[2019] JMSC Civ 235

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2018 HCV 02246

BETWEEN	**CHERRI-ANN CAMOYA SCARLETT**	**CLAIMANT**
AND	**IAN GEORGE SCARLETT**	**DEFENDANT**

Mr. Paul Beswick and Miss Gina Chang instructed by Ballantyne Beswick & Co. for the Claimant

Miss Diandra Bramwell-Daley and Fabian Campbell for the Defendant

Heard 12th June, 2019 and 6th December, 2019

PROPERTY (RIGHTS OF SPOUSES) ACT- DIVISION OF MATRIMONIAL PROPERTY- POST NUPTIAL AGREEMENT- FAMILY HOME- OTHER MATRIMONIAL PROPERTY- MAINTENANCE ACT- MAINTENANCE OF SPOUSE

WILTSHIRE C, J.

Introduction

[1] This an application by the Claimant Cherri Ann Camoya Scarlett under the Property (Rights of Spouses) Act for declarations and the division of properties acquired during her marriage to the Defendant Ian George Scarlett. The Fixed Date Claim Form specifically sought the following:

"-That the first hearing of this matter be treated as the trial of the claim;

-That time be extended to the date hereof, for the filing of this application for Division of Property in accordance with Section 13 (2) of The Property (Rights of Spouses) Act;

-A declaration that the Settlement Agreement dated June 20, 2012 be deemed null and void and of no effect, and is not binding on the parties;

-A declaration that the Claimant is entitled to a one-half share of the Defendant's interest . in EM2P Company Limited;

-A maintenance order for the Defendant to pay to the Claimant the amount of J$76,000 per month for five (5) years;

-An order directing the Defendant to repay to the Claimant in full Bank of Nova Scotia Plan Loan No. 1367224 being principal of $539,968 and any and all interest accrued at19.99% from August 26, 2015 to the date of repayment occasioned by the Claimant having obtained said loan to settle the Defendant's liabilities due to his unemployment;

-That the Defendant be made to account to the Claimant for the earnings of EM2P Company Limited since the date of separation, January 1 7, 2016 and that the Defendant be directed to pay to the Claimant 22.5% of the earnings since that time, representing one-half share of the Defendant's interest within seven (7) days of the date hereof;

-That 50% of the interests of Ian George Scarlett in EM2P Company Limited be transferred to Cherri-Ann Camoya Scarlett within seven (7) days of the order hereof;

-That any failure by the Defendant to effect said transfer, the Registrar of Companies is hereby directed to transfer one-half of the interests of Ian George Scarlett in EM2P Company Limited to Cherri-Ann Camoya Scarlett forthwith;

-A declaration that the Claimant is entitled to a one-half share of the family home currently held solely in the name of the Defendant, being all that parcel of land and the dwelling house thereon located at 84 Bridgetown Place - Barbados, Caribbean Estates, Portmore in the parish of Saint Catherine, being the lands registered at Volume 1421, Folio 869 of the Register Book of Titles and having Valuation number 19006035084;

-That the Defendant herein shall have the right of first refusal to purchase the interests of the Claimant in property located at 84 Bridgetown Place - Barbados, Caribbean Estates, Portmore in the parish of Saint Catherine currently held in the name of the Defendant, who if he is unable or unwilling to purchase same within 30 days of the date hereof then same shall be sold on the open market at the market or reserved price. Whether being sold on the open market or being acquired by the Defendant, the price shall be determined by a valuation report conducted by an independent valuator agreed by the parties or upon failure to agree same within seven (7) days of the order hereof, a valuator shall be selected by the Registrar of the Supreme Court and both parties shall bear the expense equally. The net proceeds of such sale shall be distributed equally;

-A declaration that the Claimant is entitled to one-half of the value of the 2010 Subaru Impreza WRX STI registered in the name of the Defendant;

-That the Defendant herein shall have the right of first refusal to purchase the interests of the Claimant concerning the 2010 Subaru Impreza WRX STI who if he is unable or unwilling to purchase same within 30 days of the date hereof then same shall be sold on the open market at the market price certified by a valuation report appointed by both parties or upon failure to agree same within seven (7) days of the order hereof, a valuator shall be selected by the Registrar of the Supreme Court and both parties shall bear the expense equally;

-That the Registrar of the Supreme Court shall be empowered to sign any document if the Defendant neglects or refuses to sign the documents required to sell the relevant property or transfer the shares;

Background

[2] The parties were married on December 31, 2006. On June 20, 2012 following separation they made a settlement agreement purportedly to address the distribution of their marital properties and then resumed living together again. They again separated on January 17, 2016 and got divorced on May 28, 2018. The Claimant seeks the division of their properties pursuant to the Property (Rights of Spouses Act)

(PROSA). The Claimant claims that the settlement agreement is invalid and the Defendant insists that it is binding. The agreement is set out below.

[3] "THIS SETTLEMENT AGREEMENT made and entered into IAN GEORGE SCARLETT (hereinafter referred to as "the Husband") Information Technology Specialist of 84 Bridgetown Place, Caribbean Estate in the parish of Saint Catherine, and CHERRI-ANN CAMOYA SCARLETT Senior Scientific Officer, of 84 Bridgetown Place, Caribbean Estate in the parish of Saint Catherine, (hereinafter referred to as "the Wife") WITNESSETH AS FOLLOWS:

WHEREAS the Husband and the Wife:

(i) were married on the 31st day of December 2006 at the Hibiscus Lodge Hotel, Ocho Rios, in the parish of Saint Ann;

(ii) have experienced matrimonial difficulties to the extent that the marriage has broken down irretrievably and there is no hope of reconciliation

(iii) mutually intend this agreement to be a final disposition and settlement of all matters regarding our marital affairs, personal and real property, and finances;

(iv) mutually agree that in the event of a dispute arising regarding the enforcement of this agreement, the prevailing party will be entitled to his or her reasonable costs and attorney's fees,

(v) intend that this agreement be incorporated into any subsequent decree of dissolution of marriage or other Court Order; and

(vi) have been advised by attorneys-at-law of their choosing regarding their legal rights as relates to this agreement.

(1) **PROPERTY DISTRIBUTION AND FINANCES**

In exchange for the mutual promises herein contained, we agree to live separately and to settle all issues related to marital property and finances according to the following mutually agreed upon terms and conditions:

1. The Husband and the Wife hereby agree that the Wife shall take the following in and final settlement of all claims which she may be competent to bring against the Husband in respect of property, whether real or personal and all maintenance upon signing this Settlement Agreement.

(i) a lump sum payment of Nine Hundred Thousand Dollars (JMD$900,000.00) which has been deposited in the account of the Wife; receipt of which is acknowledged by the signing of this agreement;

(ii) usage of the husband's fully maintained company motor car for a year from the date of the signing hereof and in the event the car becomes unavailable during that year the husband shall pay a monthly sum of JMD$23,000.00 for a period of 1 year or such period as remains of the year from the date. the vehicle Is no longer available;

(iii) the following furniture and household items:

(a) Chest of Drawers

(b) Queen Sized Bed

(c) Toaster oven

(d) 20" Television

(e) Desktop Computer;

(f) Green and Black Dinner plate, bowl and tea cup set

(g) Cutlery set

2. The Husband and the Wife hereby agree that the Husband shall take the following in full and final settlement of all claims which he may be competent to bring against the Wife in respect of whether real or personal and all maintenance upon signing this Settlement Agreement:

(i) the matrimonial home located at 84 Bridgetown Place, Caribbean Estate in the parish of Saint Catherine, registered in the name of the Husband.

(ii) the following furniture and household items:

(a) Twin beds;
(b) Dresser;
(c) Chest of Drawers;

(d) Living Room Suite;

(e) Entertainment Stand;

(f) CD/DVD Players;

(g) 44" Television;

(h) Microwave;

(i) Stove;

(j) Refrigerator;

(k) Dinner Breakfast Plate,Tea cup, Saucer,Bowl Set;

(l) Cutlery Set:

(m) All other utensils;

(n) Book shelf;

(o) Computer Desk;

(p) Dining Table and Chairs;

(q) Washing Machine;

3. Husband and Wife agree that from the date of this agreement neither shall assume any joint debt or liability or is responsible for the payment of any pre-existing debts or obligations of the other party, and either party shall hereafter refrain from acquiring any debts or obligation, or from entering into any other such loan arrangements with any financial or other lending institution, so as to cause such debt or obligation from being a claim, demand, lien, or obligation against the property of the other party, and shall refrain from pledging each other's credit.

4. Except as provided in this agreement and subject to any additional gifts from one of the parties to the other in any will validly made after the date of this agreement the husband and wife release all rights which he or she has or may acquire under the laws of any jurisdiction in the estate of the other.

GENERAL

6. The Wife who currently still resides in matrimonial home, will relocate within three (3) months of the date of the signing hereof.

7. Husband and Wife acknowledge that each has entered into this agreement in good faith, without any duress or undue influence. The parties have had separate and Independent legal advice in respect of this document, and either party hereby acknowledges that he/she has a full and complete understanding of the provisions of this Agreement, and their legal rights and obligations under this agreement.

8. Husband and Wife agree that this agreement shaft be governed and construed in accordance with the laws of Jamaica.

The Claimant's case

[4] Sometime in 2007 the parties started the process of buying a house at 84 Bridgetown Place - Barbados, Caribbean Estates, Portmore in the parish of Saint Catherine, registered at Volume 1421, Folio 869 of the Register Book of Titles. They moved into it in 2008 as their matrimonial home. The Claimant testified that she paid for and made improvements, assisted with furnishing the said property, maintained the residence, did the gardening and beautification of the common areas, paid all the utilities for the said property and had the responsibility for the care and general upkeep of the house, life and health insurance for the both parties and paid the maintenance fees to the strata for the house.

[5] She said that in 2010, after her father died, her marriage was strained and the parties attended marital counselling. She found out that the Defendant was having extramarital affairs. There were numerous conflicts, differences and acts of infidelity by both of them during this time. The trust between them broke down significantly and this led to the Defendant in February 2012, asking her to move out of their matrimonial home.

[6] During the time that they lived apart, she said the Defendant would visit her apartment for sex saying that they were still married so she had to do it and also he would ask her to go to the house on the weekends to do laundry as he led her to believe that this was her obligation to him. It was during this time that according to her he became unemployed, in about March 2012, and she said she moved back into the house at his request. He had no income and "*rising debt to maintain his high standards of living"*. She said that when she returned to the home he made certain marital demands and said that if she wanted the marriage she would sign the settlement agreement. She said "*For some peace and comity, I signed the said agreement as he demanded, on the 20th June, 2012, against the advice of my Attorneys-at-Law.* "

[7] She accused the Defendant of inducing and manipulating her to sign the said settlement agreement if she had any hope of them getting back together. During this time, she was extremely stressed by the sequence of events which had led up to the separation. She said she honestly believed that doing the agreement would save their marriage. In her view after the agreement was signed, they reconciled the marriage and resumed cohabitation as man and wife. Hence the settlement agreement was no longer of any effect as the intention of separation in 2012 had dissipated. They had resumed their marriage in every sense and the Defendant was unemployed from April 2012 to August 2015, during which she paid for the mortgage while he paid to service a car loan that was $108,000 per month.

[8] She denied receiving the Nine Hundred Thousand Dollars ($900,000.00) which should have been paid over on her signing pursuant to the settlement agreement. She insisted that the only $900,000.00 in her account had been there from February 2012, and was the proceeds from the sale of their first vehicle. The account history showed that said monies were used for household expenses and portions of same were transferred to the Defendant.

[9] She however conceded that the Defendant would sometimes get projects but he used all of his money to service the car loan. *She* however forfeited her standard of living and gave up prospects of furthering her education. In 2015 his credit was ruined whereupon he encouraged her to take out a Scotia Plan Loan to clear his credit card debt since she was offered a special rate of 19.99% which was lower than the more than 40% that was being accrued on his credit card. He had agreed that he would service this loan as he had regained employment and offered to close it after they separated but that this was never done. Instead in 2017, he sent her an email saying that he could no longer help her to pay the loan and stopped making payments. She said she eventually closed the loan with funds from her mother and from additional duties at work because the monthly payments were becoming harder to meet.

[10] She said that on December 31, 2015, they agreed to separate, they discussed the separation of assets and he told her to draft an agreement and send to him. On January 17, 2016 the marriage broke down irretrievably and the parties have been separated since that time.

[11] In addition to her contribution to the home she also said she played a critical role in the establishment of the company known as EM2P Company Limited, which is an Information Technology Solutions company [in which the Defendant has an interest]. She claimed that she was instrumental in the company receiving a contract from the University of the West Indies, provided administrative support and consultancy and further gave financial and other support during the establishment and operation of the company. She however never worked directly for the company.

[12] Regarding the *2010 Subaru Impreza WRX STI* the Claimant said that she was entitled to half of its value as it was her contribution to the Defendant's debts that allowed him to retain ownership of this car and it was acquired during the marriage.

[13] The Claimant stated that she is entitled to maintenance to assist her in putting herself "*in a better financial, emotional and physical position due to the numerous debts, emotional trauma and declining state of health incurred during the marriage occasioned by the Defendant's actions"*. She said that the amount of seventy-six thousand dollars ($76,000) was the amount that she had paid for the mortgage and the loan payments which were his responsibility, and proposed to the Court that that sum should be a starting point for any consideration of spousal support. *"*

The Defendant

[14] The Defendant in response filed his own application thereafter for the following orders:

-A declaration that the Settlement Agreement dated the 20th day of June 2012 and duly executed by Ian George Scarlett and Cherri-Ann Camoya Scarlett be deemed valid and legally binding on the parties.

–That the Defendant/Claimant, Cherri-Ann Camoya Scarlett, is to pay to the Applicant/Defendant, Ian George Scarlett a sum of One Million Eight Hundred and Fifty- Six Thousand Five Hundred and Eight Dollars and Fifty Two Cents ($1,856,508.52) for unpaid credit card charges to the Applicant/Defendant's Scotiabank MAGNA Mastercard, Account Number 5201 7690 1038 7500 between February 2012 and February 2016.

–That the Defendant/Claimant, Cherri-Ann Camoya Scarlett, is to pay to the Applicant/Defendant, Ian George Scarlett a sum of Three Hundred and Forty-Five Thousand Dollars ($345,000.00) for storage fee.

–That the Defendant/Claimant, Cherri-Ann Camoya Scarlett, is to pay to the Applicant/Defendant, Ian George Scarlett a sum of Two Hundred and Thirteen Thousand Five Hundred and Seventy-One Dollars Fifteen Cents ($213,571.15) for money spent to assist the Defendant/Claimant with her Scotia plan loan payments.

[15] He said the Claimant was not entitled to any share of the property located at 84 Bridgetown Place. That along with his NHT contributions he was financially assisted by his uncle Osmond Gibson and mother Eula May Gibson. Mr O. Gibson and Ms E. Gibson have an investment of Three Million Five Hundred Thousand Dollars (JMD $3,500,000.00 plus interest) and One Million Two Hundred Thousand Dollars (JMD $1,250,000.00 plus interest) respectively. Further in September 2011 they were separated as the marriage had broken down due to the Claimant's continuous infidelity and they "*discussed and documented all interests in the properties acquired during the marriage and further proceeded to negotiate settlement agreement."* He said both parties sought legal assistance and after about nine (9) months a final settlement was reached on June 20, 2012.

[16] During the negotiations, he alleged that the Claimant demanded an interest of Six Million Dollars (JMD $6,000,000.00) for the matrimonial home. She then became aware that all debts against the property must be paid out before they could collect against the property. The property was in a deficit of Four Hundred Sixteen Thousand Dollars (JMD $416,000) which they would both have to pay for. So the Claimant collected a cash settlement of Nine Hundred Thousand Dollars ($900,000.00), furniture/household items, car (14 months access) and removed from the home in February 2012 as per the terms of the final settlement agreement that was signed on the 20th day of June 2012" He said that after the Claimant moved out she was struggling to provide for herself and that in the interest of her safety he allowed her to move back into [his] house in April 2012 (settlement agreement was not yet finalized/signed), as there was a robbery/shooting incident at her Barbican apartment. This living arrangement was supposed to be a temporary one as the Claimant had indicated that she would be actively searching for an alternative living arrangement.

He said he and the Claimant were not reconciled and they slept in two separate bedrooms and used separate bathrooms. He said they were both concerned about how this unforeseen arrangement would affect the settlement agreement and after consultation with their attorneys, they agreed to continue to honour the agreement and signed same on the 20th day of June 2012. He insisted that the Claimant was well informed and properly guided by her legal representative and understood that by signing the agreement she was relinquishing all her interest in the property at 84 Bridgetown Place, even after moving back in his house in April 2012.

[17] He said after the Claimant moved out permanently in January 2016, she continued to rely and acted upon said agreement of June 2012 when arrangements were made for her to remove the remaining furniture/household items listed in the same agreement from the premises in December 2017.

[18] The Defendant also insisted that he is not liable for the Claimant's Bank of Nova Scotia Plan Loan of Five hundred and Thirty-Nine Thousand Nine Hundred and

Sixty-Eight Dollars ($539,968.00). He says the credit card in question was being used by both of them and he was the primary card holder and a supplemental card was given to the Claimant in 2005. He said he had intended to cancel the supplemental credit card after their February 2012 separation but he kept it on condition that she assisted with the repayments. He claimed she owed him One Million Eight Hundred and Fifty -Six Thousand Five Hundred and Eight Dollars Fifty- Two Cents ($1,856,508.52) for unpaid charges to the credit card account and had not paid her portion of the credit card bill.

[19] He said he was solely responsible for the mortgage ($54,00.00/month), car loan ($108,000.00/month), food, insurances, credit card usage and other personal expenses, but he had not paid close attention to all the transactions that were happening on his credit card account. He said he insisted that the Claimant assist with the credit card payments and he w*as* now prepared to cancel the supplemental credit card when the Claimant transferred a sum of Five Hundred and One Thousand Dollars ($501 ,000.00) to their Scotia Bank joint account on the 28th day of August 2015. He explained that he immediately transferred Five Hundred and Forty Thousand Dollars ($540,000.00) directly to the credit card account. She continued to use his supplemental credit card until February 8, 2016 when he collected the credit card.

[20] He objected to the Claimant's claim for spousal support. He denied having sex with her during their 'separation' and her washing his clothes, that he was unemployed causing her to move back into the house and that he had her sign the agreement as a condition of the marriage continuing. Further he denied that after signing they reconciled. *He said* although they shared the same roof and were technically still married, there were extremely rare occasions of sexual intimacy and that the Claimant had other relationships. He admitted that they would both "fall *weak to the flesh and try to salvage the relationship".* However, he said the Claimant never proved to be trustworthy and as she was always intimately engaged with others, he "*never took her/us serious*."

[21] He denied being unemployed during April 2012 — August 2015 and said he solely maintained all his expenses including the mortgage and car loans. He said that as a result of the living arrangement since April 2012, the Claimant paid some household bills including, light, water, maintenance and cable but before their separation in February 2012, he solely paid all the expenses.

[22] He said he never needed the Claimant's financial support as he was employed. It was the Claimant who proved to be more of a continuous financial burden to him. He however assisted the Claimant and her family including her mother and sister. He said he charged the Claimant a storage fee of Fifteen Thousand dollars monthly for storing her furniture/house items and her mother's belongings at the house but has not received compensation for his inconvenience from January 2016 to December 2017 (23 months) and that she owes him Three Hundred and Forty Five Thousand Dollars ($345,000.00) in storage fee and Two Hundred and Thirteen Thousand Five Hundred and Seventy One Dollars and Fifteen cents ($213,571.15) for assisting her in repaying her loan.

[23] He said the Claimant had no interest in EM2P or in the 2007 Subaru, adding that the creation of the company was executed by the three founding members and that "*the Claimant had no involvement in its inception and operation; she offered no service, material or otherwise."* He said the Claimant had no entitlement to his vehicle, whether legal or financial and all the assets, including the Subaru were dealt with in the settlement agreement of June 2012. He stated that he negotiated the price for the company's car on her behalf in order to benefit from the employee's discount hence she only paid $850,000.00 for the said vehicle instead of the market value. He said she told him that the money she deposited in his First Heritage Co-Operative Credit Union account to pay for her Camry motor car was from the $900,000.00 she received in March 2012 from the settlement agreement.

Submissions

[24] Counsel began by referring to some relevant sections of The Property Rights of Spouses Act as the primary basis of the Claimant's Claim. The relevant sections being sections 2.4, 6 and 10. Counsel then treated with the Settlement agreement and submitted that section 10 of the statute was clear that such an agreement may be made by spouses in respect of property and listed the safeguards. The wording of the section specified "property", and consistently treated it throughout the Act as separate from the "family home". It was noted that the instant agreement contended specifically with the family home. The safeguards under section 10(3) and (4) namely that there be independent legal advice, that it be in writing and witnessed by a Justice of the Peace or other specified person, were in fact complied with.

[25] Counsel referred to the provisions of the statute which set out the circumstances where the agreement can be declared unenforceable, particularly where the Court is satisfied it is unjust to give effect to the agreement. The consideration of "unjust" includes, as prescribed by section 10(8),: the provisions of the agreement; the time that has elapsed since the agreement was made; whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable; whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable; any other matter which it considers relevant to any proceedings.

[26] It was pointed out that the English statutory regime in respect of marital property and agreements was not similar, but their case law had made comparable assessments of those considerations in their own jurisdiction to enforce or decline to enforce post or pre-nuptial agreements as contemplated under our section 10. Counsel cited the case of **KA v MA** [2018] EWHC 499 (Fam) where it was said at paragraph 49 that for a post-nuptial agreement, to carry full weight, the parties

> *"must enter into it of their own free will, without undue influence or pressure, and informed of its implications…. "*

The case emphasized the importance that each party should intend that the agreement should be effective and that regarding the circumstances surrounding the making of the agreement the first question is whether any duress, fraud or misrepresentation, is present because these will make the agreement ineffective. Also conduct such as undue pressure or an exploitation of a dominant position would reduce or eliminate the effect of the agreement. At paragraph 49 it was said further, that the court may take into account a party's emotional state, and what pressures he or she was under to agree and that if the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage.

[27] Counsel argued that the marriage was not short and lasted four years more from the time the agreement was signed in 2012. Further that t*he agreement was contemplated by its very wording (usage of the car for a year, lump sum) for final separation at the time of signing which obviously was no longer the case four (4) years later when the second separation led to permanent separation of the marriage.* Additionally, he said between the years 2012 to 2016 the Claimant paid for utilities, groceries, insurance and mortgage payments and that her having done this it would not be fair that she be bound by an agreement which did not contemplate these circumstances.

[28] Counsel emphasized that the Claimant has been renting while the Defendant had the benefit of a home outright that she had for almost ten years committed her resources to. It was argued that w*hile* the Claimant was steadily employed and could fortunately afford to rent an apartment, to secure permanent housing required monies for down payment, insurance, various fees and taxes as well as furnishings all of which could reasonably be subsidized by her half value of the family home which she contributed to, again for the better part of the decade.

[29] Counsel contended that the terrible financial and other decisions made by the Defendant caused her financial hardship and undue stress. Further that the family home and other assets the Defendant was now enjoying, were retained by the Defendant as he was able to keep them due to the sacrifice of the Claimant, even after the settlement agreement.

[30] Counsel cited the case of **Luckwell v Limata** [20141 EWHC 502 (Fam) 130- 131 referred to in **KA v MA** at paragraph 67, where at *para 130, Holman J summarised the law in this way:*

> *"(1) It is the court, and not the parties, that decides the ultimate question of what provision is to be made;*
>
> *(2) The over-arching criterion remains the search for 'fairness', in accordance with s 25 of the MCA 1973 as explained by the House of Lords in Miller v Miller*; McFarlane v McFarlane *[2006] UKHL 24, [2006] 2 AC 618, [2006] 2 WLR 1283, [2006] 1 FLR 1186 (i.e. needs, sharing and compensation). But an agreement is capable of altering what is fair, including in relation to 'need';*
>
> *(3) An agreement (assuming it is not 'impugned' for procedural unfairness, such as duress) should be given weight in that process, although that weight may be anything from slight to decisive in an appropriate case;*
>
> *(4) The weight to be given to an agreement may be enhanced or reduced by a variety of factors;*
>
> *(5) Effect should be given to an agreement that is entered into freely with full appreciation of the implications unless in the circumstances prevailing it would not be fair to hold the parties to that agreement That is, there is at least a burden on the [claimant] to show that the agreement should not prevail;*
>
> *(6) Whether it will 'not be fair to hold the parties to the agreement' will necessarily depend on the facts, but some guidance can be given:*
>
> *A nuptial agreement cannot be allowed to prejudice the reasonable requirements of any children;*
>
> *Respect for autonomy, including a decision as to the manner in which their financial affairs should be regulated, may be particularly relevant where the agreement addresses the existing circumstances and not merely the contingencies of an uncertain future;*

> *There is nothing inherently unfair in an agreement making provision dealing with existing non-marital property including anticipated future receipts, and there may be good objective justifications for it, such as obligations towards family members;*
>
> *The longer the marriage has lasted the more likely it is that events have rendered what might have seemed fair at the time of making the agreement unfair now, particularly if the position is not as envisaged;*
>
> *It is unlikely to be fair that one party is left 'in a predicament of real need' while the other has 'a sufficiency or more';*
>
> *Where each party is able to meet his or her needs, fairness may well not require a departure from the agreement. "*

[31] Counsel *submitted based on the aforementioned analysis that there was no fairness in the agreement between the parties. Reference was made to* the case of **NA v MA** [2006] EWHC 2900 (Fam), where the court considered the weight of a post nuptial agreement. *The court made the following observations and stated:*

> *"In **Edgar v Edgar** [1980] 1 WLR 1410, as Ormrod LJ with whose judgment Oliver LJ agreed, said, at 1417C:*
>
> *"To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. "*

[32] Counsel submitted that b*ased* on the authorities and the evidence*, the said* agreement was unfair, unjust, inherently flawed and premised on several untrue financial considerations. The Defendant has perpetual benefit of the home to which the Claimant is entitled to half by law, and which she contributed to its purchase and helped with the payment of and maintenance in substantive ways between the first separation with the settlement agreement and the second separation four years later.

Submissions of the Defendant

[33] *Counsel referred to the general presumption laid down in **Balfour v Balfour** [19191 2 KB 571 (CA) that parties to a domestic agreement do not intend to create legal relations. Further that although the presumption may be rebutted by evidence*

of contrary intention, a mere subjective intention to create legal relations will not suffice. In domestic arrangements 'clear' evidence is required of an intention to create legal relations. It was stated that some of the factors to which the court will have regard in considering whether or not the presumption has been rebutted are the context in which the agreement was made, what was said when it was made and the certainty of the language used.

Counsel cited ***Merritt v Merritt*** *119701 1 WLR 1211, 1123 per Lord Denning: which demonstrated that an agreement between husband and wife in a "business context" that are about to separate or have separated, which are sufficiently certain, will rebut the presumption. The presumption does not operate because the parties "bargained keenly" and do not rely on "honorable understanding". They wanted everything cut and dried. It may safely be presumed that they intend to create legal relations.*

[34] *It was submitted that the complete context and the language of the settlement agreement was specific/certain and the intent of both parties were to create a legally binding agreement.*

[35] It was also contended that where one party acted to his detriment on the faith of the agreement a court may be willing to conclude that the agreement was intended to have legal consequences. Where the terms of an agreement are uncertain, there is a presumption that there is no intention to create legal relations (**Jones v Padavatton** [1969] 1 WLR 328 (CA). However, the presumption may be rebutted where there is both reliance and certainty of terms. Mr. Scarlett relied on and complied with all the terms of the June 20, 2012 Settlement Agreement. He paid into Mrs. Scarlett bank account $900,000.00 as negotiated and agreed.

[36] When Mrs. Scarlett was cross-examined by Counsel, she agreed that the Camry was purchased in April 2013 for approximately $850,000.00; she acknowledged that the said vehicle was insured but not certain of the cost; she also admitted that the she was the primary driver of the Camry and Mr. Scarlett removed his name

from the title; Mrs. Scarlett also indicated that she did not know where the monies came from to purchase the vehicle. However, she enjoyed the benefit and eventually owned a car valuing approximately $900,000.00)

[37] Counsel argued that Mr. Scarlett provided Mrs. Scarlett with a motor vehicle for 12 months (actually 14 months) as negotiated and agreed. He allowed Mrs. Scarlett to remove all the furniture and household items from the home as negotiated and agreed. On the 3rd day of December 2017, Mrs Scarlett further relied on said settlement agreement and removed the remaining furniture/household items from the home.

[38] *In **Albert v. Motor Insurers' Bureau** [1972] AC 301, 340*, the determining factor was the fact that the parties acted in reliance upon the agreement. The courts are reluctant to allow the parties to go back on their agreement once it has been acted upon. It was submitted that both Mr. and Mrs. Scarlett fully relied and acted upon all the terms of the June 20, 2012 Settlement Agreement. Mrs. Scarlett should not therefore be allowed to go back on the agreement after she fully relied on the terms, collected all monies and furniture/households items to the detriment of Mr. Scarlett.

[39] It is submitted that Mrs. Scarlett was never manipulated into signing the June 20, 2012 Settlement Agreement that was extensively negotiated by each party's independent attorneys. Mrs. Scarlett 'freely exercised her independent will' (**Inche Noriah v Shaik Allie Bin Omar** [1929) AC.127 at p.135) and was able to 'form an entirely free and unfettered judgement, independent altogether of any sort of control' (**Archer v Hudson** (1844) 7 Beav.551).

[40] *Both parties considered and complied with all the terms of the agreement. Mr. Scarlett heavily relied and complied, to his detriment. Mrs. Scarlett willingly agreed and accepted (with no undue influence) all that was offered to her. In December 2017, Mrs. Scarlett ensured that she removed the remaining furniture/household*

items that were promised in the said Agreement. At the time of the negotiation, both parties had legal guidance.

Issues

[41] The court must determine the following:

(i) Is the Settlement Agreement dated June 20, 2012 null and void, and not binding on the parties;

(ii) Is the Claimant entitled to a one-half share of the Defendant's interest in EM2P Company Limited;

(iii) Should the Defendant account to the Claimant for the earnings of EM2P Company Limited since the date of separation, January 1 7, 2016 and be directed to pay to the Claimant 22.5% of the earnings since that time, representing one-half share of the Defendant's interest

(iv) Should a maintenance order be made for the Defendant to pay to the Claimant the amount of J$76,000 per month for five (5) years;

(v) Should the Defendant repay to the Claimant in full the Bank of Nova Scotia Plan Loan No. 1367224 being principal of $539,968 and any and all interest accrued at 19.99% from August 26, 2015 to the date of repayment occasioned by the Claimant having obtained said loan to settle the Defendant's liabilities due to his unemployment;

(vi) Is the Claimant is entitled to a one-half share of the land and the dwelling house thereon located at 84 Bridgetown Place - Barbados, Caribbean Estates,

(vii) Is the Claimant entitled to one-half of the value of the 2010 Subaru Impreza WRX STI registered in the name of the Defendant;

(viii) Should the Defendant/Claimant, Cherri-Ann Camoya Scarlett, pay to the Applicant/Defendant, Ian George Scarlett a sum of One Million Eight Hundred and Fifty-Six Thousand Five Hundred and Eight Dollars and Fifty-Two Cents ($1,856,508.52) for unpaid credit card charges to the Applicant/Defendant's Scotiabank MAGNA MasterCard, Account Number 5201 7690 1038 7500 between February 2012 and February 2016.

(ix) Should the Defendant/Claimant, Cherri-Ann Camoya Scarlett, pay to the Applicant/Defendant, Ian George Scarlett a sum of Three Hundred and Forty-Five Thousand Dollars ($345,000.00) for storage fee.

(x) Should the Defendant/Claimant, Cherri-Ann Camoya Scarlett, pay to the Applicant/Defendant, Ian George Scarlett a sum of Two Hundred and Thirteen Thousand Five Hundred and Seventy-One Dollars Fifteen Cents ($213,571.15) for money spent to assist the Defendant/Claimant with her Scotia plan loan payments.

Analysis

Extension of time to file application under PROSA

[42] The Defendant argued that the Court should reject the Claimant's application for time to be extended for the filing of her application within Section 13(2) of The Property (Rights of Spouses) Act as she had "*permanently removed from the home approximately seventeen (17) months when she made her Application. He said that this is not in keeping with the twelve (12) month timeline dictated by the act.*"

[43] Section 13 of the PROSA states that:

> *"13- (1) A spouse shall be entitled to apply to the Court for a division of property- (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation ;….*
>
> *(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation,*

> *annulment of marriage,* ***or*** *separation* ***or*** *such longer period as the Court may allow after hearing the applicant.*

[44] The section provides options for when the twelve -month period starts to run. If the parties were married but the marriage is dissolved then it is from the dissolution of the marriage, if cohabiting then it starts at the termination thereof, if the marriage is annulled then from that date **or** if they were separated then from the time of their separation date or the court can decide the period.

[45] The parties are in the first category and the relevant date for them in my view is the date of dissolution of the marriage. These parties received their decree absolute on July 4, 2018. The application was made by fixed date claim form filed June 13, 2018. The application is therefore well within twelve months of the dissolution and in compliance with the statute.

[46] If I am wrong, then in using the provision for the court to apply its discretion to decide to allow the application the Court notes that the Defendant has not stated any reason apart from the non-compliance with the twelve-month period as to why the Claim should not be dealt with. The statute has already cured that issue by giving the court a discretion. The Defendant needed to provide a reason for the court not to exercise its discretion in favour of the application. In the absence of such reason the Court should allow the matter to proceed. In addition, these parties shared a family relationship and are bound in ways that even the dissolution of their marriage will not erase. The final treatment of these marital properties should be addressed and allow the parties to move on. The Defendant himself has made applications to the court indicating his willingness for the application to proceed. Neither party will be prejudiced by it going forward. The overriding objective in civil cases involves justice being done. I have also had regard to the overriding objective of the Civil Procedure Rules while applying the provisions of the enabling statute and I am satisfied that this is a fit case to exercise my discretion and allow the claimant to file a claim under Section 13(2) of PROSA. The claimant's application is therefore granted.

The Claims

[47] The Claimant must satisfy this court that the settlement agreement was null and void and therefore the court should treat with the matrimonial property pursuant to the provisions under PROSA regarding the family home and other matrimonial property. According to section 2(1*) of the Property (Rights of Spouses) Act "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 by a donor who intended that spouse alone to benefit;”*

Also by section 2 (1) of the same Act: *"property" means,*

> *‘any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled;”*

[48] These properties were acquired during the marriage. There is on the face of it no impediment to a division of these items between the parties under the rules of PROSA. The Act sets out how the family home is to be shared at section 6 where it states:

> *“(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home—*
>
> *(a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation; ….*
>
> *(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.*
>
> *7.-(1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into*

consideration such factors as the Court thinks relevant including the following-

(a) that the family home was inherited by one spouse;

(b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;

(c) that the marriage is of short duration.

(2) In subsection (1) "interested party" means- (a) a spouse; (b) a relevant child; or (c) any other person within whom the Court is satisfied has sufficient interest in the matter.

[49] However, the parties signed a settlement agreement regarding the division of the property they acquired in the marriage which would remove the need for the court's intervention and the application of the above sections of the PROSA. *By section 10-(1) Subject to section 19-*

(a) spouses or two persons in contemplation of their marriage to each other or of cohabiting may, for the purpose of contracting out of the provisions of this Act, make such agreement with respect to the ownership and division of their property (including future property) as they think fit;

(b) spouses may, for the purpose of settling any differences that have arisen between them concerning property owned by either or both of them, make such agreement with respect to the ownership and division of that property as they think fit.

(2) Without prejudice to the generality of subsection (1), an agreement may-

(a) define the share of the property or any part thereof to which each spouse shall be entitled upon separation, dissolution of marriage or termination of cohabitation; (b) provide for the calculation of such share and the method by which property or part thereof may be divided.

(3) Each party to an agreement under subsection (1) shall obtain independent legal advice before signing the agreement and the legal adviser shall certify that the implications of the agreement have been explained to the person obtaining the advice.

(4) Every agreement made pursuant to subsection (1) shall be in writing signed by both parties whose signatures shall-

(a) if signed in Jamaica, be witnessed by a Justice of the Peace or an Attorney-at-Law;

(b) if signed in a country or state other than Jamaica, be witnessed by-

(i) a person having authority by the law of such country or state to administer an oath in that country or state; or

(ii) a Jamaican or British High Commissioner or Ambassador, as the case may be, or a Jamaican or British Envoy, Minister, Charge d'Affaires, Secretary of Embassy or Legation or any Jamaican or British Consul-General or Consul or Vice-Consul or Acting Consul or Consul Agent exercising his functions in that country or state.

(5) Subject to subsection (7), an agreement to which this section applies shall be unenforceable in any case where

(a) there is non-compliance with subsection (3) or (4); or

(b) the Court is satisfied that it would be unjust to give effect to the agreement.

[50] The court finds that the settlement agreement dated June 20, 2012 is not invalid on the basis of non-compliance with the statute. There is no doubt that it was duly signed by the parties (after consulting with their attorneys), properly witnessed, and that the formalities were met. Its terms were set out in writing and it clearly outlined the division of the properties. It purported to give the Claimant in final settlement of all claims a lump sum of $900,000, use of the husband's car for one year or monthly payments in lieu and some itemized furniture and appliances. The Defendant was to receive the matrimonial home and itemized furniture and appliances. The Claimant admitted that she voluntarily signed it despite the objections of her legal adviser. On the face of it the agreement seems valid.

[51] The concept of fairness is however, another principle to be applied in these matters. The PROSA indicates that whether or not the agreement is unjust is relevant to enforcement and outlines what should be regarded. The court must consider whether or not this is so. The PROSA at section 10 (8*)* states:

"In deciding under subsection (5) (b) whether it would be unjust to give effect to an agreement, the Court shall have regard to-

(a) the provisions of the agreement;

(b) the time that has elapsed since the agreement was made;

(c) whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable;

(d) whether any changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) render the agreement unfair or unreasonable;

(e) any other matter which it considers relevant to any proceeding."

[52] In addition to the Statute there is authority at common law for what may make an agreement unjust. Counsel for the Claimant referred to the case of **KA v MA (supra)** for which the court is grateful and which has proven to be very helpful in this matter. The case in summary states:

"Where a wife had signed a pre-nuptial agreement, despite having been advised by her solicitor that she would be compromising her future rights by doing so and, notwithstanding her allegation that she had been pressured into signing the agreement prior to marrying the husband, the Family Division ruled that it could consider the prenuptial agreement, because there was no evidence that, by the time she had authorised the release of the signed agreement, the wife's free will had been completely overborne by any action or inaction on the part of the husband. The court ruled that the principle of autonomy and the parties' intentions had to be factored into the overall assessment of fairness in the case. However, notwithstanding the existence of the prenuptial agreement, it held that regard had to be had to all the factors set out in s 25(2) of the Matrimonial Causes Act 1973." https://www.lexisnexis.com/uk/legal/results/enhdocview.do?docLinkInd=true&ersKey=23_T29061012897&format=GNBFULL&startDocNo=0&resultsUrlKey=0_T29061012899&backKey=20_T29061012900&csi=279841&docNo=6&scrollToPosition=560(accessed on 11/5/2019 at 2:36pm).

[53] The case emphasized in the judgment of Mrs Justice Roberts, the requirement for both parties to "*of their own free will, without undue influence or pressure, and informed of its implications sign"*. At paragraph 49 the comment of Lord Philips of Worth Matravers in the case of **Radmaster (formerly Granatino v Granatino)** [2011] 1 All ER 373 was recited by Justice Roberts. He had said at paragraph 68-70 of that case:

> *"If an ante-nuptial agreement, or indeed a post-nuptial agreement, is to carry full weight, both the husband and wife must enter into it of their own free will, without undue influence or pressure, and informed of its implications….*
>
> *…. if it is clear that a party is fully aware of the implications of an ante-nuptial agreement and indifferent to detailed particulars of the other party's assets, there is no need to accord the agreement reduced weight because he or she is unaware of those particulars.* ***What is important is that each party should have all the information that is material to his or her decision, and that each party should intend that the agreement should govern the financial consequences of the marriage coming to an end.(my emphasis)***
>
> *It is, of course, important that each party should intend that the agreement should be effective. In the past it may not have been right to infer from the fact of the conclusion of the agreement that the parties intended it to take effect, for they may have been advised that such agreements were void under English law and likely to carry little or no weight. That will no longer be the case. As we have shown the courts have recently been according weight, sometimes even decisive weight, to ante-nuptial agreements and this judgment will confirm that they are right to do so. Thus in future it will be natural to infer that parties who enter into an ante-nuptial agreement to which English law is likely to be applied intend that effect should be given to it."*

[54] The Claimant in our case, having entered into the agreement fully informed and advised, is therefore presumed to have intended that the agreement be effective. Lord Philips, however went further and regarding the circumstances under which the agreement was made said at paragraphs 71 to 73:

> *"In relation to the circumstances attending the making of the nuptial agreement, this comment of Ormrod LJ in Edgar's case [1980] 3 All ER 887 at 893, [1980] 1 WLR 1410 at 1417, although made about a separation agreement, is pertinent:*
>
> *'It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel; all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. '*
>
> *The first question will be whether any of the standard vitiating factors: duress, fraud or misrepresentation, is present. Even if the agreement does not have contractual force, those factors will negate any effect the agreement might otherwise have. But unconscionable conduct such as undue pressure (falling short of duress) will also be likely to eliminate the weight to be attached to the agreement, and other unworthy conduct, such*

as an exploitation of a dominant position to secure an unfair advantage, would reduce or eliminate it.

The court may take into account a party's emotional state, and what pressures he or she was under to agree. But that again cannot be considered in isolation from what would have happened had he or she not been under those pressures. The circumstances of the parties at the time of the agreement will be relevant. Those will include such matters as their age and maturity, whether either or both had been married or been in long-term relationships before. For such couples their experience of previous relationships may explain the terms of the agreement, and may also show what they foresaw when they entered into the agreement. What may not be easily foreseeable for less mature couples may well be in contemplation of more mature couples. Another important factor may be whether the marriage would have gone ahead without an agreement, or without the terms which had been agreed. This may cut either way.

If the terms of the agreement are unfair from the start, this will reduce its weight, although this question will be subsumed in practice in the question of whether the agreement operates unfairly having regard to the circumstances prevailing at the time of the breakdown of the marriage. "

[55] This case aligns with section 10(8)(c) of the PROSA –"whether, in light of the circumstances existing at the time the agreement was made, the agreement is unfair or unreasonable" . On the Claimant's evidence in the instant case, she was put under pressure to agree to the document. She was already in an emotionally negative place as her father had died, there was infidelity on the part of both parties and she wanted to reconcile even if it meant signing to an agreement which could be to her detriment. She agreed to taking only a fraction of the marital property. On the face of it the agreement seemed unfair.

[56] Mrs Justice Roberts, in **KA v MA**, after considering the words of Lord Philips said

*"…….. I was taken to a decision of Baron J where a similar question arose in the context of a post-nuptial agreement: see **NA v MA** [2006] EWHC 2900 (Fam), [2007] 1 FLR 1760. At 18, her Ladyship said this:*

"… in a case involving a husband and a wife where it is clear that interdependence and mutual influence are the basis of the relationship, I consider that the court has to take special care when assessing the manner in which each party's conduct affected the other. For example, if a wife has been accustomed to placing reliance on her husband's decisions she might

be much more easily influenced than an individual in a commercial transaction……. '

……...In the earlier case of ***RBS v Etridge*** *(No 2) [2001] 2 FLR 1364, a decision of the Court of Appeal which Baron J had well in mind when she made these observations, Lord Nicholls had stated at p 1368:*

"Equity identified broadly two forms of unacceptable conduct. The first comprises overt acts of improper pressure or coercion such as unlawful threats. Today there is much overlap with the principle of duress as this principle has subsequently developed. The second form arises out of a relationship between two persons where one has acquired over another a measure of influence, or ascendancy, of which the ascendant person then takes advantage ...

In cases of this latter nature the influence one person has over another provides scope for misuse without any specific overt acts of persuasion. The relationship between two individuals may be such that, without more, one of them is disposed to agree a course of action proposed by the other. Typically, this occurs when one person places trust in another to look after his affairs and interests, and the latter betrays this trust by preferring his own interests. He abuses the influence he has acquired...

The law has long recognised the need to prevent abuse of influence in these 'relationship 'cases despite the absence of evidence of overt acts of persuasive conduct. .... Relationships are infinitely various...

Even this test is not comprehensive. The principle is not confined to cases of abuse of trust and confidence. It also includes, for instance, cases where a vulnerable person has been exploited. Indeed, there is no single touchstone for determining whether the principle is applicable. Several expressions have been used in an endeavour to encapsulate the essence: trust and confidence, reliance, dependence or vulnerability on the one hand and ascendancy, domination or control on the other. None of these descriptions is perfect. None is all embracing. Each has its proper place.

It is not essential that the transaction should be disadvantageous to the pressurised or influenced person, either in financial terms or in any other way. However, in the nature of things, questions of undue influence will not usually arise, and the exercise of undue influence is unlikely to occur, where the transaction is innocuous. The issue is likely to arise only when, in some respect, the transaction was disadvantageous either from the outset or as matters turned out. '

[57] The Court recognizes that there are various ways in which relationships can be abused and persons exploited. The fact of the disadvantage meted out to a party is a possible red flag or indicator that there was some undue influence and exploitation under which the Claimant signed the agreement and was therefore not

entering of her own free will but under duress to do so. The Defendant disputes this. He said the Claimant was advised by her counsel and made her choice.

[58] In **NA v MA** [2006] EWHC 2900 (Fam), the court there said:

> *In **Edgar v Edgar** [1980] 1 WLR 1410, as Ormrod LJ with whose judgment Oliver LJ agreed, said, at 1417C:*
>
> *"To decide what weight should be given in order to reach a just result, to a prior agreement not to claim a lump sum, regard must be had to the conduct of both parties, leading up to the prior agreement, and to their subsequent conduct, in consequence of it. It is not necessary in this connection to think in formal legal terms, such as misrepresentation or estoppel, all the circumstances as they affect each of two human beings must be considered in the complex relationship of marriage. So, the circumstances surrounding the making of the agreement are relevant. Undue pressure by one side, exploitation of a dominant position to secure an unreasonable advantage, inadequate knowledge, possibly bad legal advice, an important change of circumstances, unforeseen or overlooked at the time of making the agreement, are all relevant to the question of justice between the parties. Important too is the general proposition that, formal agreements, properly and fairly arrived at with competent legal advice, should not be displaced unless there are good and substantial grounds for concluding that an injustice will be done by holding the parties to the terms of their agreement. There may well be other considerations which affect the justice of this case; the above list is not intended to be an exclusive catalogue. " Oliver LJ similarly enunciated the general principle at 142E-F:*
>
> *"... in a consideration of what is just to be done in the exercise of the court's powers under the Act of 1973 in the light of the conduct of the parties, the court must, I think, start from the position that a solemn and freely negotiated bargain by which a party defines her own requirements ought to be adhered to unless some clear and compelling reason, such as, for instance, a drastic change of circumstances, is shown to the contrary, "…….*

[59] The main principle gleaned for consideration therefore is that genuine consent to the agreement is needed and that fairness to the parties may be inferred based on their conduct and circumstances before and after signing. There is no doubt that the wife in our instant case felt similarly the victim of an ultimatum as in the Edgar case. She had been asked to move out of the home as a result of her infidelity. Her evidence was that she was allowed back in only as the Defendant needed financial help. The Defendant said he allowed her to come back because there were security issues with her new place of abode. She said he told her that

if she wanted the marriage however, then she would sign the agreement. She said she did and thereafter they reconciled. The Defendant said they never reconciled.

[60] The court accepts regarding the couple's first separation that the Claimant had moved out at the Defendant's request. He has not denied that. The court accepts that the Claimant moved back into the house with the permission of the Defendant. He has not denied this. In fact, he said he allowed her in because where she lived was unsafe and had issues financially. She said she had moved back in at his request as he had financial issues. Either way, he had decided.

[61] The court accepts that they were reconciled after the Claimant moved back into the house. The Defendant admits that they had intercourse after she moved back in and that he had only resolved not to have sex with her in 2015. The court is not aware as to whether he stuck to his resolve. The payment of bills on her credit card indicates her contribution to the household. The dates were not seen on the statements but the Defendant did not deny that she paid some bills. They shared their credit cards even after the agreement, both allowing the other to use each card and both saying they repaid their parts. This indicates partnership and comity. They shared at least one motor car which was driven by the Claimant though the Defendant's name alone was on the title. He took in her mother. He said her mother was in need and she said it was done to help her take care of future children. The court does not accept that the Claimant's mother was there for future grandchildren as there were none. The Claimant was not said to be pregnant anywhere in the facts. Her being in need was a more believable explanation. The Defendant helped his mother-in-law to have a place to stay. Regardless of the reason, her presence shows a sense of family that she should be in the house. It did not indicate a temporary situation as he had suggested. The Claimant said they wore their rings, went out as a couple and the Defendant gave her gifts after the agreement. The Defendant has not challenged this. These parties had reconciled however fragile the bond. The fact of the agreement being signed is not in dispute. The court finds that they had, after it was signed, conducted themselves, in such a way that it implied reconciliation.

[62] From the evidence the Court can only draw the inference that the agreement was a condition of the continuation of the marriage. The Defendant had not evicted the Claimant since 2012 after signing the agreement despite saying they were not reconciled and were only temporarily living together and despite the agreement requiring her to vacate the home. The Claimant remained in the house for years afterwards. She was a woman who was by her own evidence and by the evidence of the Defendant gainfully employed. There is no reason she would have stayed in the home for so long after the agreement unless she was of the view that they had reconciled. Even if she could not afford to buy a house, surely she could have rented a place other than the one in Barbican as she eventually did when they really separated. Surely she could have found alternative accommodation elsewhere before then. He too would not have had sexual relations with her, despite its alleged infrequency, if they had not been reconciled, fragile union or not. It was his evidence that they fell weak to the flesh and tried to salvage the relationship. The conduct of the parties after the agreement suggests that it was the condition under which the marriage continued.

[63] The Claimant said she signed for the sake of her marriage. Thus indicating her state of mind. She really wanted to continue the relationship. Yet she was not the only guilty party. The Defendant himself admits to indiscretions yet he kept the lion's share of their marital property by this agreement. It wreaks of unfairness, spite, abuse of power and undue influence. He not only had the power as the house and car were in his name, but he used it. She was to have a small lump sum, the use of the car for a year and some furniture and appliances while he took the home and much of the furniture and appliances despite the fact that they both were unfaithful.

Time lapse and Change in circumstances

[64] By section 10(8) (b) and (d) of PROSA- the time that has elapsed since the agreement was made and changes in circumstances since the agreement was made (whether or not such changes were contemplated by the parties) are valid

considerations as to whether the agreement is now unfair or unreasonable and hence unjust to enforce same.

[65] This was not short marriage and the parties continued to live together for years after the agreement. The court agrees that the longer the marriage has lasted the more likely it is that circumstances may have changed, rendering what would have seemed fair then, now unfair. The court is of the view that they had reconciled after the agreement, and however fragile their relationship, it is clear from the evidence that they both fulfilled various roles and responsibilities at the home. This marriage continued 4 years after the agreement was signed and during said period the parties continued to share a bank account and credit card, and engage in sexual intercourse with each other. The Claimant contributed financially to the household (being utilities, groceries, insurance and payments in respect of the property during that time). It would now be unfair that she be bound by the agreement.

[66] Regarding the lump sum payment of $900,000.00, the Claimant denied receiving same. She agreed that the wording of the agreement suggested that having received the lump sum, she signed the document. The Defendant insisted that he had paid her the sums from his redundancy payment but produced no evidence of the transaction. The Claimant further denied under cross examination that she had received the benefit of the $900,000.00 in the form of a car purchased for the sum of $850,000.00 for her use. She also denied that the $900,000.00 had been transferred to another account held solely in her name. The suggestion of this range of possible means by which the lump sum was paid has led the court to believe that the Claimant has not received this money.

[67] It is also worthy of note that the agreement stated that the Claimant should have moved out within three months of the date the agreement was signed. The parties have not complied with the terms of the agreement. It was not being treated as one to be legally enforced once it was signed. Not only was there a failure to comply with its terms, but conditions had changed fuelled by the continuation of their relationship.

Inability of the Agreement to meet the needs of the parties

[68] By section (10) (8)(a) of the PROSA the provisions of the agreement are a valid consideration as to whether or not it would be unjust to enforce it. Regarding the needs of the parties this is a reflection or indicator of whether the agreement should be deviated from or not. The enforcement of the agreement would not adequately meet the needs of the Claimant who having spent her resources on the Caribbean Estate home should receive a benefit which would allow her to buy her own. The Claimant is employed however she argues that the requirements to acquire a new home could be met reasonably by her receiving half of the value of the family home.

[69] Her attorneys also state that she is in need of maintenance. The court is mindful of its obligations to consider and give *"appropriate weight"* to these agreements and that these agreements should *not oust the jurisdiction of the court. It is noted* that *it is unlikely to be fair that one party is left 'in a predicament of real need' while the other has 'a sufficiency or more';* and also that the question of fairness may require a departure from the agreement. For all these reasons the agreement is invalidated. It is unjust and will not be enforced.

Dividing the property without the Agreement

[70] The court will therefore treat with the properties according to the usual provisions of the PROSA. Regarding the house, the Claimant asserts that it is the family home. The Defendant says that others have an interest in the house. Section 2 of the PROSA defines the "*family home" as the dwelling-house that is wholly owned by either or both of the spouses."*

[71] The court recognizes that only the name of the Defendant appears on the title. However, there is also a letter from the Defendant's uncle to the sellers New Era Homes, dated August 28, 2007, on which the Defendant relies as proof that his uncle had an interest the property. This letter indicates that his uncle asked for his name to not appear on the title as his only interest is to contribute his NHT points

used in the acquisition of the property. Points did not give an interest. Yet there were also exhibited receipts dated July 17, 2006 indicating payment from the Defendant and Osmond Gibson to New Era Homes limited for the deposit of $1,274,100.00. This money would have indicated an interest. Further, a letter dated September 4, 2008 exhibited from Scotia Jamaica Building Society addressed to the Defendant and Mr Osmond Gibson as customers and outlined details of the mortgage for the property. The view of the court is that he was on the record not as a result of his points contributed but clearly he had contributed money along with his nephew, the Defendant, to the purchase and had an interest in the property.

[72] The Defendant also exhibited the account statements of Eula May Gibson from September 2006 to December 31, 2015 from JMMB and a cheque in the sum of $US13,050.00 made out to Joseph Holding Limited dated July 16, 2007 (used to purchase local Jamaican Dollars for deposit for property).

[73] Counsel for the Claimant admitted his client's awareness of these other possible interests in the property. They however dismissed these interests as false. Counsel referred to the Defendant's evidence that the Claimant was originally insisting on an equal share of the property but agreed to forego same and take a lump sum because there was significant debt on the property to his mother and uncle who contributed to the purchase and had liens against the property. But the evidence suggests that the Uncle had no interest in the property, merely contributed his NHT points and made no other financial contribution. It is also of note that a certified copy of the title was provided to the Court and there is no interest of either the Uncle or the mother noted nor are there any liens endorsed thereon.

[74] The deposit on the house was taken from funds held in a JMMB account in the names of both the Defendant and Claimant. The Claimant's undisputed evidence was that she personally contributed thousands of US dollars to that account which was deposited by the Defendant's mother while she and the Defendant were overseas. The Defendant stated that the account was opened to benefit his mother

and the funds therein were the proceeds of an accident settlement. He subsequently admitted that he and the Claimant had also placed monies in the account. The monies were therefore obviously muddled, but the Defendant insisted that the Claimant's money was lost in a failed joint venture and was therefore not a part of he and his mother's money that paid the deposit. Despite being taken through an exercise during cross examination, the Defendant was unable to show the court how this separation of the monies took place.

[75] It is not readily apparent to this court that either the mother or the uncle have any interest in the property. Further in light of the absence of any evidence of a lien there is merit in Counsel's submissions that the financial situation described to the Claimant at the time of agreement was not the true position. The property is registered solely in the Defendant's name. The Defendant's uncle requested that his name not be placed on the title but his name appears on the receipt for the deposit. The court notes however that in his letter to the vendor he said clearly that his only interest was to contribute his points from NHT. On the mortgage letter however, the bank recognized him as a part owner.

[76] The uncle's letter suggests that he intended to make a gift of a financial contribution to the purchase of the property by his nephew. The letter showed that he did not want any interest in the property and his name was not placed on the title as per his wishes. On the face of it the owner is the Defendant. The Defendant's evidence is that he was financially assisted by his uncle and mother and he refers to them having an investment. He also said that his uncle's investment was registered against the property with Scotiabank Building Society. What was exhibited to the court from Scotia Jamaica Building Society was in fact a letter from them to the Defendant and his uncle outlining the payment schedule for the mortgage. This letter is not evidence of an interest in the property.

[77] Regarding the Eulah Gibson's interest Counsel for the Defendant submitted *that* Mrs. Scarlett did not contribute to the deposit used to secure the home in question and it was Ms Eulah Gibson's money that was used as an investment. There is no

proof of whether Eulah Gibson paid her own money or money from the parties. It has not been challenged that the JMMB account held monies from both the Claimant and the Defendant. When asked under cross examination about depositing funds into said account, the Claimant answered that "personally" she had not. This supported her previous evidence that while working overseas she would send the US dollars earned to her mother in law in Jamaica, and she would in turn make the deposit for her. Further there was no proof of a link between the money on the cheque from the JMMB account and the property that was bought. It was just a cheque made out to Joseph Holding Limited dated July 16, 2007. There was no proof it was used to purchase local Jamaican Dollars for deposit for property. The court is satisfied that neither the Defendant's mother nor his uncle has any interest in the Caribbean Estate property.

[78] The house being registered solely in the Defendant's name raises the question as to whether it is to be treated as the family home. I find on the evidence that the house situated at 84 Bridgetown Place, Caribbean Estates, was used habitually by the Claimant and the Defendant as the only family residence. It is the family home. Therefore the Claimant is entitled to one-half share on the grant of the decree of dissolution of the marriage.

Other properties

[79] Regarding the other properties for division in this matter Section 14(1) of the PROSA sets out the law in relation to the division of these. It states:

> *"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)."*

[80] Section *14(2)* stated:

“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.

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

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

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

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

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

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

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

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

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

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

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

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

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

Interest . in EM2P Company Limited and the 2010 Subaru Impreza WRX STI

[81] These interests were acquired after the parties were married. The Claimant's contribution, financial or otherwise, directly or indirectly made to the acquisition, conservation or improvement of these properties will be examined. While it is disputed as to the extent, it cannot be denied however that the Claimant assisted the Defendant financially overall by paying some of the bills. The court has seen credit card statements and has concluded that she did contribute to the home management financially. Her financial contribution to the household meant that the Defendant had more of his own money to spend.

[82] She said she did more when the Defendant was unemployed. The Defendant has denied the Claimant's claim that he received help from her when she claims he lost his job. There is no evidence that he was ever unemployed and he denied that he was. In addition, the Defendant claimed to be self-employed and there has been no disputing this. The Claimant admitted he indeed did projects.

[83] In relation to her non- financial contribution the Claimant said she cooked some meals, did major cleaning and helped and facilitated the formation of the Defendant's company. The court cannot speculate. However, on the face of it, it seems to be safe to say the Claimant helped in the *management* of the household and the performance of household duties and gave assistance which indirectly aided the other spouse in the acquisition or creation of property.

The Claimant's entitlement to a one-half share of the Defendant's interest . in EM2P Company Limited

[84] There has been no evidence of the Claimant's involvement in the company. She admitted that she never worked directly for the company but said she had brought the partners together, allowed them space, spent money, facilitated contracts, promoted them, prepared documents, allowed them to use her credit card, and

gave guidance. The spreadsheet which the Claimant said was prepared by the Defendant and which she says indicates her spending of monies including that for the company, and which was exhibited to the Court, has specific identifier for money spent on company items. It is however no more than a list of figures. There is no admission that it was made by the Defendant and that the figures are as stated. The Court cannot use this document as proof of its authenticity has not been adduced.

[85] The Defendant denied that she facilitated or assisted the company. No witnesses have been called in support either way. This is especially alarming on her part as she says his partners were her friends, her brother was the company secretary and the other team members were her former students. She herself admits keeping her distance from the company as she says the Defendant needed to be in control and she wanted to have her own income and would better assist the company from the University. Any contribution to the company in this regard has not been proven. The contribution she made are relevant more to the home and both of them did that.

[86] As for him benefitting from her financially, the Defendant said however that she was the financial burden and though she paid some bills she was an enthusiastic spender and still owed him money on his credit card bill. She, on the other hand, also accused him of heavy spending occasioning a loan which she had to rectify. She denied being excessive but admitted using the Defendant's credit card. The Court cannot determine who was the excessive spender from the credit card statements seen. Both parties agree that they used it.

[87] In light of the above, the court cannot find any contribution to the Defendant attributable to the Claimant that assisted in his company and for which an interest in the Defendant's share in the company to the Claimant should be granted.

[88] The court has found no reason for the Defendant to be made to account to the Claimant for the earnings of EM2P Company Limited since the date of separation,

January 1 7, 2016 and be directed to pay to the Claimant 22.5% of the earnings since that time, representing one-half share of the Defendant's interest

2010 Subaru Impreza WRX STI

[89] ” *The 2010 Subaru Impreza WRX STI is registered in [the Defendant’] s name and was purchased using funds from the sale of a* ***2004 Subaru motor car which was jointly acquired and was purchased through a loan which Ian had obtained. That I am entitled to half of the value of this vehicle as it was my contribution to Ian's debts that allowed him to retain ownership of this*** *car and it was acquired during the marriage (para 34 of her Affidavit in support of fixed date claim form).*

[90] The Defendant responded at paragraph 79 of his affidavit in response that *“In response to paragraph 34, this is in contradiction with paragraph 19 of her affidavit. These claims are entirely false and the Claimant has no entitlement to my vehicle, whether legal or financial. All assets, including the Subaru was considered in the settlement agreement of June 2012.”*

[91] The court has already set aside the agreement as invalid. At paragraph 19 of her affidavit the Claimant had said “*That during the said period, I added the mortgage to my monthly payments and most of Ian’s payments went into servicing a car loan that was $108,000 per month. At the point of purchasing this car, we had sold a previous car that we both owned and I told him to use some of the money as a deposit on the new car so that the monthly payments would be lower but as was usually the case, he did not take my financial advice and later we ended up losing money as a result of it*…….”

[92] Clearly the Claimant cannot be believed as she said in one breath that the car was bought with funds from their jointly owned car as well as that it was not as the Defendant did not take her advice. Both cannot be true. In addition, she said the Defendant was the one who paid for the car. The court has already considered non- financial contribution including assistance and support to the Defendant’s

acquisition of properties and determined that there was no overall net positive effect. Her interests in the car are therefore nil.

Maintenance Order

[93] The Claimant asks for a maintenance order be made for the Defendant to pay her the sum of J$76,000 per month for five (5) years. She believed she was entitled to a maintenance order under Section 5 of The Maintenance Act to assist her in putting herself in a better financial, emotional and physical position due to the numerous debts, emotional trauma and declining state of health incurred during the marriage occasioned by the Defendant's actions.

[94] She said that the amount of $76,000 is the amount that she had paid for the mortgage and the loan payments which were his responsibility, and proposed to the Court *that this sum should be a starting point for any consideration of spousal support*. She said "*this sum would allow me to have the financial ability to further my studies and to assist me in recovering from the terrible financial and other decisions made by Ian which has caused me great financial hardship and undue stress. The assets to which Ian now claims and enjoys which I am claiming herein, were retained by him solely because of the sacrifice and financial discipline which I exercised during the marriage."*

[95] The Matrimonial Causes Act states at section 23(1) that,

> *"The Court may make such order as it thinks just for the custody, maintenance and education of any relevant child or for the maintenance of a spouse-*
>
> *(a) in any proceedings under section 10, or in any proceedings for dissolution or nullity of marriage before, by or after the final decree;*

By section 23 (2) an order under subsection (1) for the maintenance and education of any relevant child or for the maintenance of a spouse shall be in accordance with the provisions of the Maintenance Act

[96] The maintenance Act at section 6 says,

> *"(1) In the case of cohabiting parties and subject to the provisions of this section, after the termination of cohabitation each spouse has an obligation, so far as he or she is capable, to maintain the other spouse to the extent that such maintenance is necessary to meet the reasonable needs of the other spouse, where the other spouse cannot practicably meet the whole or any part of those needs having regard to-*
>
> *(a) the circumstances specified in section 14(4);*
>
> *and (b) any other circumstances which, in the opinion of the Court, the justice of the case requires to be taken into account.*
>
> *(2) An application for maintenance upon the termination of cohabitation may be made within twelve months after such termination, and the Court may make a maintenance order in accordance with Part VI in respect of the application."*

[97] There appears to be a conflict between the two acts as the Maintenance Act says the application must be made within 12 months of separation and the Matrimonial Causes Act says it may be made once the petition is presented. The conflict is resolved as the application is made under the Matrimonial Causes Act.

[98] *I ruled that the application could proceed by virtue of section 23(1)(a) of the Matrimonial Causes Act, as proceedings were for the dissolution of the marriage between the parties. Section 23(2) empowers the court to make the maintenance order sought, which if granted should be made in accordance with the factors outlined in Maintenance Act.* Time does not therefore affect the application for maintenance under the Matrimonial Causes Act once the petition has been filed. The factors under the maintenance Act are relevant however.

[99] Section 14(4) of the Maintenance Act says:

> *"In determining the amount and duration of support, the Court shall consider all the circumstances of the parties including the matters specified in sections 5(2), 9(2) or 10(2), as the case may require, and-*
>
> *(a) the respondent's and the dependant's assets and means;*
>
> *(b) the assets and means that the dependant and the respondent are likely to have in the future;*
>
> *(c) the dependant's capacity to contribute to the dependant's own support;*

(d)the capacity of the respondent to provide support;

(e) the mental and physical health and age of the dependant and the respondent and the capacity of each of them for appropriate gainful employment;

f) the measures available for the dependant to become able to provide for the dependant's own support and the length of time and cost involved to enable the dependant to take those measures;

g) any legal obligation of the respondent or the dependant to provide support for another person;

h) the desirability of the dependant or respondent staying at home to care for a child;

I) any contribution made by the dependant to the realization of the respondent's career potential;

j) any other legal right of the dependant to support other than out of public funds;

k) the extent to which the payment of maintenance to the dependant would increase the dependant's earning capacity by enabling the dependant to undertake a course of education or training or to establish himself or herself in a business or otherwise to obtain an adequate income;

l) the quality of the relationship between the dependant and the respondent;

(m) any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.

[100] The aim of the Act is to provide for the needs of the recipients, in our case -both spouses, as far as the means of the payer will allow. Both spouses are eligible for maintenance from each other. The Claimant has made an application. The Defendant has not. Her needs and the Defendant's means need to be shown.

[101] In the case of **Albert Martinez-Martin v Racquel Anita Murcott Parke** [2019] JMSC Civ. 22 in the judgment of Lindo J. the case of **Suzette Hugh Sam v Quentin Hugh Sam** [2015] JMMD FD1 was referred to:

*"In the **Hugh Sam** case, also, the learned judge outlined what a judge looks for when considering whether to award maintenance to a former spouse. At paragraph [52] of his judgment, he states:*

> *"It must be demonstrated by evidence, firstly that the spouse who is tasked with the responsibility of spousal maintenance has the capability to fulfil that role. Secondly, the claimed maintenance must be demonstrably necessary. Thirdly, the needs being considered must meet the bar of reasonableness. Finally, the evidence must show that it is impractical for the spouse to wholly or partially satisfy those needs."*
>
> *In the case of **Alfred Robb v Beverley Robb**, Claim No 2005/D01148, unreported, delivered December 11, 2009, a case cited by Counsel for the Respondent, in which an award of maintenance was made to the wife, E. Brown J (Ag.) (as he then was), after stating the legal basis of an application for an order for spousal maintenance, as set out in section 4 of the Act, at paragraph 18 of his judgment, had this to say:*
>
> *"The obligation to maintain the other spouse is, in the first instance latent. It is activated by the inability of the other spouse to maintain himself or herself. So, the court has to make, as a condition precedent to a maintenance order, a threshold finding that the dependant spouse cannot practicably meet the whole or part of her reasonable needs..."*
>
> *I therefore find that the starting point in determining whether the Petitioner is to be ordered to contribute to the maintenance of the Respondent, is to determine what the reasonable needs of the Respondent are and whether she is able to meet the whole or part of those needs, and then assess the Petitioner's capability to provide maintenance to the extent that is necessary to meet her reasonable needs.*
>
> *The issue in relation to maintenance of the Respondent, I find, has to do with what her reasonable needs are, considered against her ability to meet those needs and the Petitioner's ability to provide support to assist in meeting those needs. I also bear in mind the other considerations as set out in section 14(4) of the MA."*

[102] The Claimant has not outlined her needs and expenses. The amount of $76,000 was not based on her needs but based on the amount she had paid for the loan and mortgage which she said were his responsibility. The court has not accepted that either party had not owed the other and in any event the amount was not based on his means. She needed housing however and this was a valid need especially in light of the Defendant having the house. Yet she has not shown that she cannot provide this for herself as the cost of housing which she would like has not been given to the Court however.

[103] In relation to her need to further her education it makes sense and is reasonable that if she did she would be better able to support herself in the future. She has

not shown however that she could not provide that for herself. In our case the court has not been provided with the expenses and he current income of the parties.

[104] The Means and expenses are only one consideration however. Section5(2) states:

> *" In determining the amount and duration of support to be given, to a spouse under a maintenance order, the Court shall have regard to the following matters in addition to the matters specified in section 14(4)- the length of time of the marriage or cohabitation; the spouse's contribution to the relationship and the economic consequences of the relationship for the spouse; the effect of the responsibilities assumed during the marriage or cohabitation on the spouse's earning capacity; the spouse's needs, having regard to the accustomed standard of living during the marriage or cohabitation; whether the spouse has undertaken the care of a child of eighteen years of age or over who is unable, by reason of illness, disability or other cause, to care for himself any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support; the effect of the spouse's child care responsibilities on the spouse's earnings and career development; the terms of any order made or proposed to be made under the Property (Rights of Spouses) Act in relation to the property of the parties; the eligibility of either spouse for a pension, allowance or benefit under any rule, enactment, superannuation fund o scheme, and the rate of that pension, allowance or benefit.".*

[105] The Claimant said she wanted maintenance to "*assist [her] in recovering from the terrible financial and other decisions made by Ian which has caused [her] great financial hardship and undue stress."* She has not said how this would help her to recover from his decisions. It seems like compensation is what the Claimant is seeking. I do not think the purpose of maintenance is for payback or retribution.

Repayment to the Claimant in full Bank of Nova Scotia Plan Loan No. 1367224

[106] The credit card from Scotia bank in the name of the Defendant showed the period October 2014 –December 2015. He had significant balances in the range of hundreds of thousands of dollars. The Defendant said that the Claimant owed these. The court cannot determine if this is true, there is no indication of who used the card when or where. The Claimant admits using he card but asserts that she paid her part. The Defendant disputes this and wants her to repay him. But his own expenses are there and are not differentiated.

[107] The parties were in a marital relationship and the court notes that they were divorced on July 4, 2018. There is no indication that the Claimant had determined from the time she decided to assist the Defendant with her card (if that is to be believed) that she that if he defaulted she would take legal action if the parties had divorced. In other words, their agreement or not was binding in honour only and the court cannot enforce that.

[108] The court does not think he should be made to repay her in the absence of proof of a contract to do so.

[109] Should the Claimant, pay to the Applicant/Defendant, One Million Eight Hundred and Fifty-Six Thousand Five Hundred and Eight Dollars and Fifty-Two Cents ($1,856,508.52) for unpaid credit card charges to the Applicant/Defendant's Scotiabank MAGNA MasterCard, Account Number 5201 7690 1038 7500 between February 2012 and February 2016.

[110] The court has heard both sides claim to be owed monies in relation to their credit cards. As in the case of **Balfour v Balfour** [1919] 2 KB 571 (CA) clear evidence must be presented to support an intention to create relations, as there is a presumption that persons in relationships such as these do not intend to do so. The evidence before the court is that both parties contributed to the credit card bills. Where either party spent much, it was with the full knowledge that they were spouses and could put the other party in peril. It was a risk that each took in letting the other spend and in deciding to tale on liabilities of each other.

Should the Claimant pay to the Defendant Three Hundred and Forty-Five Thousand Dollars ($345,000.00) for storage fee.

[111] There was no evidence of a contract to pay these fees. He did not indicate how and when the parties had arrived at this agreement. The Claimant denied knowledge of it. On that basis the Court will not order the Claimant to pay the storage fee.

Should the Claimant pay to the Defendant Two Hundred and Thirteen Thousand Five Hundred and Seventy-One Dollars Fifteen Cents ($213,571.15) for money spent to assist the Claimant with her Scotia plan loan payments.

[112] The Court did see that as the Claimant said there was a transfer of $501, 000 from hers to the Defendant's account on August 28. The year is not known. We also see that the Claimant took out a loan for $539960 on April 5, 2016. Which was paid off on January 11, 2018. As confirmed by a letter from the Scotia Bank.

[113] It suggested she had taken a loan and also that she gave the money to the Defendant. It could be taken as she said: that she gave it to him to pay his loan and he was to repay her. He said she was the one who had spent on his credit cards and he was helping her to repay her loans and so she owed him. She denied owing any sums and emphasized that he said he had admitted using the money to pay the credit card bill.

[114] The Court can only safely say that the Claimant borrowed money and paid it to the Defendant. It is consistent with her trying to help him cover his own debt but It is also consistent with her owing him for credit card debt that she should repay him. It is illogical that he should be helping her to repay the loan if she was owing him. If that were so, he would be receiving his money owed by her to him only to pay her back. The only way to determine the true party owing though would be to look at the credit card statements and identify the spender but that will not help in our case as they both used their cards and there is no indication of who bought what.

[115] In addition, no year is stated on the statements. He has not admitted using her card. She has shown no proof he was paying her for monies owed to her. She has however admitted using his card. Though she said she paid up The court cannot ascertain this in its entirety or at all. Extensive accounting would need to be done. In that regard she will not be required to pay the Defendant at this time.

Conclusion

I. It is therefore declared that the Settlement Agreement dated June 20, 2012 is null and void and of no effect and not binding on the parties.

II. The declaration sought that the Claimant is entitled to a one half share of the Defendant's interest in EM2P Company Ltd is refused.

III. The maintenance order sought for the Defendant to pay $76,000.00 to the Claimant is refused.

IV. The order sought directing the Defendant to repay the sum of $539,968.00 plus interest to the Claimant is refused.

V. The order sought that the Defendant account to the Claimant for the earnings of EM2P Company Ltd and that the Defendant pay to the Claimant 22.5% of the earnings is refused.

VI. It is declared that the dwelling house currently held solely in the name of the Defendant located at 84 Bridgetown Place, Barbados, Caribbean Estates, Portmore, St. Catherine, is the family home.

VII. The Claimant is entitled to a one half share of the family home being all that parcel of land and the dwelling house thereon located at 84 Bridgetown Place, Barbados, Caribbean Estates, Portmore in the parish of St. Catherine, being the lands registered at Volume 1421, Folio 869 of the Register Book of Titles.

VIII. The Defendant herein shall have the right of first refusal to purchase the interests of the Claimant in the said property. If he is unable or unwilling to purchase same within 60 of the date hereof then same shall be sold on the open market.

IX. Whether purchased by the Defendant or sold on the open market, the price of the property shall be determined by a valuation report prepared by an independent valuator agreed by the parties within 14 days of the order

hereof. Should the parties fail to agree same, a valuator shall be appointed by the Registrar of the Supreme Court.

X. Both parties shall bear the cost of the valuator equally.

XI. The Registrar of the Supreme Court is empowered to sign any document required for the sale and transfer of the property if the Defendant neglects or refuses to sign said documents.

XII. The declaration sought that the Claimant is entitled to one half the value of the 2010 Subaru Impreza is refused.

XIII. The order sought that the Claimant pays to the Applicant/Defendant, One Million Eight Hundred and Fifty-Six Thousand Five Hundred and Eight Dollars and Fifty-Two Cents ($1,856,508.52) for unpaid credit card charges to the Applicant/Defendant's Scotiabank MAGNA MasterCard, Account Number 5201 7690 1038 7500 between February 2012 and February 2016 is refused.

XIV. The order sought that the Claimant pays storage fees to the Defendant is refused.

XV. The order sought that the Claimant pays to the Defendant Two Hundred and Thirteen Thousand Five Hundred and Seventy-One Dollars Fifteen Cents ($213,571.15) is refused.

XVI. Each party shall bear their own costs.