[2023] JMSC Civ. 111

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2020CV03544

BETWEEN	**JANET MARY HANNA**	**CLAIMANT**
AND	**STEVE NAJEEB HANNA**	**DEFENDANT**

Mr. Gordon Steer and Miss Abigail Heslop, instructed by Chambers, Bunny & Steer for the claimant

Mr. Kevin Williams instructed by Grant, Stewart, Phillips & Co. for the defendant

Heard November 8, 2022, and June 27, 2023

*Property adjustments under the Property (Rights of Spouses) Act 2004 (**PROSA**) – whether property is the family home – whether the equal share rule should be varied – other property and the application of factors under section 14(2) of **PROSA** – whether other property was a transfer by way of gift – allotment and issuing of shares - sections 38 (1), 38(5)(a) and (b) of the Companies Act – whether a claim to a percentage interest in shares and a share of profits in a limited liability company are sustainable without the company being a party to the claim.*

CORAM: JARRETT, J

Introduction

[1] The claimant and the defendant are wife and husband. They were married on September 20, 2003, and separated in November 2016. The marriage produced

two children born on February 10, 2005, and December 6, 2007, respectively. This is the claimant's application under the Property (Rights of Spouses) Act 2004 ("**PROSA**") for a determination of the ownership of property between herself and the defendant. The defendant filed a notice of application for court orders seeking occupation rent should the court find that the claimant is entitled to an interest in property located at 1 Waterworks Crescent, Kingston 8. I will outline the claim, consider the relevant provisions of **PROSA**, and examine the declarations sought in relation to each of the properties in dispute. The defendant's notice of application for occupation rent, I will address after determining the other issues connected with the property located at 1 Waterworks Crescent, Kingston 8.

The claim

[2] The claimant began her claim by filing a fixed date claim form on September 22, 2020, supported by an affidavit filed on the same day. She filed a further affidavit on May 28, 2021, in response to the affidavit filed by the defendant. The defendant filed two affidavits in response to the claim. One was filed on March 5, 2021, and the other on May 27, 2022, in response to the claimant's further affidavit. In her fixed date claim form, the claimant seeks the following remedies:

i. A declaration that the property located at 1 Waterworks Crescent, Kingston 8 in the parish of Saint Andrew and registered at Volume 1098 Folio 907 in the Register Book of Titles is the family home of the parties.

ii. A declaration that the property located at 1 Waterworks Crescent, Kingston 8 in the parish of Saint Andrew and registered at Volume 1098 Folio 907 in the Register Book of Titles is owned by the claimant and the defendant in equal shares of 50% each.

iii. A declaration that the property located at 72A King Street, Kingston and registered at Volume 937 Folio 158 of the Register Book of Titles

is owned by the claimant and the defendant in equal shares of 50% each.

iv. A declaration that the claimant is entitled to one-half (50%) of all the rental income generated from the property situated at 72A King Street, Kingston since the date of separation November 2016 and that the defendant shall pay to the claimant, the said sums due and owing.

v. The properties aforementioned are to be valued by a valuator to be agreed by the parties within sixty (60) days of the Court's order. If the parties do not agree to a valuator within fourteen (14) days of this order, then the Registrar of the Supreme Court shall appoint a valuator to value the properties.

vi. The claimant and the defendant shall bear the cost of the valuation of the properties equally.

vii. The claimant shall have the first option to purchase the defendant's interest in the family home registered at Volume 1098 Folio 907 in the Register Book of Titles. The said option must be exercised within sixty (60) days of the receipt of the valuation report failing which, the property shall be put on the open market and sold by private treaty or public auction.

viii. The defendant shall have the first option to purchase the claimant's interest in the King Street property registered at Volume 937 Folio 158 in the Register Book of Titles. The said option must be exercised within sixty (60) days of the receipt of the valuation report failing which the property shall be put on the open market and sold by private treaty or public auction.

ix. A declaration that the claimant is entitled to forty-eight percent (48%) of the shares allotted in the company known as S.N.H Worldwide Trading Company Limited duly incorporated on the 16th of December 1994, their offices being situated at 34-35 Shannon Drive, Kingston.

x. A declaration that the claimant is entitled to one-half share of all profits generated by the company aforementioned since the date of separation November 2016.

xi. The shares in S.N.H Worldwide Trading Company Limited are to be valued and, in the course, thereof, a forensic audit is to be done of the finances of S.N.H Worldwide Trading Company Limited.

xii. The parties are to agree to a valuator and auditor within fourteen (14) days of the date of the Court's order. The cost of the valuation and forensic audit is to be met by S.N.H Worldwide Trading Company Limited.

xiii. If no valuator and /or auditor can be agreed upon, one shall be appointed by the Registrar of the Supreme Court.

xiv. The defendant is given the first option to purchase the claimant's shares owned and entitled to in S.N.H Worldwide Trading Company Limited within ninety (90) days of the presentation of the valuation report, failing which the shares shall be put on the open market and sold by private treaty or public auction.

xv. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of this Honourable Court if either party is unable or unwilling to do so.

xvi. Such costs as are incidental to the proceedings.

xvii. Liberty to apply.

xviii. Such further and other relief as this Honourable Court may deem just.

PROSA

[3] The law in Jamaica before **PROSA** was similar to the law in Antigua and Barbuda at the time of the Privy Council decision in **Abbott v Abbott [2007] UKPC 53 (26July 2007).** That case was an appeal from a decision of the Eastern Caribbean Court of Appeal, involving a dispute between a divorced husband and wife over the beneficial ownership of their former matrimonial home. In describing the state of the law in Antigua and Barbuda, Baroness Hale (as she then was), said at paragraph 2 that: -

> "Unlike some other Caribbean countries, Antigua and Barbuda have no equivalent of the wide powers of property adjustment enjoyed by divorce courts in the United Kingdom. Property disputes have therefore to be resolved according to the ordinary law. Nevertheless, the inference to be drawn from the conduct of the husband and wife may be different from those to be drawn from the conduct of parties to more commercial transactions".

The ordinary law referred to by the learned judge, included common law presumptions, the law of resulting and constructive trusts and the various presumptions aligned to those trusts.

[4] **PROSA** was described by Cooke JA in **Annette Brown v Orphiel Brown**, **[2010] JMCA 12,** as a "dramatic break from the past" in respect of property adjustments between spouses on the termination of cohabitation or the dissolution of marriage. **PROSA** is indeed revolutionary in its scope and effect. It introduced the concept of the "family home" in which each spouse is entitled to an equal share; and gives the court wide discretionary powers in respect of property "other than" the family home. **PROSA** also replaced the common law and equitable presumptions with its

own provisions. Brooks JA in **Carol Stewart v Lauriston Stewart** [**2013] JMCA Civ 47**, said at paragraph 22 in relation to **PROSA** that:-

> "An examination of the Act must … bear in mind the absence of previously existing common law and equitable presumptions.

In **Donna Marie Graham v Hugh Anthony Graham**, **unreported decision delivered April 8, 2008,** McDonald Bishop J (as she then was), on examining **PROSA** said that the object of the legislation is to attain fairness in property adjustments on the separation of the parties or the end of the marriage. I must acknowledge, of course, that **PROSA** also applies to couples who have not been legally married but who have cohabited in a common law union for at least 5 years.

[5] Section 6 of **PROSA** which creates the equal share rule, provides as follows: -

> "6 – (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 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;
> c) where a husband and wife have separated and there is no likelihood of reconciliation.
>
> (2). Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home ".

[6] Section 7 provides the circumstances under which a court may vary the equal share rule where the court considers that it is unreasonable or unjust for each spouse to be entitled to one-half of the family home. The circumstances listed in the section are however not a closed set of factors. This means that the legislature

left the court with a discretion to vary the equal share rule where, having regard to the circumstances in any given case, it is unreasonable or unjust to apply it. The factors included in the section are where the family home was inherited by one spouse; where it was already owned by one spouse at the time of the marriage or the beginning of cohabitation and where the marriage was of short duration. Under section 13, a spouse is entitled to apply to the court for a division of property where, among other things, there has been termination of cohabitation or the dissolution of a marriage. Section 15 gives the court the power to alter the interest of either spouse in property other than the family home, but with the stipulation that the court should not make any such adjustment unless it is satisfied that it is just and equitable so to do. Section 23 outlines the various powers the court has when making property adjustments.

[7] The family home is defined in section 2 as:

> "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 by the doner who intended that spouse alone to benefit."

[8] Section 14 provides that:

> 14. (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) the 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".

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".

1 Waterworks Crescent, Kingston 8

[9] In relation to 1 Waterworks Crescent, Kingston 8 ("the property"), the following two issues arise for determination:

a) Whether the property is the family home.
b) Whether the claimant is entitled to a one-half share in it.

As both these issues are closely connected, I will deal with them together.

The claimant's evidence

[10] The claimant's evidence as contained in her affidavit filed on September 22, 2020, is that she is Trinidadian by birth and nationality, and she met the defendant in 2000 while on a visit to Jamaica. They got married on September 20, 2003, and purchased the property shortly afterwards. On transfer, it was registered in both their names as joint tenants. In her second affidavit filed on May 28, 2021, she says that after the wedding, they both resided at the defendant's parents' home at Caramel Way and lived there until they purchased the property. There was a small shortfall in the purchase price and both the defendant's father and her father gave them the balance on the purchase price as a wedding gift. The transfer of the property was registered on December 3, 2003.

[11] According to the claimant, she and the defendant maintained their lives and raised their two children at the property until their separation in November 2016. This is the only home their children know. Both she and the defendant lived primarily there, and it was the family home. There was never any discussion with the defendant or his father that his father would have an interest in the home. She said the allegation that the defendant's father has a beneficial interest in the home was being raised by the defendant for the first time in these proceedings. On cross-examination the claimant said that the defendant's father's contribution was US$50,000.00 but she maintained that it was a wedding gift. When asked if she had seen where the defendant said his father's contribution was US $150,000.00 the claimant said she could not recall.

The defendant's evidence

[12] The defendant in his affidavit filed on March 5, 2021, says that there is no dispute that the property is where he and the claimant resided during the currency of the marriage with their children. He says however that it was purchased with funds contributed by his father and therefore his father has a beneficial interest in it, a fact of which the claimant is aware. The money paid by his father was not a "small shortfall". He and the claimant did not have the funds to complete the purchase of the property. He denied that the claimant's father contributed anything to the purchase price. When asked on cross examination if the names on the title for the property are his and that of his wife, the defendant said that he was not sure. Asked if his father was a party to the claim, the defendant said he could not recall, and when asked whether his father has made a claim for an interest in the property his response was also that he could not recall. When it was suggested to him that the money his father had contributed to the purchase price was a gift, he said he was not sure. But near the end of the cross examination, when it was suggested to him that his father's contribution was a gift to him and the claimant, his answer was "no".

[13] During cross examination the defendant admitted that in custody and maintenance proceedings involving the claimant, he had given evidence that the property is one in which he and the claimant are joint registered owners and that he had acceded to the claimant's request to move from the home even though he is a joint registered owner. This admission was elicited from him after he initially said he could not recall ever giving such evidence, and only after a document was shown to him.

Submissions

[14] In his written closing submissions, counsel for the defendant, Mr Kevin Williams, submitted that the property is not the family home within the meaning of **PROSA** because it is not owned solely by the claimant and the defendant. He argued that the defendant's father has a beneficial interest in the property based on his contribution towards the purchase price. Counsel submitted therefore that it would be unjust and unreasonable to find that the property was the family home and that the claimant, and the defendant are each entitled to a 50% interest in it. Mr Williams relied on the decision of **Donna Marie Graham v Hugh Anthony Graham** (supra) to argue that it is enough for the defendant to raise the fact of his father's beneficial interest, to require the court to deal with the issue of whether the equal share rule should be varied.

[15] Mr Gordon Steer on the other hand, submitted on behalf of the claimant that based on the evidence, the property is the family home, and there is no section 7 factor to justify a departure from the equal share rule. He argued that the defendant's father is not a party in these proceedings and based on case law, it is settled that when parents contribute financially to the purchase of a matrimonial home by a newly married couple, the usual inference is that the contribution is a gift to both rather than to only one of them. For this submission, learned counsel relied on **Abbott v Abbott** (supra).

Analysis and discussion

[16] In **Abbott v Abbott**, the parties got married in 1983. One year after the wedding, the husband's mother transferred land to him on which he built the matrimonial home which was in his sole name. The husband's mother made contributions towards the construction costs of the home with the balance being met by loan and mortgage financing which were in the parties' joint names. For about 11 years the wife did not work and on their divorce, she claimed a 50% interest in the home. On the question of the status of the husband's mother's financial contribution to the construction of the home and her transfer of the land in his name, the husband argued that she had intended both as gifts to him alone. On this issue the Privy Council held that the usual inference when parents gift property to newlyweds is that it is intended for both parties. At first instance, the trial judge found that the husband's mother's contribution was as a gift to both the husband and the wife, during the early days of their marriage. Baroness Hale (as she then was) said the Board would not interfere with the trial judge's inference of a gift and said however that it might be doubted whether such an inference could be drawn in other countries with different cultural norms. The learned judge put it this way at paragraph 17: -

> "It has been said more than once in the English courts that if a parent gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them rather than to one alone: see **McHardy and Sons (A Firm) v Warren [1994] 2 FLF 338, at 340; Midland Bank plc v Cooke [1995] 4 All ER 562, at 570.** It might be doubted whether such inference could so readily be drawn in other countries where the culture may be different. But this was a Caribbean judge, albeit from a different small Caribbean Island, and it is certainly not for us to say that it was an inference which he was not entitled to draw."

[17] I find it remarkable that on cross examination the defendant said he was not sure his father's contribution was a gift and he cannot recall whether his father has made a claim to the property. In his affidavit in response to the claim, sworn almost two years earlier, he said definitively that his father's contribution amounted to him having a beneficial interest in the property. His lack of certainty under cross examination as to whether his father's contribution was a gift is striking. His equivocation on this issue leads me to doubt his credibility. His inability to recall whether his father has made a claim to the property is also worthy of note. If his father had made any such claim, I would have expected him to know about it. I would also have expected him to take the necessary steps to ensure that the court was seised of the existence of any such claim. I find his evidence in this regard to be less than credible. Besides, in prior custody and maintenance proceedings, it would appear that the defendant made no mention in his affidavit evidence in those proceedings, of his father having a beneficial interest in the property. His evidence in those proceedings was that in relation to the property, he and the claimant are the joint registered owners.

[18] I reject the defendant's assertion that his father has a beneficial interest in the property. I find that the contribution his father made was a wedding gift to both the defendant and the claimant. The giving of a contribution by parents towards the acquisition of a matrimonial home by a newlywed couple is not unusual in the Jamaican culture. The couple got married on September 20, 2003, and the property was purchased on December 3, 2003. The purchase took place only about two or so months after the wedding. The defendant's father is not a party to the claim. There is no evidence from him to support the defendant's contention that his contribution was not a gift and that he has a beneficial interest in the property. The claimant's evidence is that there was no discussion had with the defendant or his father that his father would have a beneficial interest in the property. I accept that evidence as well as her evidence that the contribution from the defendant's father was a wedding gift and I so find. There was no credible evidence from the defendant to lead me to a contrary view. I prefer the claimant's

evidence to that of the defendant, whose evidence on this issue, was inconsistent and lacking in credibility.

[19] I am satisfied that the property was where the defendant and the claimant habitually resided with their children during the marriage. Having found that the contribution from the defendant's father was a wedding gift to the parties, I accordingly find that the property was the family home within the meaning of **PROSA**, it being where the parties habitually resided during the marriage and it being property owned solely by them. Other than to argue that the property is not owned solely by the parties, the defendant has not provided any evidence of a section 7 factor or similar factor that would make it unreasonable or unjust to apply the equal share rule. There is no evidence to support a departure from that rule. I unquestionably accept, as argued by Mr Williams, that on the authority of **Donna Marie Graham v Hugh Anthony Graham** (supra)**,** there is no need for the defendant to have made a formal application to dispute the equal share rule. But the burden is on him to satisfy the court that there are section 7 considerations or other similar considerations which would make it unjust or unreasonable to apply the equal share rule. He has failed to do so. I therefore find that the legal and beneficial interest in the property is owned by both the claimant and the defendant in equal shares of 50% each.

Occupation rent

[20] The defendant's notice of application for court orders seeking occupation rent was filed on November 1, 2022. In this application he asks for the following orders: -

I. That if the court determines that the claimant is entitled to a share and interest in the property located at 1 Waterworks Crescent, Kingston 8, St Andrew (Volume 1098 Folio 907) the court to determine whether the defendant should be paid occupational rental by the claimant in circumstances where the claimant has remained in sole occupation of the aforesaid property since April 2016.

II. That the Registrar shall take account, enquire into and determine how much should be paid to the defendant by the claimant for occupational rental for the claimant's sole use and occupation of the property located at 1 Waterworks Crescent, Kingston 8, St Andrew (Volume 1098 Folio 907).

III. The court to determine whether interest should be paid to the defendant by the claimant on such sum, if any, found to be payable to the defendant by the claimant for occupational rental in relation to the claimant's sole use and occupation of the property located at 1 Waterworks Crescent, Kingston 8, St Andrew (Volume 1098 Folio 907).

IV. Costs of the application to be determined by the court.

V. Such further and other relief and order as this court shall think fit in the circumstances.

[21] The grounds relied on by the defendant in support of his application are that-a) in 2016, the claimant requested and directed that he removes from and cease residing in the said property and that -b) since April 2016 [1], the claimant has been in sole occupation thereof without paying him rent while he has had to rent alternative accommodation.

[22] In urging me to make the order in the defendant's favour, Mr Williams argued that the evidence of the defendant is that it was the claimant who removed him from the former matrimonial home. He said that at paragraph 3 of the defendant's affidavit filed on March 5, 2021, he states that it was the claimant who in January

[1]Based on the evidence, I consider that this is a typographical error and that it should read April 2017

2017 asked him to leave the matrimonial home and that this is unchallenged evidence. He also pointed to the claimant's evidence on cross examination that she was aware that the defendant was paying rent of US $1,200.00 per month for alternate accommodation. Counsel argued that the claimant should be ordered to pay the defendant occupation rent in circumstances where she ousted and excluded the defendant from the former matrimonial home. He relied on the authorities of Carol **Stewart v Lauriston Stewart** (supra)**, Patsy Powell v Courtney Powell [2014]JMCA Civ 11**, and **Marlene Davis v Hugh Ashley Davis [2018]JMSC Civ 99** (in which the principles in **Mercedes Blake v Andrew Blake [2016]JMCA Civ 63** were applied)

[23] Mr Steer objected to the late filing and service of the application and argued that, as it was short served, I should not give it any consideration. He submitted that the claimant ought to have gotten at least seven days' notice of the application in accordance with CPR 11(i)(b). If I decide to consider the application, Mr Steer argued that I should refuse it. He said that there was no 'ouster' of the defendant as the separation from the matrimonial home was consensual. He drew reference to the evidence of the defendant on cross-examination when he admitted that in separate custody and maintenance proceedings, he had said: -

> "That the home at Waterworks Crescent is sufficient to secure the reasonable comfort of the children. My clear position is that the children should continue to reside with their mother at the house".

[24] Learned counsel also sought support for his proposition in **Mercedes Blake v Andrew Blake** (supra). He argued that in that case as in this one, the defendant relinquished occupation. There is no evidence of him wanting to return to the home and the claimant preventing him from doing so.

Analysis and discussion

[25] Although the notice of application was short served, I will consider it. The claimant, through her counsel, cross examined the defendant on the issues arising on the application. Furthermore, no additional affidavit evidence was filed by the defendant in support of the application. In all the circumstances, it is my view that the claimant is not prejudiced by the short service.

[26] The authorities relied on by counsel undoubtedly demonstrate that our courts have accepted that in appropriate cases, occupation rent may be payable by an occupying spouse, to the spouse who is not in occupation of property jointly owned by them. But what is occupation rent? I discern from the authorities that it is the rent paid by an occupying party, for using the non-occupying party's share of property they jointly own. It is predicated on the fact that parties who jointly own property are entitled to occupy it, and occupation rent is intended to permit the non-occupying party's share in the property to be credited, as it were, with an amount to reflect the occupying party's sole use and occupation of the property.

[27] Since 1996 in England, the issue of occupation rent is governed by the **Trust of Land Appointment of Trustees Act 1996 (TOLATA)**. **TOLATA** gives the court wide ranging powers when an application is made for a non-occupying party to receive occupation rent. Lord Neuberger, in the House of Lords decision in **Stack v Dowden [2007] 2 All ER 929,** gave the following synopsis of the relevant provisions of **TOLATA** at paragraphs 93 and 94 of his judgment: -

> "[93] There remains the question of the payment for Mr Stack's alternative accommodation. This matter is governed by the Trusts of Land and Appointment of Trustees Act 1996. Section 12(1) gives a beneficiary who is beneficially entitled to an interest in land the right to occupy the land if the purpose of the trust is to make the land available for his occupation. Thus, both these parties have a right of occupation. Section 13(1) gives the trustees the power to exclude or restrict that entitlement, but under s 13(2)

this power must be exercised reasonably. The trustees also have power under s 13(3) to impose conditions upon the occupier. These include, under s 13(5), paying any outgoings or expenses in respect of the land and under s 13(6) paying compensation to a person whose right to occupy has been excluded or restricted. Under s 14(2)(a), both trustees and beneficiaries can apply to the court for an order relating to the exercise of these functions. Under s 15(1), the matters to which the court must have regard in making its order include (a) the intentions of the person or person who created the trust, (b) the purposes for which the property subject to the trust is held, (c) the welfare of any minor who occupies or might reasonably be expected to occupy the property as his home, and (d) the interests of any secured creditor of any beneficiary. Under s 15(2), in a case such as this, the court must also have regard to the circumstances and wishes of each of the beneficiaries who would otherwise be entitled to occupy the property.

[94] These statutory powers replaced the old doctrines of equitable accounting under which a beneficiary who remained in occupation might be required to pay an occupation rent to a beneficiary who was excluded from the property".

[28] In Jamaica, we have no legislation like **TOLATA.** Nothing in **PROSA** is comparable. Therefore, it is to equitable accounting that we must turn. As Brown J (as he then was) observed in Mercedes **Blake v Andrew Blake** (supra), equitable accounting allows the court to do justice between co-owners. In the older pre **TOLATA** authorities in England, the court of chancery was concerned with whether the occupant of jointly owned property excluded the other co-owner and where that was found to be the case, occupation rent was paid to the excluded party. Where there was no exclusion, occupation rent was not ordered to be paid. As the jurisprudence developed, it was considered that exclusion was not conclusive. **In re Pavlou (a Bankrupt) 1993 3 AER 955,** (one of the cases from which Brown J culled the applicable principles in **Mercedes Blake v Andrew Blake** ,) it was held that the court would order an inquiry and payment of

occupation rent not only where the co-owner occupant had ousted the other owner, but in any case where it was necessary to do equity between the parties that occupation rent be paid.

[29] In paragraph 3 of the defendant's affidavit filed on March 5, 2021, he says that he and the claimant were living separate lives in the former matrimonial home since 2013. On December 16, 2016, the claimant advised him that she wished to leave the marriage and in or about January 2017, she asked him to leave the matrimonial home and he complied with that request. The claimant in response to that evidence says in paragraph 3 of her affidavit filed on May 28, 2021, that she is not aware of them living separate lives since 2013. According to her, she discovered that the defendant was being unfaithful, and they quarrelled as a result. After one such quarrel in November 2016, she told him she wanted a divorce, and he left the home in January 2017 to live in an apartment. The further evidence of the defendant in his affidavit filed on May 27, 2022, is that he found an apartment, the claimant signed the lease with the relator and moved all his clothes into the apartment on the Easter weekend in 2017. In cross examination he admitted that in custody and maintenance proceedings he had said that his clear intention is that the children should remain in the matrimonial home with the claimant. He also repeated his earlier evidence that the claimant moved him into his apartment. When I asked him what that meant, he said that one day when he got home, he recognised that the claimant got work men to move out his clothes along with an old couch and some utensils she did not want.

[30] Was there an ouster? The evidence is that it was the claimant who asked the defendant to leave the matrimonial home, and he complied with the request. There is no evidence of any resistance on his part. Although his evidence is that it was the claimant who removed his belongings from the home and into an apartment (for which he now pays rent), there is no evidence that he could not return if he wanted to, or for that matter that he wanted to return but was prevented by the

claimant from doing so. I therefore find that there was no ouster of the defendant from the matrimonial home.

[31] The authorities indicate that finding that the defendant was not ousted from the matrimonial home, does not necessarily mean that he would not be entitled to occupation rent. The question in each case, is what is necessary to do justice between the parties. In seeking to do justice between the claimant and the defendant, the evidence of the defendant in the custody and maintenance proceedings that it is his clear intention that the children should remain in the matrimonial home, weighs heavily on me. I infer from the evidence that the children, one of whom is still a minor, continue to reside with the claimant in the home. In cross examination when asked if he expects the claimant to pay him rent for occupying the home with their children, the defendant said: “yes”. When asked how much she should pay, he said “half”.

[32] Both the defendant and the claimant have a responsibility to provide a home for their minor children. The defendant’s expressed intention in the custody and maintenance proceedings that the children should remain in the matrimonial home, leads me to the view that it is only just and equitable that his half share in the home be treated as used for the benefit of the children who remain in occupation along with the claimant. In coming to my decision, I also consider that the effect of this expressed intention is that it is the claimant, the parent who is in the home, who will have the day-to-day responsibility for the children. So, while she remains the occupying party, equity and broad justice require that she not be levied with occupation rent. In the result, I find that it would not be just and equitable for the claimant to pay occupation rent to the defendant.

[33] On the issue of the date of the separation, I do not find the defendant’s evidence that the parties lived separate and apart in the matrimonial home since 2013, to be credible. In his affidavit filed on March 5, 2021, at paragraph 12(ii), he says that towards the end of the marriage in 2016, the claimant started to do some work in S.N.H Worldwide Trading Company Limited. Yet in that same affidavit in paragraph

3, he says that they lived separate lives since 2013. I prefer and accept the evidence of the claimant that she asked the defendant for a divorce in November 2016, and that was when they separated. It is consistent with the defendant's own evidence in paragraph 12(ii) of his first affidavit, where he refers to the marriage as ending in 2016. I find that it was in November 2016, that the parties separated and began to live separate and apart in the matrimonial home until the defendant moved out in April 2017.

72A King Street

[34] 72A King Street is a commercial property located in downtown Kingston. The issue in relation to this property ("the King Street Property "), is whether the claimant is entitled to a 50% share in it as well as in the rental income generated since the parties separated in November 2016.

The claimant's evidence

[35] In her affidavit filed on September 22, 2020, the claimant says that she and the defendant jointly own the King Street Property which was gifted to them by the defendant's father. It has been rented for several years to Kingston Bookshop at a monthly rental of over US$5,000.00 but she has never received a share of the rental income, whether prior to or after the separation. It was never her intention that the defendant would be the sole beneficiary of the rental income, but as he sufficiently maintained her and the children, she made no issue of it during the currency of the marriage. Now that they are going through a divorce, she wishes to receive what is hers and what she has been denied.

[36] In the claimant's affidavit filed on May 28, 2021, she says the King Street Property was transferred to her and the defendant on February 20, 2013, by way of gift, and it was always their common intention that it would be jointly owned by them in equal shares. There was no need for the defendant's father to place her name on the title, it was a gift to which neither she nor the defendant made any contribution. According to her, the profits from S.N.H Worldwide Trading Company Limited were

used to maintain the King Street Property. She said the money used to maintain the family came from the defendant's: "drawing from the company" and was used for his benefit, hers, and that of their children.

[37] In cross examination, the claimant said that she contributed money towards the general upkeep of the King Street Property by way of money from S.N.H Worldwide Trading Company Limited (a company owned by her and the defendant), that was used to fix the building. She admitted that she did not personally make any contribution and that she never received any of the rental income.

The defendant's evidence

[38] In his affidavit filed on March 5, 2021, the defendant admits that in 2013, the King Street Property was registered in his and the claimant's joint names by way of a gift from his father. But he says the claimant is fully aware that she has no beneficial interest in it. He says that the property was purchased by his father and his uncle in 1991, they were both elderly at the time and they decided to transfer two properties to the defendant and his cousins. The intention was, he says, to keep the property in the Hanna family, and for it to be his and his cousins' inheritance. He advised his father and his uncle to transfer one of the properties into the joint names of the claimant and himself. The other property was transferred to his cousin.

[39] The King Street Property, says the defendant, is his inheritance from his father. The claimant did not contribute to its maintenance and upkeep. He said that at no time did he intend to give her the property or any part of it. The intention was always to keep it in the Hanna family and pass it on to his son as his father had done to him. The claimant was never paid any of the rental income from the King Street Property (which was US $4,000.00 per month), for two reasons. One reason is because she does not own a beneficial interest in it. The other reason is because the rental income was used as capital for S.N.H Worldwide Trading Company Limited from which JA$600,000.00 monthly was paid to the claimant during the

marriage to maintain the household. He denied any common intention that he and the claimant would own equal shares in the King Street Property.

[40] In his affidavit filed on May 27, 2022, the defendant says that the claimant's name was added to the title only because she was nagging him to do so. The King Street Property generates its own rental income and save for structural repairs, the tenants of that property are responsible for its maintenance.

[41] On cross examination the defendant said that he could not recall if the transfer to him and the claimant of the King Street Property was by way of gift, and neither could he recall if he and the claimant had signed the transfer. Since the separation, he has not been collecting rent, it is S.N.H Worldwide Trading Company Limited that has been doing so. He said he was not sure if S.N.H Worldwide Trading Company Limited owned the King Street Property and he was also not sure whether the title for the King Street Property has the claimant and him as joint owners. Prior to the separation in 2016, he said the rental from the King Street Property was not used to support the family. He admitted to not owning the property when the claimant nagged him into putting her name on the title and he said he guessed that his father and uncle could have transferred the property into his name alone. But he was not sure why they did not do so. He was also not sure that his evidence is that the King Street Property was his inheritance.

Submissions

[42] Mr Williams submitted that the King Street Property is the defendant's inheritance from his father, and it was never intended that the claimant would have a beneficial interest in it. Her name was only added to the certificate of title, counsel argued, because at the time of the transfer, she was nagging the defendant to add her name to it. Counsel also argued that the claimant has failed to discharge the burden on her to prove why the defendant's uncle (who was the joint registered proprietor with the defendant's father), and not her relative, would transfer his half interest in the property to her. Mr Williams further argued that the transfer by gift did not vest in the claimant any beneficial interest. She did not make any

contribution to its acquisition, or its maintenance and it is clear from the defendant's evidence that the transfer was an *inter vivos* gift to him for his inheritance. The reference on the certificate of title to the transfer being by way of "gift' submitted counsel is: "merely the consideration reflected on the certificate of title for purposes of the relevant tax assessment legislation and the Registration of Titles Act". There is no presumption of advancement under **PROSA,** the claimant has not discharged the burden of proof under sections 14(2) and 14(3), and with no evidence of her contribution to the property, there is no basis for her to claim a 50% interest in it. Learned counsel relied generally on the principles enunciated by Edwards JA(Ag), as she then was, in **Suzette Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam [2018] JMCA Civ 15,** in relation to property on Dillsbury Avenue, which the court found did not qualify as the family home, and which it treated as "other property" under section 14 .

[43] Mr Steer argued that the claimant has an equal share in the King Street Property and in its rental income from the parties separated in November 2016. The property was never that of the defendant to give to the claimant, or to add her name to the transfer. This, said counsel, was the: "sole prerogative of the transferors", the defendant's father and his uncle. Mr Steer submitted that the property was never transferred to the defendant alone, yet he claims it was his inheritance. He argued that the defendant's posture would suggest that no relevance is to be placed on how husbands and wives arrange their affairs throughout the marriage, and so the fact that the defendant collected rental income, used it to maintain the household or assist a company in which they are shareholders, "has no bearing on what happens after a separation". The certificate of title for the King Street Property speaks for itself, posited Mr Steer. He argued that it was transferred by gift to both the claimant and the defendant as joint tenants, and the claimant is entitled to her half interest in both the property and the rental income generated by the property since the parties separated.

Analysis and discussion

[44] As seen from section 14 (2) of **PROSA,** on an application by a spouse for division of property other than the family home, the court should make any decision it thinks fit, taking into account any or all of several factors listed in the section. These include such other fact or circumstance which in the opinion of the court the justice of the case requires it to take into account. In **Carol Stewart v Lauriston Stewart** (supra), Brooks JA (as he then was) pointed to the fact that the evidence required to show that the equal share rule should be varied in relation to the family home is not the same as that required by section 15(2), which deals with proof when a spouse seeks to alter the parties' interest in property other than the family home. His lordship said at paragraph 28 that: -

> "Section 15(2) requires the court to be satisfied that its order, in respect of other property, is "just and equitable" . In other words, in section 15 (2) there is no requirement to displace the norm".

[45] The justice of this case requires that I make no property adjustment to the legal ownership of the King Street Property. This is because it is my view and I so find that the transfer from the defendant's father and uncle was indeed a transfer by way of a gift to both the claimant and the defendant as joint tenants. I am therefore not satisfied that it is just and equitable to make any adjustment to the interest the parties have in the King Street Property. In making this finding I do not rely on any presumption of an advancement. This was a perfect gift, not an imperfect one. At the time of the transfer, the transferors could have transferred the property solely to the defendant if they wished to do so and if the intention was for him to benefit solely. The defendant's father and uncle were seasoned businessmen. The defendant says in paragraph 6(iii) of his affidavit filed on March 5, 2021, that his family has: "a long history of business in Jamaica". It is my view that seasoned businessmen would know or would know to seek professional legal advice on how

to make legal arrangements to ensure that the defendant benefitted solely from a transfer of land. I reject the defendant's evidence that he was being "nagged" by the claimant to add her name to the transfer. Mr Steer is quite right. Adding the claimant's name to the title was not the defendant's prerogative. He did not own the land and therefore he could not transfer any interest in it to the claimant or add her name to the transfer. Only the transferors could have done that and there is no evidence from any of them to corroborate the defendant's allegations.

[46] Mr Williams suggested that the court must accept the evidence of the defendant that the claimant nagged him into placing her name on the transfer, because she did not refute that evidence. But I do not find that evidence reasonable or probable for the reasons I have already given. As the trier of fact, I undoubtedly am entitled to reject any evidence if I find it unreasonable or lacking in credibility, even though there is no evidence from the other side refuting it.

[47] The facts of this case can easily be distinguished from the facts surrounding the disputed Dillsbury Avenue property in **Suzette Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam** (supra) a case heavily relied on by Mr Williams. The Dillsbury property in that case was not owned jointly by the appellant and the respondent, but by the father of the respondent, he, having purchased the land, placed the respondent's name on the title, splintered the title and thereafter built townhouses on it in collaboration with a developer. The appellant and the respondent resided for a time in one of those townhouses which had a splinter title in the name of the respondent and his father, and that property was one of the disputed properties on appeal. There was no transfer by way of gift to the appellant and the respondent in that case. There was no evidence of the property being held jointly by the appellant and the respondent as joint tenants.

[48] The King Street Property is legally owned by both the claimant and the defendant as joint tenants. The burden is therefore that of the defendant to show why it is just and equitable that the beneficial ownership should be anything but equal. Neither

the claimant nor the defendant contributed financially or otherwise to its purchase. The evidence of the defendant is that but for structural repairs, the tenants of the King Street Property maintain it. He gave no evidence of undertaking any structural repairs to the property himself. There is no evidence from him of any section 14(2) factor to satisfy me that it is just and equitable to alter the interests of the parties in the King Street property. It is my view that the defendant's father and uncle, in transferring the property by way of gift to both the claimant and the defendant as joint tenants, intended them to hold the legal and the beneficial interest. I therefore find that the King Street Property is owned legally and beneficially by the claimant and the defendant in equal shares.

[49] Having found that the claimant and the defendant both own in equal shares the legal and the beneficial interest in the King Street Property, I also find that the claimant is entitled to 50% of the rental income generated from that property since the separation in November 2016. The defendant's evidence on cross examination was that the rental income was not used to support the family, but his direct evidence painted a slightly different picture. He said in paragraph 19 (iii) of his affidavit filed on March 5, 2021, that one of the reasons the claimant was never paid any part of the rental income from the King Street Property was because the rental was used as capital for S.N.H Worldwide Trading Company Limited, and $600,000.00 monthly from that company was paid to the claimant to maintain the household during the marriage. The claimant does not deny that the defendant took funds from the company to maintain the household. What she says is that the entire family benefitted from those funds. On the evidence of both the claimant and the defendant, I therefore find that during the marriage, both parties benefited at least indirectly from the rental income generated from the King Street Property. Consequently, on their separation, I see no basis to deny the claimant a share of the rental income generated since the parties' separation. I am of the view that as a joint owner of the property, it is only fair that that share be 50%.

S.N.H Worldwide Trading Limited

[50] The two issues to be decided in relation to S.N.H Worldwide Trading Company Limited ("the company") are:

(a) Whether the claimant is entitled to 48% of the shares in the company.

(b) Whether the claimant is entitled to one-half of all profits generated by the company since the parties separated in November 2016.

The claimant's evidence

[51] In her affidavit filed on September 22, 2020, the claimant says the company mainly imports bulk food items to be sold locally and is owned by her and the defendant jointly. She currently owns 96,000 shares or 48% of the 200,000 allotted shares. Her shares were not a gift but were allotted to her because it was understood between herself and the defendant that the company was theirs. Throughout the marriage she worked in the business as the accountant, collections officer and wherever else in the business she was needed. She did this while being responsible for the household and assumed management of all aspects of the company whenever the defendant was unavailable or overseas. She worked Mondays to Fridays, and when the company's accounting system was digitised, she spent less time in office as she was then able to do some work from home.

[52] In relation to the profits made by the company, the claimant says that she was never given a share in them. She did not receive a salary, even though the defendant recorded in the company's books that she did. From time to time, she said he asked her to sign tax returns when he deemed it necessary. Up to the time when they separated, she remained active in the business, but when they separated the defendant told her not to return. During the time of her active participation in the business, she was also the primary caregiver for the children and the homemaker for the family. It was the common understanding between them that the defendant was the breadwinner, and she was the nurturer. The

defendant never had to worry about the children as he knew she was taking care of them.

[53] In her affidavit filed on May 28, 2021, the claimant says that prior to the marriage, she visited Jamaica 3 to 4 times each year and she accompanied the defendant to the business whenever he went there. She was involved in the business and worked in it before the marriage. After the marriage, she took orders and: "did basically everything". This included doing receivables, bank deposits, ensuring that delivery trucks had the proper orders and making sure that customers paid for goods received. She said the defendant would bring home bills, cash, and receipts for her to reconcile.

[54] On cross examination the claimant said she attended director's meetings but there were no formalities such as the taking of minutes. She did not know if director's resolutions existed, but she said: "we sat down and discussed where the business would go". She was involved in the company since 2000 but there were no shareholders' meetings. According to her: "everything was informal". She denied the suggestion that since 1994 the company was operated as a one-man company by her husband. In her view "allotted" and "held" in relation to the shares is the same thing and 96,000 shares in the company were allotted to her by the defendant.

The defendant's evidence

[55] The defendant's evidence is that the company is registered under the Companies Act of Jamaica, and he is a director in it. By letter dated October 20, 2020, he advised the claimant that effective December 3, 2020, the company would be closed. He advised her further that if she was interested in purchasing the company, that is, the shares not held by her, she was to do so by November 30, 2020. She has not done so to date. According to him, the records of the company show the claimant as being allotted 96,000 of the issued shares. The claimant did not pay for these shares, and he did not tell her that the company was theirs. He

denies that the claimant worked in the company as accountant, collections officer or in any capacity.

[56] Despite his asking, the defendant says that the claimant played no part in the running of the company. They held a joint bank account in which the profits made by the company were deposited. The amount in that account totalled US $ 536,000.00 and he turned that account over to the claimant. But, according to him, no part of that money belonged to her. It was the company's money and was reflected in its books as directors' loans. He had no discussion with the claimant in terms of his expectations of her or her earning a salary, and there was no common intention in this regard. She was never employed to the company and the $600,000.00 he gave her to run the household came from the company and recorded in its records as her salary on the advice of the company's accountants. He said he and the claimant were the only two directors for the company and had to sign the tax returns. As to the running of the household, the claimant did not assume all the responsibility for that. He paid all the household expenses, which included a fulltime household helper and a gardener.

[57] According to the defendant, the claimant did; " no work in the home ". The company was not a husband-and-wife company, and he was not aware that she did any tasks at home relating to the company's operations or accounting system. Towards the end of marriage in 2016 she did a few tasks from home, but she was not effective or efficient in doing them. He says he discovered stale dated cheques which she had in her possession. She is not entitled to any share in the company's profits, and in terms of the remedies, she seeks in her fixed date claim form, he says the company's records speak to the number of shares held by each of them and that is not in dispute. He does not wish to buy out the claimant's shares and if she wishes to have them valued that is a matter for her account.

[58] In his affidavit filed on May 27, 2022, the defendant reiterates that the claimant played no active role in the company and said that her role was confined to signing

accounts and tax returns on behalf of the business. The accounts and tax returns were always prepared by the company's staff and independent accountants it had retained.

[59] On cross examination the defendant initially said that he could not recall if the company's documents record that the claimant was allotted 96,000 shares. At first, he admitted to offering the claimant to buy out his shares in the company, but when asked if the claimant owned any shares in the company, he said he did not know. Later in the cross examination he said he could not recall saying that the claimant could purchase the shares not held by her in the company. Asked if the claimant owns 96,000 shares, his answer was that he did not know. When shown the company's annual returns for 2017, he admitted that they show the claimant owning 96,000 shares, his father owning 2000 shares and him owning 102,000 shares. He however insists that the claimant does not own 96,000 shares in the company and says that the company's documents are not accurate. He admits that the documents show that 200,000 shares have been taken up since incorporation and that they are all fully paid up but says he cannot verify "the truth or lie" of the documents.

[60] On further cross examination, the defendant said he owned more than 102,000 shares and that he had offered to sell the claimant 200,000 shares which he owns in the company. When asked to show where on the company's documents it shows him owning 200,000 shares, the defendant said he could not show where that is reflected in the documents. Asked how many shares the claimant has in the company, he said:" zero". He could not recall saying that his wife did a few tasks from home towards the end of the marriage or that she was not efficient or effective in performing them.

Submissions

[61] Mr Williams submitted that the evidence is that the claimant did not purchase any shares in the company and that the company was incorporated nine years before

the parties got married. He argued that the provisions of **PROSA** cannot supplant the clear provisions in the Companies Act which do not permit a company to "gift" or allot anyone its shares. Neither, he argued, does the defendant in his private capacity have the authority to "gift" the claimant shares in the company. Learned counsel supported his argument by relying on section 38 of the Companies Act.

[62] Counsel further argued there is no evidence that the directors passed a resolution vesting in the claimant, 48% of the shares in the company by way of gift. He submitted that under **PROSA**, there is no longer a presumption of advancement and in this case, the claimant has the burden to prove how she claims to be entitled to a beneficial interest in the shares in the company. He posited that she is asking the court to believe that she took care of the household and the children to enable the company to prosper and that as such she is entitled to a 48% share in the company. For her to claim an interest, he argued that she would have to show that she provided sufficient non-monetary contributions towards their acquisition and the proper director's resolution in compliance with section 38 of the Companies Act would be essential. In terms of the need to show her non-monetary contributions, counsel cited the dictum of Edwards JA(Ag), as she then was , at paragraph 155 of the decision in **Suzette Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam** (supra) **.** Mr Williams submitted that there is no evidence of anything done by the claimant to support the acquisition or establishment of the company. Nor, he argued, is there any evidence of her contribution towards its development and expansion. Her evidence of taking care of the children does not support her claim, as the defendant's unchallenged evidence is that he paid all the household expenses and there was a full-time helper to manage the household paid for by him. In relation to the claimant's claim for profits, counsel said that whatever view the court takes of the claimant's claim to be a shareholder, profits belong to the company and not to the shareholders. For this proposition he cited several authorities among them, Suzette **Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam** (supra).

[63] Mr Steer submitted on behalf of the claimant that she is entitled to the shares reflected in the annual returns for the company as of July 2017. He says those annual returns carry the signature of both the claimant and the defendant and were signed at a time, when, based on the evidence, the parties had separated. Counsel submitted that the returns speak for themselves, and the claimant is entitled to the value of the shares standing in her name and whatever dividends would be due to her. He further argued that although the defendant alleges that the claimant did not pay for the shares issued or allotted to her, the annual returns say otherwise.

Analysis and discussion

Whether the claimant is entitled to 48% of the shares in the company

[64] As I understand the claimant's case, she claims that she was allotted 96,000 shares or 48% of the company's 200,000 issued shares by the defendant, and she is asking for a declaration in relation to that shareholding. I therefore do not understand her case to be that her work in the household and with the children contributed to the acquisition of the company and its development, therefore her claim to an interest in the company's shares, is based on that contribution. Her plain evidence is that the defendant allotted the shares to her because it was understood between them that the company was theirs.

[65] The following dicta of Edwards JA (Ag), as she then was, in Suzette **Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam** (supra)**,** was **quoted** by Mr Williams to support his submission that the claimant's claim to shares in the company can only succeed if she proves her non-financial contributions to its acquisition and development:-

> "[155] The issue for the judge to consider, having found that the applicant made no financial contribution, was whether she made any non-financial contribution. In other words, did her efforts and actions as a wife contribute to its acquisition, development, sustenance or expansion?".

But the relevant facts in that appeal are distinguishable. The claimant in the instant case is claiming what she says are the 96,000 shares in the company which she contends were allotted or issued to her by the defendant. While in **Suzette Ann Maire Hugh Sam** v **Quentin Ching Chong Hugh Sam** (supra), one of the declarations sought by the appellant was that she was entitled to a half of the respondent's interest and shares in certain limited liability companies. So, the appellant in that case was not claiming shares in the companies in issue *qua member*, but instead, she was claiming an interest in her husband's shares and interest. Edwards JA (ag) made this distinction clear in paragraph 15 when she said the following: -

> "[15] It is true that when the pleadings were examined the appellant had sought a declaration that she was entitled to 'on half of the net annual interest and profits' of the various companies…When compared to the amended order sought, which requested that the appellant be entitled to ' one half of the respondent's interest and shares' in the companies, it became obvious that these were two different claims. The interest and profits of a company (if by interests the appellant means assets) belon to the company and a claim for any such 'interests and profits' would have to be made against the company. However, a claim for a share of the respondent's interest and shares in the companies is altogether different".

[66] The defendant's evidence on this issue is inconsistent. In his initial response to the claim, he said that in October 2020, he wrote to the claimant and advised her that the company was going to be closed and if she were interested in buying out the company, that is, purchasing the shares not held by her, she should do so by November 30, 2020. For the defendant to speak of the claimant buying out the company by purchasing shares "not held by her", suggests to me that in October 2020, he acknowledged that the claimant held shares in the company, and was offering her the option to purchase those she did not hold and thereby own all the issued shares. In cross-examination he could not recall making any such offer to

the claimant, but when pressed, he admitted that he made the offer, but said that what he was offering was the entire issued shareholding of 200,000 shares which were held by him. When confronted with the 2017, annual returns for the company, the defendant admitted that they showed the claimant owning 96,000 shares but said the document was inaccurate and he could not say whether it was true or not that all 200,000 shares had been fully paid up. This, despite the annual returns indicating that since incorporation, all 200,000 shares had been fully paid up. Furthermore, in his affidavit filed on March 5, 2021, the defendant says that the company's records reflect the shares held in the company and are not in dispute, and he is not interested in buying out the claimant's shares.

[67] The company's annual returns filed in July 2017, which is an agreed document, show that it is a private company and that there are 200,000 fully paid-up shares. The shareholders are stated as Steve Hanna (the defendant) holding 102,000 shares, Janet Hanna (the claimant) holding 96,000 shares and Mansure Hanna (the defendant's father) holding 2000 shares. Both the claimant and the defendant are named as the two directors. The defendant was appointed director on December 16, 1994, and the claimant on January 3, 2005. The Certificate of Incorporation and the Memorandum of Association (both agreed documents) state respectively that the company was incorporated on December 16, 1994, and that the defendant and his father, Mansure Hanna were the two subscribers.

[68] Both the defendant and the claimant signed the 2017 annual returns in their capacities as directors. The claimant is stated as the secretary and the defendant signed the returns certifying its correctness. Having certified that the annual returns are a truthful reflection of the company's shareholding and directorship as of July 2017, and without providing any evidence to prove that the document is inaccurate, it is curious that the defendant now says that he cannot verify whether that document is true or false.

[69] The claimant's evidence is that she did not pay for the 96,000 shares in the company, they were not a gift but were allotted to her by the defendant as it was understood that the company was theirs. Section 38(1) of the Companies Act provides that shares may be paid for by either money or property or past services rendered for a value that is a fair equivalent for the money which the company would have received had the shares been issued for money. Section 38(4) provides that no allotment by a company of shares for a consideration other than cash shall be made unless the directors have passed a resolution that the allotment be made and the resolution states the nature of the consideration, its value and the extent to which the shares issued will be credited as paid up by virtue of it. Section 38 (5) (a) and (b) provide respectively that before such a resolution is passed, where the consideration consists of services, the directors must have a qualified accountant estimate the value of the services to the company in money terms and, in any other case must have the consideration valued by a qualified accountant, valuer or surveyor.

[70] At common law, issuing and allotting shares are two different processes. Shares are issued after the directors agree by resolution (the allotment) that they be issued and there is notification of the allotment. The registration of the shares in the company's register of members completes the issuing process and confers title on the shareholder. Shares are therefore issued on registration. (See **the House of Lords decision in National Westminister Bank plc v IRC (1995) 1 AC 119).** This common law position has not been altered by our Companies Act**.**

[71] The annual returns indicate that the defendant was a director since 1994. There is no evidence of any other director being appointed, other than the claimant in 2005.There is no evidence when the claimant was issued the 96,000 shares, but the 2017 returns indicate that she held them during the previous year. Although the claimant provided no evidence of a directors' resolution indicative of the allotment made to her, and on her evidence, there were no such formalities, the fact is that the defendant has certified as true and correct, the company's official

annual returns filed with the Office of the Registrar of Companies in July 2017, which show the shareholdings held by the claimant. Those annual returns say that all the issued shares are fully paid up in cash, but the evidence of the claimant and the defendant is that the claimant did not pay for the 96,000 shares. There is some inconsistency here. If therefore , the 96,000 shares were allotted and subsequently issued to the claimant for a consideration which was not a fair equivalent for the money the company would have received had the shares been issued for money; and if the other statutory devices in section 38(5) (a) and (b) of the Companies Act (commonly accepted as designed to prevent 'share -watering') were not complied with; these are matters the defendant and indeed the claimant , as directors, will have to contend with, should the company in the future decide to raise them.

[72] This leads me to a very important point, and that is that a share is a bundle of rights against a company. These rights (at the very basic level) are to vote at shareholder's meetings, to receive dividends declared by the board of directors and on the company being wound up, to receive its property, after creditors and others with claims against the company are paid. Farrell J in **Borland's Trustee v Steel [1901] 1Ch 279**, described a share in this way: -

> "A share is the interest of a shareholder in the company measured by a sum of money, for the purpose of liability in the first place, and of interest in the second but also consisting of a series of mutual covenants entered by shareholders *inter se* in accordance with section 16 of the Companies Act 1862[2]. The contract contained in the articles of association is one of the original incidents of the share. A share is…an interest measured by a sum of money and made up

[2] Section 19 of the Companies Act of Jamaica is a similar provision.

of various rights contained in the contract, including the right to a sum of money of a more or less amount".

[73] Since shares are a bundle of rights against a company, this simply means that a claim to a percentage interest in a company's shareholding, ought properly to be against the company itself. Moreover, any adjudication in relation to the accuracy or otherwise of its annual returns, must undoubtedly involve the company. In this case, the company has not been joined as a party to the claim. The claimant is seeking a declaration in relation to what she contends is her shareholding in the company. Declarations are declaratory of rights. (See **Gouriet v The Union of Post Office Workers and Others [1977] 3AER**) The rights in issue are the claimant's alleged rights against the company. It follows therefore, that her claim for a declaration that she is entitled to 48% of the company's shareholding, is unsustainable without the company being joined as a party.

[74] The claimant's claim for a one-half share in the company's profits generated since the parties' separation in November 2016, is also unsustainable without the company being joined as a party. Although shares are personal property, they do not represent a property right in the company's assets. (See **Macaura v Northern Assurance Co. Ltd & Others [1925]A.C. 619**.) Edwards JA (Ag) in paragraph 15 of her judgment in **Suzette Ann Maire Hugh Sam v Quentin Ching Chong Hugh Sam** (supra), which I quoted earlier, reiterated this well-established principle of law. Simply put, any profits made by the company belong to it, and as such, any claim to a share in those profits can only be made against the company.

S.N.H Foods Company Limited and S.N.H Trading Successors Limited

[75] In her affidavit filed on May 28, 2021, in response to the defendant's affidavit filed on March 5, 2021, the claimant claims to be entitled to 50% of all shares standing in the name of the defendant in S.N.H Foods Company Limited and S.N.H. Trading Successors Limited. No permission to amend the fixed date claim form was

requested to include what is clearly additional relief being sought by the claimant. The claimant says she is seeking this relief because she believes that the defendant is attempting to defeat her claim relative to her shareholding in S.N.H. Worldwide Trading Company Limited. Mr Steer quite wisely made no submissions in relation to this 'additional claim'. With no amendment being made to the fixed date claim form to include such relief I am not prepared to consider it. In any event, the claimant has provided no evidence to support her contention of an entitlement to a percentage of the shareholdings held by the defendant in these two companies. Simply to say that the defendant is seeking to deny her an interest in S.N.H. Worldwide Trading Company Limited, is hardly enough evidence to support such a claim under **PROSA.** Mr Williams is right when he argues in his closing submissions, that there is no evidence of any section 14(2) **PROSA** factors in relation to this 'additional claim', given by the claimant.

Conclusion

[76] Having regard to the forgoing, I make the following declarations: -

I. The property located at 1 Waterworks Crescent, Kingston 8 in the parish of Saint Andrew and registered at Volume 1098 Folio 907 in the Register Book of Titles is the family home of the parties.

II. The property located at 1 Waterworks Crescent, Kingston 8 in the parish of Saint Andrew and registered at Volume 1098 Folio 907 in the Register Book of Titles is owned by the claimant and the defendant in equal shares of 50% each.

III. The property located at 72A King Street, Kingston and registered at Volume 937 Folio 158 of the Register Book of Titles is owned by the claimant and the defendant in equal shares of 50% each.

IV. The claimant is entitled to one-half (50%) of all the rental income generated from the property located at 72A King Street, Kingston

since the date of separation November 2016 to the date her interest in the property is either purchased by the defendant or the property is sold to a third party.

[77] I also make the following orders: -

V. The aforementioned properties are to be valued by a valuator to be agreed by the parties within sixty (60) days of this order. If the parties do not agree to a valuator within fourteen (14) days of this order, then the Registrar of the Supreme Court shall appoint a valuator to value the properties.

VI. The claimant and the defendant shall bear the cost of the valuation of the properties equally.

VII. The claimant shall have the first option to purchase the defendant's interest in the family home registered at Volume 1098 Folio 907 in the Register Book of Titles. The said option must be exercised within sixty (60) days of the receipt of the valuation report failing which, the property shall be put on the open market and sold by private treaty or public auction.

VIII. The defendant shall have the first option to purchase the claimant's interest in the property located at 72A King Street, Kingston, registered at Volume 937 Folio 158 in the Register Book of Titles. The said option must be exercised within sixty (60) days of the receipt of the valuation report failing which the property shall be put on the open market and sold by private treaty or public auction.

IX. The defendant shall pay to the claimant 50% of the rental income generated by the property located at 72A King Street, Kingston, since the date of separation November 2016 to the date he either

purchases her interest in the property or the property is sold to a third party.

X. The Registrar of the Supreme Court is empowered to sign any and all documents necessary to bring into effect the orders of this Honourable Court if either party is unable or unwilling to do so.

XI. The defendant's application for occupation rent is refused.

XII. The claimant's claim for a declaration that she is entitled to 48% of the shares allotted in the company known as S.N.H Worldwide Trading Company Limited is refused.

XIII. The claimant's claim that she is entitled to one-half of all the profits generated by S.N.H Worldwide Trading Company Limited since the date of separation November 2016, is refused.

XIV. Each party to bear his/her own costs.

XV. Liberty to apply.

A Jarrett
Puisne Judge