*** [1990] 27 JLR 65 in which it was stated by Rowe JA at page 67 that:

"*The law applicable to a case of this nature is well settled. Where husband and wife purchase property in their joint names intending*

that the property should be a continuing provision for them both during their joint lives, then even if their contributions are irregular the law leans towards the view that the beneficial interest is held in equal shares"

[59] This and other cases also rely on the principle of the common intention of the parties whether by conduct or express words as to how the interests were to be held. In those cases, also there were circumstances where less than half share was held to be a fair entitlement (See ***Giffing*** Supra)

[60] However, and more importantly the ***Property (Rights of Spouses) Act*** (The Act) has basically displace the presumptions at common law and equity and has made specific provisions for the division of matrimonial property in this jurisdiction.

[61] In the case of ***Thelma May Whilby-Cunnningham v Leroy Augustus Cunningham***, in The Supreme Court of Judicature of Jamaica in Civil Division Claim No. 2009/HCV02358, McDonald Bishop J as she then was stated at paragraph 37 that:

"there is no need, by law, to revert to the rules and presumptions of common law and equity to determine the parties' entitlement to the house in question. In fact, by virtue of section 4 of the Act, those principles are inapplicable to the transactions between the parties in respect of the house"

[62] Section 4 of the Act states that:

"The provisions of this Act shall have effect in place of the rules and presumptions of the common law and of equity to the extent that they apply to transactions between spouses in respect of property and, in cases for which provisions [are] made by this Act, between spouses and each of them, and third parties"

[63] I have also made the observation that while section 6 of the Act provides for 50 % share of the Family Home for each spouse regardless of the contribution and regardless of whether both spouses names appear on the title, there is no automatic entitlement to half share of other matrimonial property.

[64] Section 6 reads:

> *"- (1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home –*
>
> (a) *On the grant of a decree of dissolution of a marriage or the termination of cohabitation;*
>
> (b) *On the grant of a decree of nullity of marriage, where a husband and wife have separated and there is no likelihood of reconciliation."*

[65] In fact, this entitlement to half share in the family home can be displaced, but only by cogent evidence being provided in order to satisfy certain conditions stipulated in section 7. I do not believe it is necessary for purposes of this hearing for me to outline these conditions as there is no indication that any of these properties in which the Applicant is claiming an interest is the family home.

[66] Mention is made of the legal principles in relation to the family home merely to emphasize the point that the appearance or non-appearance of the name of a party on the registered title is not conclusive evidence of the interest or the lack thereof in matrimonial property. The Act provides specific guidance as to how the relevant interests in the different types of matrimonial property are to be determined**.**

[67] Other matrimonial property apart from the family home is treated with under Section 14 of the Act. There is no stipulated right to half share in this regard. In determining a party's interest, the court is entitled from the outset to look at the party's monetary contribution to the acquisition of the property. This is clearly stated in subsection two of Section 14 of the Act.

[68] Additionally, in the case of ***Carol Stewart v Lauriston Stewart*** [2013] JMCA Civ 47 at paragraph 35 and 36 Brooks JA in highlighting the distinction in relation to the legislative provisions as it relates to the division of both types of matrimonial property stated:

> "*It is, however, based on a comparison of sections 7 and 14 of the Act. Whereas, by section 14, the legislature specifically allows the consideration of financial and other contributions in considering the allocation of interests in property, other than the matrimonial home, such a factor is conspicuously absent from section 7. Similarly, what may, inelegantly be called, a "catch-all" clause, placed in section 14(2)(e), to allow consideration of "other fact[s] and circumstance[s]", is also absent from section 7. From these absences it may fairly be said that the legislature did not intend for the consideration of the family home to become embroiled in squabbles over the issues of contribution and other general "facts and circumstances", which would be relevant in considering "other property".*

Whether the Applicant Made any Financial Contribution to The acquisition of or Improvement to The Relevant Properties

[69] I find it very instructive that Mr Cespedes being the Applicant in this matter has provided no details in his evidence in chief in relation to his financial contribution, whether to the direct or indirect acquisition of the relevant properties. He simply states that "during the marriage we acquired several properties." It is only on cross examination in response to the suggestion that he made no financial contribution to the said acquisition that he states that he invested $US12,000 in the business and that the properties were bought from the business. He agrees that he provided no proof of him investing $US12,000 in the business nor any proof of purchase.

[70] He asserts that the business only became profitable in 2003 when he invested in it. He however agrees that before he came to Jamaica, the Petitioner Mrs.

Cespedes had already acquired at least two (2) expensive properties. These are Farrington and Canterbury. He further admits that in 2003 when he intended to buy a Mark 2 she was able to, and did purchase an escalade for him in cash for US$90,000.

[71] While Mrs. Cespedes contends that the Applicant provided no financial contribution to the acquisition of the relevant properties, she also asserts that the properties in question were acquired from the proceeds of the business.

[72] In light of the fact that both parties are asserting that the relevant properties were purchase from funds taken from the business, it is my view that in order for me to make a determination as to whether the applicant made any financial contribution to the acquisition of the relevant properties I have to do so by determining whether there was indirect financial contribution through his financial contribution to the Company.

[73] Mrs. Cespedes contends that when Mr. Cespedes came to Jamaica she was already operating a business which was generating huge profit. It is also her evidence that she alone provided expenditure for the improvement of these properties**.** The company, as evidenced by a letter from the Registrar of Companies and the Certificate of Incorporation was incorporated on the 3rd of May 2004.

[74] Despite his assertions that the business was small, I find Mr. Cespedes' evidence that he did not meet Mrs. Cespedes with a profitable business defies logic and lacks credibility. The fact is, he admits on cross examination that prior to the marriage she was able to purchase at least two (2) "expensive properties".

[75] Furthermore, the uncontested evidence is that the company A and S Cespedes Trading Limited was formed a few months prior to the marriage. In light of the evidence from both parties, it is also clear that the relevant properties were purchased subsequent to the formation of the Company, and during the marriage, but prior to the separation.

[76] When I examine the Certificates of Title, they indicate that the Tower Street Properties were transferred in the names of both parties on the 27th of January 2006 and the Waterloo Property was transferred in the names of both parties on the 1st of February 2007. While both parties accused each other of gambling and waste in relation to the Company's revenue, in light of the fact that I hold the view that this does not affect the issue that I have to determine, I find that it is un-necessary for me to make a finding on these allegations.

[77] However, as I have earlier indicated, both parties admit that the purchase price for the properties essentially came from the company. I have no doubt that the primary source of capital for the company came from the business that was previously owned and operated by Mrs. Cespedes.

[78] The Applicant Mr. Cespedes, having indicated that he returned to Jamaican with US$4,000, has produces no supporting evidence of his financial contribution in terms of capital to the company.

[79] Additionally, whereas Mrs Cespedes has given evidence that she worked while she was in prison in the USA, essentially substantiating the source of the start-up capital for the business, Mr. Cespedes has indicated that he did not work while incarcerated before being deported to Jamaica. His evidence that he got the money from his family is quite vague and unreliable.

[80] He asserts that between 2002 to 2006 he invested $US12,000 in the business yet he has provided no reliable evidence with regards to the source of this additional $US 8000. In fact, on cross examination, he admits that when he came to Jamaica he was not doing any other business.

[81] I also take note of the evidence of Mr. Cespedes, on cross examination, in which he responded that "between 2004 to 2006 I did not earn that much US Dollars. "we earned it together". In insisting that between 2004 and 2006 he was able to deposit one million US dollars in the NCB account which he, opened, he later

admitted that not long after that he added Mrs. Cespedes name to the account on her insistence that it was both of them business.

[82] Therefore, the only logical inference I can draw is that the one million US dollars came from the business. However, the evidence is undisputed that Ms. Cespedes was operating a business at least 9 years prior to the marriage. The evidence is also undisputed that she was able to purchase at least three properties and an expensive motor vehicle from the business prior to the formation of the company and prior to the marriage.

[83] Therefore, I conclude that the business was a fairly successful business prior to the marriage and prior to the formation of the company. The evidence is also undisputed that it was the business that was incorporated into A and S Cespedes Trading Limited. This is sufficient to establish the financial contribution of Mrs. Cespedes to the formation of the company and consequently her indirect financial contribution to the purchase of the relevant properties. However apart from his say so the Applicant has produced no evidence of his financial contribution to the formation of the company. I find that the Applicant has failed to convince me that he made any financial contribution to the business. I find that his evidence in this regard is mostly unreliable and lacks credibility

[84] Therefore I reject Mr Cespedes' evidence that he made any financial contribution to the capital of the company. Consequently, I find that he has failed to establish any direct or indirect financial contribution to the acquisition of the relevant properties. However, the cases and the legislation have indicated that the consideration in determining the parties' contribution to matrimonial property other than the family home is not be limited to financial contribution.

[85] Section 14 (2) (a) of the act refers to:

> *"the contribution**, financial or otherwise, directly or indirectly** made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has,*

since the making of the financial contribution, ceased to be property of the spouses or either of them";

[86] Additionally, section 14 (3) (d)(ii) provides that contribution includes:

> *"the giving of assistance or support by one spouse to the other, whether or not of a material kind, including the giving of assistance or support which aids the other spouse in the carrying on of that spouse's occupation or business"*

[87] Despite Mrs Cespedes' evidence that the incorporation of the Company was to facilitate Mr. Cespedes obtaining a firearm licence she eventually admits that A and S Cespedes Trading was the brainchild of Mr. Cespedes and not hers and that she was not familiar with the account held by A and S Cespedes Trading Ltd despite her saying that she was bullied to sign it.

[88] Mrs Cespedes has denied that Mr Cespedes played an active part in the company. However, she did state on cross examination that he formed the company. Further she admits that when A&S Cespedes Trading was incorporated in 2004 it was the Applicant who established a bank account in that name despite she being a signatory on that bank account. She also states that she did not make deposits to that account, the Applicant did.

[89] It is also her evidence that he was responsible for collecting her money. The implication on the evidence is that he collected not just rent but money from her debtors. It is my considered opinion that debt collection is essential to the operation of any company. I note the fact that the Petitioner complained that the Applicant collected her money, gambled and wasted it.

[90] However in light of her evidence that her marriage went well up until 2007; and the fact that the properties were acquired between 2006 and early 2007, even if I find this as a fact this would have been subsequent to the acquisition of the relevant properties.

[91] Therefore I find that Mr Cespedes did play an active role, not only in the formation of the company but was active in the operations of the company since 2004 to its closure in 2013. The fact that the properties were purchased from proceeds of the company I find that Mr. Cespedes did make non-financial contribution to the acquisition of the Tower Street and WaterLoo properties.

[92] However, the fact is, the properties were purchases approximately 2 years after the marriage. Therefore, despite being instrumental in the formation of the company in terms of idea and in the collection of debts, I find that at the time of purchase Mr. Cespedes contribution can by no means be deemed to be significant. Additionally, up to the time of separation there is no evidence that he contributed to any further improvement or conservation of these properties. In fact, he admitted on cross examination that Mrs. Cespedes expended on improvement to the Waterloo Property but he is mounting a challenge to the sum expended.

[93] Another factor which I feel obliged to take into consideration is that whereas Ms. Cespedes has provided an explanation as to why Mr. Cespedes' was named a shareholder in the company she has provided no explanation as to why his name was included on the certificates of title of the relevant properties. In light of this conduct and the evidence, it is clear that at the time of purchase it was her intention for the Applicant to have some beneficial interest in the property. I am strengthened in this position by virtue of the fact that even to date she is not claiming all of the rent but only a portion.

[94] Therefore despite the fact that is not specifically enumerated in Section 14 (2) of the Act I believe that this factor would be covered in that section which indicates that the court can consider "such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account"

[95] However it is my view that the fact that Mrs Cespedes allowed Mr. Cespedes to collect half of the rent, is not sufficient within the scheme of the Act for me to conclude that he is entitled to half interest in these properties. The relevant consideration is his contribution to the acquisition, conservation. and improvement

to these properties. In this regard I agree with the submissions of counsel for the Respondent and disagree with counsel for the Applicant that the presumption of equal share applies.

[96] The law as it now stands in this jurisdiction, as discussed earlier is that this presumption has been displaced by the provisions in the Act, which retains the automatic equal share entitlement, with provision for variation only as it relates to the family home. In light of my assessment of the evidence I find that there is insufficient contribution on the part of the Applicant to the acquisition of the Tower Street and Waterloo for him to be awarded 50% interest in these properties.

[97] Additionally, there is no evidence of his contribution to the conservation or improvement to these properties. In the case of ***Greenland v Greenland*** (unreported) Supreme Court, Jamaica, Claim No. 02805 HCV 2007 Judgment delivered 9th of February 2011, there was evidence of minimal financial contribution of the wife towards the purchase of a matrimonial property which was not the family home. However, Brook J. as he then was found non-financial contribution on the part of the wife. Those were in relation to the construction of the building which were identified as the carrying of sand and water, mixing of mortar and cooking for the workmen. He also found significant contribution in her taking care of the house and the children while the husband was away from home, only coming home on alternate weekends. He assessed her contribution at 20 %.

[98] When I compare the contribution of the Applicant in the case at bar to the contribution of the wife in the ***Greenland*** case I find that the applicant's non-financial contribution to be way less than that of the Applicant in the ***Greenland*** case towards to the relevant properties. I also take into consideration the benefits he admits that he has derived from other properties that are no longer owned by any of the parties. These are motor vehicles to include the escalade and the race horses.

[99] In light of all the evidence I declare that his interest in the Tower Street and Water Loo Properties is 10% and that of the Petitioner 90%.

Marverly Mountain

[100] I am constrained to say I will make no declaration in relation to the Marverly Mountain property for the following reasons**:**

(i) In his Notice of Application Mr. Cespedes states that he is claiming 50% of the properties listed in his Application. On examination of the certificate of title the Marverly Mountain property is registered in the joint names of his mother and Mrs. Cespedes. He has adduced no evidence to indicate that his wife Mrs. Cespedes despite being the joint holder of the legal title has no equitable interest in the property. In fact, in his evidence he states that he is not claiming Ms. Cespedes, portion but his mother's. However, it is noticeable that he has not sought to join his mother to the action.

[101] Therefore I share view of Mr. Steer that in light of the fact that it is his mother's portion that he is claiming a determination cannot be made with regards to this property without his mother being a party to this action. That is, he must establish a claim against her title and she must be given an opportunity to defend her title. I find that there is no basis for me to declare that Mr. Cespedes has any interest in the Marverly Property (see the cases of ***Greenland v Greenland*** (unreported) Supreme Court, Jamaica, Claim No. 02805 HCV 2007 Judgment delivered 9th of February 2011 and ***Sam v. Sam*** [2018] JMCA Civ 15). In any event for the reasons I outlined in relation to the other properties his entitlement could not exceed 10%.

Whether the Applicant is entitled to Rental Income of The Properties

[102] Mr Cespedes exhibited to his affidavit filed March 2019 monthly rental receipts for the period September 2014 to May 2015 for 203/12 to 207 Tower Street signed by Steve Cespedes for the sum of US$1250 (most of these indicate one half); and monthly receipts for the same properties with the same signature for the period 1st

of February 2016 to the 1st of February 2019 for the sum of US$3,050. (There is no indication of one half on these receipts).

[103] There is also a set of monthly receipts for US$3050 signed by Mr. Cespedes , with the indication that these are for " ½ of 4 properties, 37A Upper Waterloo, 203½ to 207 Tower Street". These are for the period July 2015 to January 2016 (by the same tenant).

[104] This evidence is a clear indication that after the separation in 2014 Mr. Cespedes continued to collect rent from these properties.

[105] In his evidence in chief he states that monthly rental in relation to the Tower Street properties up to the time of separation was US$800 for 203½ Tower Street and US$1200.00 for 205 Tower Street. In the event, that he meant that these figures represent his half of the monthly rental, in light of the receipts he produced he would have collected in excess of this sum after the separation. That is US$1250 and US$3050. On re-examination he states that he was occupying 205 Tower Street and she was occupying 37A Water Loo Road. Therefore on his evidence, both parties were occupying premises exclusive to each other.

[106] There is no indication that he paid Mrs. Cespedes any rental for the premises that he was occupying exclusive to her. In light of that fact even if I find as a fact that at some point she was occupying Waterloo, exclusive to him, any rent due to him would be properly set off against rent due to her for 205 Tower Street.

[107] Additionally, I noticed that prior to July 2015 the sum Mr. Cespedes collected for the Tower Street premises as evidenced by the receipts he produced was US$1250. On those receipts it is indicated that the sum is for one half of the rental of 203½ and 207 Tower Street. On the rental receipts between July 2015 to January 2016 there is a reflection of an increase in sum collected by Mr. Cespedes by an amount of US$1800. That is the monthly amount collected for the period was US$3050. Additionally these receipts indicate that the sum was for "one half the (rent) of 4 properties, 37A Upper Water Loo Road, 203½ to 207 Tower Street."

[108] The fact that these receipts were signed by Mr. Cespedes himself indicates to me that in collecting this increase sum Mr. Cespedes had included a portion that he believed that was equivalent to his entitlement of the rental income in relation to the Water Loo Property. Despite the fact that the receipts from the 1st of February 2016 to the 1st of August.2018 only indicate rental for 203½ to 207 Tower Street and there is no mention of Upper Water Loo. I notice that the amount collected by Mr. Cespedes on those receipts reflects the same sum as those that included Upper Water loo**.**

[109] The evidence of Mrs. Cespedes is that she was only collecting US$1250 for the Tower Street Properties. This is supported by the receipts that she has produced. Theses receipts indicate that for the period September 2014 to February 2019 the monthly rent she consistently collected for 203and ½ Tower Street, 205 and 207 Tower Street was the sum of US$1,250.

[110] She also testifies that Mr. Cespedes would collect her business money and use it to purchase Race Horse and Motor Vehicles. He also collected rental income from 3 properties located at 10 Breamar Avenue, 2-4 Canterbury Road, Town House 10 and 31 Beaston Street. He purchased more than ten vehicles and several race horses.

[111] However she has produced no supporting evidence that the Applicant collected rent for the Canterbury and Beaston Street after the date of separation. Such evidence would be relevant in relation to rent collected and could have been set off against any outstanding rental income due to the Applicant.

[112] However I do not see the justice in awarding Mr. Cespedes any rental income for Water loo when he has provided no evidence to indicate that the rental income of that property was over and above that of 205 Tower Street.

[113] Additionally**,** the receipts up to January 2016 clearly state that they were for half the rental for the properties. The receipts beyond this period did not indicate they were for half rental but were for the sum of US$3050. This from the Applicant's

own evidence would have been in excess of half the rental income he claims that the Tower Street properties were generating. Even if I were to accept his evidence given late in his cross examination, that all together the rental for the 4 properties is US$6,300, half of this sum is US$3150. That is only $US100 per month more that the amount he collected monthly**.**

[114] However, in light of the documentary evidence and the evidence of both parties despite, Mr Cespedes resiling from this late in his cross examination, I find that the rental for the Tower Street properties all together was US$4,300. I find as a fact that the Applicant was already collecting a total of US$3050, which was more than half of the rental income.

[115] In relation to the Upper Waterloo property, the Applicant states that:

> In 2015 the premises at Upper Waterloo was rented for $235,000 which was collected only by Mrs Cespedes. In March or April of 2106, she displaced the school on the premises at Upper Waterloo and has assumed occupation for the operation of a school. He is entitled to ½ of the rental value. However, in light of my previous discussion in relation to 205 Tower street I find that he has not established that he is entitled to any rental income from Waterloo.

[116] In any event in light of the fact that I found that his interest in the properties is 10% he would have been entitled to only 10% of the rent. Additionally, I accept Mrs. Cespedes' evidence that she had expended in the improvement of Waterloo*.* This is in light of the evidence of the receipts she produced and Mr. Cespedes, evidence that she repaired the property but she could not have spent so much. Therefore she would have been entitled to be compensated for 10% of the cost of improvement*.*

[117] In the case of **Carlene *Miller and Ocean Breeze Suites and Inn Limited v Harold Miller and Ocean Breeze Hotel Limited [***2015] JMCA Civ 42 there was evidence that Mr. Miller constructed a dwelling house on the property after the

parties had separated. He did so at his own cost. At paragraph 62 of and 63 that Judgment (Brooks) JA stated that

> "His *expenditure would inure to the benefit of the property as a whole. Fairness would normally require, that if they are declared to be equally interested in the property as a whole, that Mrs Miller should compensate him for his expenditure by paying to him one half of the value of that structure. "*
>
> *"That approach would be consistent with that used in* ***Forrest v Forrest****, where payments made by one joint tenant to clear the mortgage debt owed on jointly owned property was deemed to be an advance, as to one-half thereof, to the other joint tenant, who is liable to repay that sum (see page 227g-h)".*

[118] Therefore in light of my findings that:

(i) The Applicant was already collecting more than half of the rental in relation to the Tower Street Properties.

(ii) He is entitled to only 10% interest in the relevant properties.

(iii) There is no evidence that he refunded 10% of the expenditure on the improvement to the Waterloo Property,

and in balancing these factors, I find that any outstanding rent that would have become due to the Applicant has been negated by these factors. In the circumstances I find that there is no outstanding rent due to the Applicant.

Money held in Accounts in Financial Institutions

[119] I am aware of the fact that in relation to this issue previous orders were made by the court to which the parties have complied. That is for the disclosure of particulars of activities on accounts. This is reflected in the order of Justice Nembhard made on the 10th of January 2019. However despite the fact that the

parties have in effect complied with the learned Judge's order, I do not share the view of counsel Mr. Steer, that I am restrained from making orders in relation to the parties' moneys standing in accounts held in financial institutions.

[120] As was pointed out by Counsel for the Applicant, the Court is encouraged in dealing with matters between parties that appear before the court, to settle the issues as best as possible so as to avoid a multiplicity of proceeding. S.48G of the ***Judicature Supreme Court Act*** reads:

> *"(g) The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined, and multiplicity of proceedings avoided".*

[121] It is in fact correct that in his application the Applicant did not specifically state that he was seeking an order for the division of the moneys is these accounts. However included in the remedies sought, is an order for the Respondent to account for the sums deposited and interest paid on these accounts. This could only be with a view for the court to determine the interest of the parties and make consequential orders. Additionally, this is not something new arising in the midst of the trial. Orders were made for disclosure on these accounts in light of the remedies sought on the application.

[122] If the court were to leave this issue unresolved it would be acting counter to the provisions of the legislation to seek to avoid multiple proceeding and the parties would be forced to pursue additional actions on matters that could have been determined in these proceeding.

[123] I find that sufficient evidence has been adduced to put the court in a position to make a determination on the issue.

[124] Mr. Cespedes' evidence on cross examination is that he opened the NCB account in 2006. He denies it could have been in 2010. The affidavit evidence of Mrs Cespedes and the supporting documents in response to the previous order for disclosure, reveal that the NCB account was opened in 2006. Mrs Cespedes admitted transferring the funds from that account to another account. That is JMMB account number 40001580. Mrs Cespedes evidence with respect to disclosure also reveals that bond settlement payment to this account were paid into account number JMMB 5704072.

[125] She also states that there was a Scotia Investment Account and an account at JMMB. She closed the investment account and moved the money to an account to pay the bills of the business. She doesn't remember the name of the account but she got all the papers from Scotia and JMMB.

[126] However in his evidence the Applicant gave accounts as to source of the funds in relation to two accounts only. These are Scotia DB and G account and the National Commercial Investment account. In fact, his application for disclosure relates to both accounts. In light of the evidence of both parties that:

(i) the funds from the Scotia DB and G account was transferred to an account in the name of the Company A and S Cespedes Trading,

(ii) That the Company had ceased operation in 2013.

(iii) There is no evidence of any funds being in this account as at the date of separation;

The account which is relevant to the application therefore is JMMB account, 40001580. That is the account to which moneys from the NCB capital market account were transferred and JMMB 5704072 the account into which the bond settlement from the aforementioned account was paid.

[127] As was discussed in an earlier section, Mr Cespedes in his own evidence states that the 1 million US Dollars which represents the initial investment in the account under discussion came from the business.

[128] His evidence is that the account was opened in 2006. This would have been only two years after the marriage. Despite the fact that he was named as the only other shareholder in the business, and having found that he did not contribute any capital investment to the business, I find that his contribution to the business in terms of human capital for that short period was not significant enough for him to be entitled to half of the proceeds from the business. Therefore I find that Mr. Cespedes entitlement is 10% of the money's in JMMB account number 40001580, to include 10% of the bond settlement in relation to this account. This would amount to approximately US$66,300.

[129] However, I find that between July 2015 to August 2018 Mr. Cespedes would have collected US$109,800 (That is US$ 3050 x 12 x 3). In light of my findings that he is only entitled to 10% of the interest in the properties, since the date of separation he would have been entitled to only 10% of the rental. Therefore, for the period July 2015 to August 2018 he would have collected an excess of US$94,320. (That is US$109,800-10 % $US 4300x12x3 (US$15,480). Therefore when the sum he is entitled to in relation to the bank accounts under discussion is set off against the excess he would have collected for rent from the relevant properties Mr. Cespedes would still have received an excess of US$28,020. Therefore I make no order for payment to the Applicant in relation to moneys in the relevant account.

ORDERS

[130] In light of my findings I make the following orders:

It is hereby declared that:

(i) The Applicant is entitled to 10% share in the following properties:

(a) 37A and 39 Upper Waterloo Road Kingston 8 registered at Volume 1076 Folio 481

(b) 205 Tower Street Kingston registered at V.1275, Folio 770

(c) Premises at the corner of Luke and Tower Street registered at V.1275 Folio 771 (203½ Tower Street)

(d) Premises at 207 Tower Street registered at Volume 1275 Folio 772

(ii) The said properties are to be valued by D.C. Tavares and Finson within 60 days of this order, in order to determine the market value of the respective properties.

(iii) The Petitioner/Respondent is entitled to purchase the value of the Applicant's share in these properties.

(iv) The option is to be exercised within 120 days from the date of the valuation.

(v) The Petitioner/Respondent is entitled to set off the sum of US$28,020 against the sum representing 10% of the Market Value of the said properties

(vi) In the event that the Petitioner/Respondent fails to exercise the option to purchase the Applicant's interest in the respective properties, the properties are to be sold on the open market and the proceeds distributed in accordance with the declared interest.

(vii) The Petitioner's attorney- at- law is to have carriage of sale.

(viii) The Registrar of the Supreme Court is empowered to sign any and all documents to give effect to these orders in the event that any party refuses or is unable to sign.

(ix) I make no order for payment to the Applicant in relation to moneys standing in the relevant accounts held in financial institutions.

(x) I make no declaration of interest or order in relation to the property at Lot 1 Marveley Mountain St Andrew registered at Volume 976 Folio 55.

(xi) Liberty to Apply with respect to the time for compliance in relation to the orders made herein

(xii) Each party is to bear his/her own Cost.