



[2018] JMSC Civ. 51

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 01459**

<b>BETWEEN</b>	<b>STEPHENSON GREEN</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>JUNE GREEN</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

Miss Carol Davis Attorney-at-Law for the Claimant.

Mrs. Gloria Langrin, Attorney-at-Law for the Defendant.

Heard: November 2, 2017 and April 11, 2018

**Whether defendant a licensee - Whether there is evidence capable of supporting finding that defendant is a licensee who has acquired a proprietary interest - Whether evidence to support finding that property is family home**

**ANDREA PETTIGREW-COLLINS, J (AG.)**

**BACKGROUND**

[1] The claimant Stephenson Green filed his Fixed Date Claim Form (FDCF) and supporting affidavit on the 12<sup>th</sup> of April 2016. He seeks possession of premises known as 27 North Monticello Crescent, Spanish Town in the parish of St. Catherine. This property is registered at Volume 1280 Folio 320 of the Register Book of Titles in the sole name of the claimant. The defendant who is in occupation of the premises is the former wife of the claimant. A decree absolute

was granted on 8<sup>th</sup> February 2012 bringing a marriage of some 28 years to an end. The claimant asserts that the defendant is a licensee and that her occupation is determinable by notice which has been given to her. The defendant has based her defence primarily on an assertion that the disputed property is the family home within the meaning of the Property Rights of Spouses Act (PROSA) and therefore she has an equitable interest therein.

**[2]** The following facts are not in dispute:

1. The parties began residing at the disputed property prior to being married and they got married whilst living there.
2. The parties were married in or about 1983.
3. The disputed property is registered in the claimant's name only.
4. From the time prior to the marriage when the parties moved into the property up to the date of the trial, the defendant has not lived at any other place apart from the disputed property.
5. The land on which the house is built was acquired by the claimant prior to the marriage of the parties.
6. The parties are parents to at least four children, two of whom are biological products of the marriage and who were born whilst the parties resided at the disputed property.
7. The younger of the two products of the marriage is a male who is approximately thirty years old and the older is a female who is approximately 35 years old.
8. The claimant came to the marriage with one child and the defendant with at least one, and all six individuals resided at the premises for an extended period.
9. The two children who are not biological children of the union but each of whom is a biological child of each party, resided at the disputed premises with the parties from their infant years.
10. The family to include the children had never resided at any other premises together.

11. It does not appear that there is any dispute that mortgages were taken in respect of the property in the claimant's name only and that payments in respect of those mortgages were made solely by him.

### **THE CLAIMANT'S CASE**

[3] The claimant's evidence is that in or around 1980, he acquired the land and at that time there was no building thereon. It is his evidence that he alone was responsible for the construction of the house and that by the time the parties had moved into the property, the construction of the house was completed. He further stated that he mortgaged the property on more than one occasions and that the purpose for so doing was to obtain funds in order to improve the house and on one occasion, (in 2004) he did so in order to pay tuition fees for the daughter of the marriage. It is the claimant's evidence that the marriage began to deteriorate around 2002. He stated that he was transferred to the parish of Manchester in his job as a police officer in 2004 and that between that time and 2006, although he continued to reside at the disputed premises, he would be at home only on weekends. In 2006 he said, he ceased living at the premises and rented a place in Manchester and to date he resides at rented premises in Manchester.

[4] He further contended that the children are now grown and are able take care of themselves. He said that the defendant and their adult son who are licensees and that he has given notice to the defendant terminating her license by way of a letter dated the 21<sup>st</sup> of March 2016, but that she has refused to leave the premises. He denied the defendant's assertions that she financed the children's schooling, paid utility bills and paid for food for the household as well as provided money to complete the bathroom to the house and paid for painting of the house. He also denied that the defendant paid for carrying out repairs to the house and that she paid to maintain the yard. He asserted that he is the one who had responsibility for all of these expenses. His only concession in this regard was that the defendant made some contribution towards food for the household. He said the reason he ensured that when repairs were to be carried out he did it himself, was because it was always understood between himself and the

claimant that the property in question belonged to him. He also denied that the adult son of the marriage has mental problems and needs to be taken care of. He offered that the son is lazy and is being facilitated by the defendant. He said that the defendant operated a shop in the craft market and that he had bought her a second shop in order that she would be financially capable of taking care of herself. He said further that the reason he permitted the defendant to remain at the house (presumably after the separation) was that the children were minors.

- [5] In cross-examination, the claimant denied that he and the defendant were living at Old Harbour Road in rented premises when the construction of the disputed property began. He however admitted that they lived together at Old Harbour Road prior to moving into the disputed property. He admitted that the claimant did other work apart from operating her shop at the craft market. He stated that she did a short stint as a Practical Nurse.

#### **THE DEFENDANT'S CASE**

- [6] The defendant's evidence is that the house in question was partially completed at the time the parties moved to the property and that they lived on one side of the house whilst work was being undertaken on the other side. It is her evidence that "we finalized the other side together. It is also her evidence that she financed the children's education, paid utility bills and paid for food whilst the claimant expended sums towards the completion of the house. She said that she paid for repairs to the house, specifically the doors and door jambs. She further stated that the claimant had agreed to add her name to the title for the subject property, but that when they became aware of the cost of transfer tax involved, they took the decision to use the money towards the purchase of material, presumably towards the construction of the house. The claimant strongly disputed this assertion. The defendant also asserted that the parties' adult son who is now over 30 years old is mentally unwell and has to be maintained by her since he is unable to provide for himself.

**[7]** In cross-examination, the defendant denied that the property was mortgaged. She then qualified this statement by saying that it was not mortgaged for the purposes of the construction of the house and she offered that the property was mortgaged in order to obtain funds for the parties' daughter to attend university. The defendant was cross-examined in relation to her affidavit evidence that she financed the children's education whilst the claimant attended to the building. She stated that this was based on an agreement between them. She was adamant that there were times when she painted the house. Not surprisingly, she was unable to say what year/s she paid for paint and paid workmen to paint the house. When asked whether she did not think it important to mention in her first affidavit that she had painted the house, the defendant's response was that she had done other things that she did not mention in her affidavit. In answer to a question put by the court, the defendant stated that at the time the parties moved into the disputed residence, the completed section of the house consisted of a bathroom, a bedroom and a kitchen. It was then suggested to her that the house now consists of four bedrooms to which she responded that it had 3 bedrooms and a utility room.

**[8]** There is much dispute as to the date of separation of the parties. The claimant said that the separation took place in 2006. The defendant however said that she was suddenly served with the petition for divorce in 2010. She said the claimant had been offering reasons related to his job as a police officer for not being able to come home as often as he did before. The defendant also said that the claimant had told her that with each promotion, she would see him less. He strongly denied making any such statement. At the time of giving evidence, the claimant had reached the rank of Superintendent of Police.

## THE SUBMISSIONS

### THE CLAIMANT

[9] Counsel for the claimant contended that the relevant law to be applied in the circumstances of this case is the law of trust. This is so she said because the parties were divorced in 2012 and are therefore no longer husband and wife thus the provisions of the Property Rights of Spouses Act (PROSA) are not applicable. She submitted that in applying the law of trust, the defendant would be required to show that there was an agreement between the parties that the defendant would have an interest in the land and that the defendant had acted on that agreement to her detriment. In the alternative, counsel said, the defendant would have had to establish that there was a common intention between the claimant and the defendant that they would share the property and that the defendant in these circumstance would have to show that she made direct contribution to the purchase price. She cited relevant passages from the House of Lords decision of **Lloyds Bank PLC v Rosset and Another** [1991] AC 107. She also cited the case of **Morris v Morris** EWCA 257 and the Jamaican case of **Dean Hinds v Janet Wilmot**, Claim No. 2009 HCV 00519.

Counsel posited that given the circumstances, including the fact that the claimant is the sole registered proprietor and that he terminated the defendant's license by letter dated the 21<sup>st</sup> March 2016, he is entitled to possession of the property. She pointed out that there is no evidence of an agreement between the parties. Counsel pointed out that the claimant's evidence is that he had always made it clear to the defendant that the house was his. She said that the defendant has not alleged that there was an agreement; but merely that the matter was discussed that her name would be added to the title for the property but that this was not proceeded with because of the cost involved, and the fact that it was felt that the money would be better spent on the house. Counsel reminded the court that the claimant has denied that any such discussion ever took place. Counsel further argued that there was no evidence before the court from which a common

intention could be inferred, as the claimant's evidence which she has asked the court to accept is that he alone purchased the property and funded the construction of the house. She pointed to the fact that the evidence that the claimant alone purchased the land is uncontested. She also says that it is uncontested that the defendant financed the construction of the house by a mortgage which he alone paid. She pointed to evidence which would suggest that the defendant knew very little of how the construction of the house was financed. In particular, the defendant stated in cross-examination that it was only in 2004 that a mortgage was taken in respect of the property. Counsel also pointed to discrepancies in the defendant's evidence. She said that in cross-examination the defendant's evidence was that she did not agree that the land was purchased by the claimant before the marriage yet in her affidavit of the 31<sup>st</sup> of October 2017 she had admitted that it was. Counsel also said that there is some discrepancy as to what the defendant was saying was her contribution as it relates to the building of the house. Counsel stated that in her first affidavit, the defendant spoke to completing a bathroom and painting the house as well as repairing doors and door jambs. However, in her affidavit of the 31<sup>st</sup> of October 2017, the defendant spoke to building a room and bathroom, and made no reference to the painting or repairing of doors and door jambs. She pointed to the absence of information from the defendant in terms of details of her contributions and of documentary proof or tangible records as to how much she contributed and when these contributions were made. She further asked the court to accept the claimant as a witness of truth.

## **THE DEFENDANT**

[10] Counsel for the defendant sought to address the question of the validity of Claim no. 2011 HCV 03343. I will not refer to the details of those submissions as the application in that regard is not before this court and the question is not directly relevant to the present claim. She submitted that the claimant has admitted that the disputed property is the family home. Further she pointed the court to aspects of the evidence given by the defendant and admitted by the claimant that is

indicative of the disputed property being regarded as the family home within the meaning of the PROSA. She also submitted that there is evidence which shows that the parties were together though not married when the land was bought.

[11] Counsel pointed the court to the defendant's evidence that she contributed towards the completion of the house, paid utility and other bills and financed the children's education whilst the claimant provided the major part of the financing towards the construction of the house. She asked the court to consider that the defendant attended to household duties when the helper was absent and that she looked after the children. She also directed the court's attention to the manner in which such contributions are viewed by PROSA. In particular, she directed the court's attention to Sections 14(3)(g) and 14(4) of the Act to show that non-monetary contribution has no greater value than monetary contribution in determining shares in a family home. Finally, she urged the court to accept the defendant as a witness of truth.

[12] Although counsel did not specifically say so in final submissions filed after the trial, the defendant asserted in her affidavit filed on the 31<sup>st</sup> of October 2017. (paragraph 3) that she is entitled to an interest in the house on two bases, firstly because the house is the matrimonial home and secondly because she contributed to the house and the household financially.

## THE ISSUES

[13] The implied assertion of the claimant is that the defendant is a bare licensee and thus she cannot claim an interest in the property either by virtue of the principle of constructive trust or of resulting trust or by provisions of the PROSA. No direct reference was made to the principle of proprietary estoppels but that principle was dealt with in the case of **Morris v Morris** which will be discussed. Therefore the main issue arising in this claim is whether the defendant is a licensee in respect of the disputed property. In order to determine whether she is a licensee, the court must examine the competing claims. The court has to view the evidence from three different perspectives:



- 1- Whether the defendant is a bare licensee whose occupation can be terminated in the manner in which the claimant sought to terminate it.
- 2- Whether the defendant's tenure is more consistent with that of a licensee who has acquired a proprietary interest or
- 3- Whether the whole scenario gives rise to circumstances whereby the property in question is such that there is evidence on which a court could determine that it is the family home within the meaning of the PROSA.

[14] I have guardedly said "evidence on which a court **could determine**" because I am not in a position to make such a determination in these proceedings. There is no application under the PROSA to be dealt with here. The task will be to examine whether there is evidence that is more consistent with this position than with the defendant being a mere licensee, for if there is, this court cannot agree with the claimant's contention that she is a mere licensee.

[15] It is noted that both parties provided affidavit evidence addressing the issue of whether or not claim no. 2011 HCV 03343 is properly before the court. If a court should later take the view that the matter is properly before the court, the defendant in these proceedings who is the claimant in that matter, could still proceed with her claim. The outcome of this matter will necessarily guide a decision on the part of the claimant/ wife in that regard. The question of the validity of claim no. 2011 HCV 03343 will have to be answered in separate proceedings. It may have been prudent to adjourn this matter when it came up for trial before me in order to await the pending application in relation to consolidation of the present claim with claim no. 2011 HCV 03343. In circumstances where the status of that claim is questionable, I opted to not waste an entire day and proceeded with the trial of the present matter.

## **THE LAW**

[16] A license may come in different forms; it may be a bare license or a contractual licensee or it may be a license coupled with a grant or interest. A bare or gratuitous license gives the licensee permission to enter the property and may be revoked at any moment. Once revoked, the licensee becomes a trespasser and

is liable to be evicted but the licensee may not be treated as a trespasser until a reasonable time has elapsed after notice is given that the license has been revoked. A contractual license is a license supported by consideration. At common law, a distinction was made between a mere license which is a bare license or a contractual license, and a license coupled with an interest. A license coupled with a grant or interest arises where a licensee is granted a definite proprietary interest in whether it be land or chattel and it may be irrevocable based on the circumstances. At common law a bare license did not give one an interest in land. Equitable principles such as estoppel have developed overtime and have allowed courts to convert the concept of a license into a protected interest. In terms of the matrimonial home, (not necessarily as defined under the PROSA but more loosely used) rules of trust, whether it be a resulting trust or a constructive trust, have been applied to determine the division of such property in Jamaica prior to the advent of the PROSA and still governs the division of matrimonial property in circumstances where the PROSA cannot be applied for one reason or another.

- [17] The principle of constructive trust was examined at length in the case of **Lloyd Banks v Rosset**, referred to by the claimant's Attorney-at Law. In that case, the family home was purchased with money inherited from the husband's family trust funds held for his benefit and was acquired in the husband's sole name. When the husband and wife were let into the property, the contract of purchase was not yet completed. They commenced extensive renovation work. The wife carried out decorative work at her expense and urged on the contractors whilst they worked, with a view to completing the renovations so that the family could move in by Christmas. Unknown to the wife, the husband entered into an arrangement with his bank for an overdraft on his account and gave the bank a lien over the property in question to guarantee his indebtedness to the bank. The account was overdrawn beyond what was agreed and the bank declined to extend further credit to the husband. The overdrawn funds were for the most part utilized for the renovation of the property. The husband failed to honour his obligations to the bank and the bank claimed possession of the property and an order for sale. The

husband did not contest the bank's claim. By this time the husband had separated from his wife and had vacated the property. The wife resisted the bank's claim on the basis that she held an equitable interest in the property by way of a constructive trust.

[18] The court at first instance rejected the wife's claim that there was an express agreement between herself and her husband that the property would be jointly owned by them, or that there was a common intention formed before the contract was entered into for the purchase of the property, that the wife would have a beneficial interest in the property. However, on the basis of the wife's input into the renovation of the property, prior to the completion of the contract of sale, the judge drew an inference of a common intention that the wife would have a beneficial interest in the house and found that the wife in fact had a beneficial interest in the property in question. The case was determined in the bank's favour based on the provisions of English Legislation which has no application in our jurisdiction. The wife appealed. The court of appeal overturned the decision at first instance and the bank appealed to the House of Lords.

[19] The House of Lords rejected the findings of the judge at first instance. In delivering his judgment, Lord Bridge of Harwick had the following to say, which is recorded at pg. 22 of the judgment

*"The first and fundamental question which must always be resolved is whether, independently of any inference to be drawn from the conduct of the parties in the course of sharing the house as their home and managing their joint affairs, there has at any time prior to acquisition, or exceptionally at some later date, been any agreement, arrangement or understanding reached between them that the property is to be shared beneficially. The finding of an agreement or arrangement to share in this sense can only, I think, be based on evidence of express discussions between the partners, however imperfectly remembered and however imprecise their terms may have been. Once a finding to this effect is made, it will only be necessary for the partner asserting a claim to a beneficial interest against the partner entitled to the legal interest to show that he or she has acted to his or her detriment or significantly altered his or her position in reliance on the agreement in order to give rise to a constructive trust or proprietary estoppel."*

He went on to say that

*“In sharp contrast with this situation is the very different one where there is no evidence to support a finding of an agreement or arrangement to share, however reasonable it might have been for the parties to reach such an arrangement if they had applied their minds to the question, and where the court must rely entirely on the conduct of the parties both as the basis from which to infer a common intention to share the property beneficially and as the conduct relied on to give rise to a constructive trust. In this situation, direct contributions to the purchase price by the partner who is not the legal owner, whether initially or by payment of mortgage installments will readily justify the inference necessary to the creation of a constructive trust. But as I read the authorities, it is at least very doubtful whether anything less will do. “*

[20] His Lordship mentioned the cases of **Eves v Eves** [1975] 1WLR 1338 and **Grant v Edwards** [1986] Ch. 638 as falling within the first category of cases, and **Pettitt v Pettitt** [1970] A.C. 777 and **Gissing v Gissing** [1971] A.C. 886 as cases falling within the second mentioned category.

[21] In **Morris v Morris** [2008] EWCA Civ 257, the claimant wife sought a beneficial interest in the assets of a farming partnership in which the defendant husband and the deceased mother had been the partners. Neither in her amended particulars of claim or witness statements did the wife assert that there was any agreement between herself, Mrs. Morris Snr. (the husband’s mother) and her husband, nor that there were discussions with them or representations by them or any of them about her acquiring a beneficial interest in the farm or the partnership assets.

[22] Among other findings of fact made by the trial judge were the following:

That in the early years, the claimant provided substantial assistance in the farming enterprise, whatever work the claimant did on the farm was done without pay, she paid money towards the construction of a manege on the farm, that there was no express discussion between the claimant on the one hand with her husband and mother-in-law or on the other, as to the claimant acquiring a beneficial interest in the farm or becoming a partner in the partnership. Further, that the claimant made her financial contribution, operated her riding school and

assisted her husband in the family enterprise, in the belief that she was furthering the interest of a partnership in which she had become an integral part. Also that that the wife felt that as a consequence of her involvement, she was entitled to share in the partnership assets, that at all material times, the legal title to the farm was in the name of Mrs. Morris Snr., and both Mr. Morris Mrs. Morris Snr. encouraged the claimant's belief by discussing with her important decisions about the farm in such a way as to indicate that the claimant did have a substantial interest in the farm. Further, that the construction of the manege and indoor riding school by the claimant enhanced the capital value of the farm.

[23] On appeal, Sir Peter Gibson rejected the judge's finding that the facts showed circumstances from which it could be concluded that there was a common intention of Mr. Morris, Mrs. Morris Snr. and the claimant that the claimant should acquire a beneficial interest in the farm. At paragraph 19 of his judgment, he had this to say:

*"I start with the claim for a common intention constructive trust and for a beneficial trust there under. That requires that the court should be satisfied that the relevant parties each had the intention, communicated to each other, that, notwithstanding the paper title in Mrs. Morris Snr. and not withstanding the absence of any writing, there should be a disposal of a beneficial interest in land to the claimant. As I have noted, this is not a case where there has been any agreement or discussion on the point by the relevant parties. The events relied on by the claimant are of course events which occurred long after the land was acquired by Mrs. Morris Snr. That the court can find that a beneficial interest is subsequently acquired by reason of conduct alone has been confirmed by this court in **James v Thomas** [2007] EWCA Civ. 1212. However, I would respectfully emphasize what Sir John Chadwick, giving the only reasoned judgment of the court, said in paragraph 24 having referred to **Gissing v Gissing** Supra at page 901 D-E and **Bernard v Josephs** [1982] Ch. At 404 E-F, Sir John added this*

*"But as those cases show, in the absence of an expressed post-acquisition agreement, a court will be slow to infer from conduct alone that parties intended to vary existing beneficiary interests established at the time of acquisition".*

[24] In paragraphs 27, 28 and 29, Sir Peter Gibson also observed as follows

*“Accordingly, I am satisfied that the judge did not have the material on which he could properly base a finding that there was a common intention constructive trust in the circumstances of the present case.”*

*“I turn then to the proprietary estoppel claim. The claimant must demonstrate 3 elements: a representation or assurance of rights, a reliance or a change of position, and an unconscionable advantage. The first difficulty facing the claimant lies in respect of the requisite representation or assurance. Effectively, the same points are relied on by the claimant to establish that there was some such representation or assurance as was relied on in support of a constructive trust. It is well established that the representation or assurance must be specific, such as would entitle the person to whom it was made reasonably to rely on it or change his/her position. But for the same reason as those for which I have found that the circumstances of the present case do not come near to showing that there has been a common intention through conduct in relation to the acquisition by the claimant of a beneficial interest in the land, so it seems to me plain that what was said and done in the present case falls well short of showing that the requisite first element in proprietary estoppel has been satisfied.”*

*“Nor am I satisfied that there has been reliance on any representation or assurance or any consequential change of position, with any unconscionable disadvantage. I fully accept that Mr. Morris behaved badly after the parties split up, but I do not see that, by itself, is enough to show that there has been unconscionable disadvantage in the present case for the purposes of proprietary estoppel. “*

**[25]** In **Dean Hinds v Janet Wilmot** 2009 HCV 00519 Edwards J. at paragraph 25 usefully summarized the relevant principles which are applicable in circumstances where a person in whom the legal title to property is not vested claims a beneficial interest in same on the basis that the one who holds the legal title holds it as trustee on trust for the beneficial interest of the claimant. She said the following

- I. *“Evidence of a common intention can either be expressed or implied. In the absence of an expressed intention, the intention of the parties at the time may be inferred from their words and/or conduct.*
- II. *Where a common intention can be inferred from the contributions to the acquisition, construction or improvement of the property, it will be held that the property belongs to the parties beneficially in proportion to those contributions. See Nourse, L.J. in **Turton v Turton** (1987) 2 ALL ER 641 at p. 684.*

- III. *In the absence of direct evidence of a common intention, any substantial contribution to the acquisition of the property maybe evidence from which the court could infer the parties' intention: Grant v Edwards [1986] 3 WLR 120, per Lord Brown-Wilkinson. The existence of substantial contribution may have one of two results or both, that is, it may provide direct evidence of intention and/ or show that the claimant has acted to his detriment on reliance on the common intention.*
- IV. *The claimant must have acted to his detriment in direct reliance on the common intention."*

[26] As indicated before, the defendant has based her defence on the position that the house in question is the family home, in accordance with the provisions of the PROSA. Section 2(1) of the PROSA defines the family home. It states:

*"Family home means the dwelling house that is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling house which is a gift to one spouse as a donor who intended that spouse alone to benefit."*

[27] Sykes J in **Peaches Stewart v Rupert Stewart** HCV 0327/2007 very helpfully dissected the meaning of the term 'family home'. In paragraph 22 and 23 of his judgment he said

22. "It is well known that when words are used in a statute and those words are ordinary words used in everyday discourse then unless the context indicates otherwise, it is taken that the words bear the meaning they ordinarily have. It only becomes necessary to look for a secondary meaning if the ordinary meaning would be absurd or produces a result that could not have been intended..."

23. "It should be noted that, the adjectives **only** and **principal** are ordinary English words and there is nothing in the entire statute that suggests that they have some meaning other than the ones commonly attributed to them. **Only** means sole or one. **Principal** means main, most important or foremost. These adjectives modify, or in this case, restrict the width of the

expression **family residence**. Indeed even if the noun residence is qualified by the noun, family which functioning as an adjective in the expression **family residence**. Thus it is not any kind of residence but the property must be the **family residence**. The noun residence means one's permanent or usual abode. Thus **family residence** means the family's permanent or usual abode. Therefore the statutory definition of family home means the permanent or usual abode of the spouses." (emphasis in the original.)

## **ANALYSIS**

[28] What is clear from the evidence is that the disputed property was the only residence at which the parties ever lived together as husband and wife. This is the residence that the claimant admittedly moved from in 2006. The four children who resided with the parties from infancy grew up in that home. Among those four children are the two biological children of the marriage, one of the other two being a biological child of the claimant and the other, a biological child of the defendant. It is safe to say that all four are children of the marriage. In fact the two biological children born of the marriage were born in that very house. It is also safe to say that this is the only residence at which the biological son of both parties ever resided up until now. From the claimant's own evidence, the parties resided in the premises as husband and wife from at least 1983 up to 2006. It is his evidence that the relationship began to deteriorate in about 2002. This is the premises at which the defendant continues to live. She has not lived at any other premises since the marriage of the parties in 1983. Do the circumstances outlined point in any other direction other than the residence being the family home? Are these circumstances consistent with the defendant being a licensee at the disputed property? I am of the view that the former position is the more tenable one. There is overwhelming evidence capable of supporting such a finding. I readily take the view that the claimant's response in cross-examination that the house was the family home was not an acceptance on his part that the house is the family home as defined by the PROSA. This is clearly a question of



mixed fact and law. A simple answer from the claimant cannot give definition to a legal concept. I make this observation only because counsel for the claimant took strong objection to the question which elicited the response, albeit, after the response was given.

**[29]** Further, while there was no direct evidence that the defendant was the one mainly responsible for child care, it is evident from the circumstances that she must have assisted to a significant degree. In cross-examination the claimant answered “yes” to a question as to whether there was a helper. He said that the helper worked from Monday to Saturday most of the times. This would certainly not negate the fact that the defendant played a significant role in caring for the children as well as fully participating in the running of the household.

**[30]** The claimant would have the court believe that the defendant made no financial contribution apart from helping to purchase food towards the household. It is his evidence that she owned a shop in the craft market and that he purchased another shop for her. He also admitted that she worked for a short time as a practical nurse. I accept the defendant’s evidence that she in fact assisted with the completion of the house and that when they moved into the disputed property the house was incomplete. I therefore reject the claimant’s evidence that the construction of the house was completed by the time they moved in. I also accept the defendant’s evidence that she assisted with renovation work to the property on occasion. Ms. Davis contends that the defendant should not be accepted as a witness of truth because of what she perceived as discrepancies with respect to the witness’s affidavit evidence. The court rejects this contention. Though the witness did not state in her first affidavit all that she is asserting that she did in the way of upkeep and refurbishing of the disputed property, she did mention in a subsequent affidavit filed on the 31<sup>st</sup> of October 2017 other things that she did. She offered that she also did things that were not mentioned in any of her affidavits. When pressed as to whether she did not think it necessary to mention all the things she did towards the property in her first affidavit, the defendant responded that she did not think of it at the time. I understood her to mean that

not everything that she did in the way of renovation and improvement was present to her mind at the time she gave her first affidavit. This is quite perfectly understandable. During the course of a marriage which lasted some 28 years (there being 24 years of togetherness), a party to such marriage would hardly be expected to have in his/her recollection after things have gone sour and where one is called upon to put forward evidence, all that he/she would have done in the way of improvement and/or renovation to property that becomes the subject of dispute, especially where what was done was not a major undertaking. Further, Ms. Davis' contention that the defendant's evidence that she made contributions in ways such as assisting with the building of a room and bathroom, painting the house and repairing doors and door jambs should be rejected because she has produced no record of her contribution is untenable. One would not necessarily have retained receipts or documentary proof in relation to materials purchased for doing mundane and routine things like painting the house and repairing doors and door jambs. It is quit readily and easily accepted that in circumstances where the claimant was often away from home she would have assumed some responsibilities. In addition to her evidence that she carried out upkeep and maintenance work of the house itself on occasions, I totally accept her evidence that she paid to maintain the yard.

[31] Counsel for the claimant also offered another reason why the defendant should not be accepted as a witness of truth. She asserted that the defendant said in cross-examination that she did not agree that the land was purchased by the claimant before the marriage but that in her affidavit she had said the opposite. A perusal of her evidence on cross-examination reveals that counsel's recount is inaccurate. The very first question put to the witness in cross-examination was this:

*"You agree with me that the **house** in question was purchased by Mr. Green before you were married?"*

The defendant's response was "*No Ma'am*". The next question was

*“You agree with me that the only person who contributed to the purchase price of the land was Mr. Green?”*

The defendant’s response was “*The land, yes*”.

She thereafter disagreed with all suggestions to the effect that it was Mr. Green alone who was responsible for the construction of the building and that the building was completed before they moved into the property. Nowhere in the evidence did she disagree that the **land** was purchased before the marriage. Counsel’s contention is therefore flatly rejected.

[32] There is one aspect of the claimant’s evidence that I need to address at this juncture. It is to be remembered that the claimant’s evidence is that he ceased residing at the property in 2006. It was his evidence that when he ceased to reside at the house, the children were minors. I have to say that there is not much to commend this evidence as it is not supported by certain facts. He did not dispute the defendant’s evidence that the daughter of the union was born in 1982. In 2006 she would have been approximately 24 years old. Their son would have been approximately 19 years old based on the fact that his age was given by the defendant as 28 years old in 2016. Again, this evidence was not disputed by the claimant. It is therefore disingenuous on the part of the claimant to say that the reason he allowed the defendant to remain in the property after he moved was because the children were minors.

[33] The defendant did not assert that she was involved in the initial acquisition of the disputed property, so that any benefit to be derived by her on the basis of a constructive trust or proprietary estoppel would have to be based on either the court finding firstly that she financially contributed to the construction and/or improvement of the property on the basis that there was an express common intention that she would have a beneficial interest in the property or that there was conduct from which the court could infer that common intention and that the defendant acted to her detriment on the basis of that common intention. As observed in **Morris v Morris**, in the absence of an express post-acquisition arrangement, a court will be slow to infer from conduct alone that parties

intended to vary existing beneficial interests established at the time of acquisition.”

- [34]** I disagree with the submission of counsel for the defendant that there is evidence to indicate that the parties were together when the defendant bought the land on which the house was built. There is nothing in the evidence that could lead to this conclusion. The defendant accepted that the claimant owned the land prior to marriage. A close examination of all the affidavit evidence and the evidence elicited in cross-examination on both sides revealed that there was in fact total silence on the matter. Neither party spoke to whether or not they had been involved in a relationship at the time of the purchase of the land. Counsel for the claimant says that the evidence that the claimant financed the construction of the house with a mortgage that he alone paid is uncontested. This is not in fact a completely accurate representation of the evidence. The defendant accepted that the claimant alone financed the mortgage that was taken in respect of the premises. There was no acceptance on her part that the house was wholly financed by a mortgage or mortgages taken by the claimant. In fact, she said quite the opposite. It was her evidence that the property was not mortgaged to finance the construction of the house but for the purpose of financing their daughter’s education.
- [35]** I do not think that the defendant was deliberately lying when she said that no mortgages were taken for the purpose of the construction of the house. It is distinctly possible that the defendant was not aware of activities relating to mortgages taken on the premises. A perusal of the copy duplicate Certificate of Title exhibited shows that numerous mortgages were taken on the property, some prior to, and others subsequent to the date of separation of the parties. The first one is recorded as having been taken in 1988 and the latest one in 2009. It is not difficult to understand why it is that the defendant could have been unaware of these mortgages. The claimant is the sole registered proprietor of the property and was therefore at liberty to act and could in practical terms have acted in relation to the property without the knowledge and/or consent of the

defendant. The claimant said in his first affidavit that the mortgages taken between 1998 and 2001 that were taken for the purpose of carrying out improvements to the house. The court accepts his evidence that mortgage/s was/were taken towards financing the property. Even so, it is evident that those mortgages taken subsequent to the separation of the parties were not taken for the purpose of the construction or renovation or improvement or for any other purpose connected with the disputed property. That fact does not take away from the defendant's evidence which I accept, that is, that she contributed directly towards the construction of the property (whether it was minimal or not). She places reliance on the provisions of Section 6 in particular of the PROSA to ground her claim to a half interest in the property but the court also recognizes as counsel for the defendant has pointed out that much of the parties' evidence would be relevant in the context of the PROSA only if the court were to be making a decision in relation to a variation of the equal share rule, and I would add, property other than the family home.

- [36]** It is the defendant's evidence that there was in fact an expressed post-acquisition agreement that she would acquire an interest in the property. Ms. Davis' submission that the defendant has not said that there was an agreement but that she said the parties had discussed that her name would be added to the title but this had not happened because of the cost is not completely accurate. In response to a direct suggestion in cross-examination that at no time did Mr. Green agree to put your name on the title", she responded that she did not agree. In paragraph 7 of her affidavit dated the 25<sup>th</sup> of August 2016 and filed on the 5<sup>th</sup> of September 2016, the defendant stated that the claimant "had agreed and attempted to put my name on the title for the property but when we were advised of the amount for transfer tax we decided to let the money go towards the purchase of material instead".
- [37]** Even if it should turn out that the defendant is unable to proceed with claim No. 2011 HCV 03343, there is evidence that could support a finding that the defendant is a licensee who has acquired an interest in the disputed property

based on the principles of constructive and or resulting trust and/or proprietary estoppel. The question of quantifying that interest would also arise. It is recognized that in seeking to quantify a person's interest in property determined to be held on a constructive or resulting trust or by virtue of the principle of proprietary estoppel in favour of that person and another, a court will find that the property belongs to the parties beneficially, proportionate to each party's contribution to the acquisition and/or construction and/or improvement to the property. Quantifying the defendant's interest in this particular instance could well prove problematic but the circumstances of this case do not dictate that that analysis/quantification be undertaken.

- [38]** Based on the foregoing, the court declines to make the order for possession sought in the claimant's Fixed Date Claim Form. The costs of these proceedings are awarded to the defendant.