[2018] JMCA Civ 15

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 4/2015

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA (AG)

BETWEEN	**SUZETTE ANN MARIE HUGH SAM**	**APPELLANT**
AND	**QUENTIN CHING CHONG HUGH SAM**	**RESPONDENT**

Stephen Shelton QC, Miss Maliaca Wong and Miss Stephanie Ewbank instructed by Myers Fletcher and Gordon for the appellant

Gordon Steer, Mrs Judith Cooper-Bachelor and Mrs Kaye-Anne Parke instructed by Chambers Bunny and Steer for the respondent

28, 29 and 30 June 2016 and 4 May 2018

PHILLIPS JA

[1] I have read in draft the judgment of Edwards JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

F WILLIAMS JA

[2] I too agree and wish to add nothing further.

EDWARDS JA (AG)

Background

[3] This is an appeal from the decision and orders made by P Williams J (as she then was) on 16 December 2014. The appellant, Suzette Hugh Sam, had applied by way of a fixed date claim form, pursuant to the Property (Rights of Spouses) Act (PROSA), for a declaration that she was entitled to a one-half interest in several properties which she alleged that the respondent, Quentin Ching Chong Hugh Sam, her former husband, owned or had an interest in.

[4] Part of the background to the claim was amply set out in paragraph [2] of the judge's reasons for judgment as follows:

> "The parties were married in November of 1998 after having lived together from 1995. At the time of their marriage the claimant was pregnant with their first child who was born in May of 1999. A second child was born in April 2001. The marriage deteriorated and by 2010 the parties resided in separate quarters in the same house. The defendant say [sic] that 'differences' had started from in or around 2008 whereas the claimant say [sic] they started in or around 2005. In any event it was the defendant who filed for divorce and the claimant was served with the petition for dissolution of marriage on the 26th of May 2012."

[5] The orders and declarations sought by the appellant in the court below were as follows:

> "1. That the Claimant is entitled to one-half interest in all that parcel of land situate at Lots 15 and 16 Peter's Rock in the Parish of Saint Andrew…

2. That the Claimant is entitled to one-half interest in all that parcel of land situate at lot [8], 4 Dillsbury Avenue, Kingston 6 in the Parish of Saint Andrew…

3. That the Claimant is entitled to one-half interest in all that parcel of land situate at 103-105 Barry Street, Kingston.

4. That the Claimant is entitled to one-half interest in all that parcel of land situate at 14 Race Course Road, Mandeville, in the Parish of Manchester.

5. A Declaration that the Claimant is entitled to one-half of the net annual interest and profits of the aforementioned businesses including: Clean Chem Limited, Sure Save Wholesale Limited, Xtra Supercentre, Hoven Enterprises Limited and Microage Enterprises Limited since incorporation or the commencement of trading and that an account be taken by the Registrar of the Supreme Court of the receipts, payments, dealings and transactions of the Defendant, his servant or agents in respect of the management or operation of the said businesses from their incorporation or the commencement of trading.

6. A Declaration that the Defendant is liable to account to the Claimant for all sums of money removed from their businesses and invested in the several other businesses referred to in the Claimant's affidavit.

7. An order that the Land Rover, 2008 Registration Number 4949 FM, Chassis Number SALLSAA138A185418, Engine number 0326576DT truck be transferred into the name of the Claimant free of all encumbrances.

8. That the aforementioned properties be valued by a reputable valuator to be agreed by both parties and in the absence of an agreement by a valuator appointed by the Registrar of the Supreme Court.

9. That the Registrar of the Supreme Court be empowered to execute the relevant transfers on behalf of the Defendant in respect of the properties to

be sold and the motor vehicle, in the event that the Defendant refuses or neglects to do so.

10. That the Claimant has the first option to purchase the properties referred to and mentioned at paragraphs one (1) and two (2) above. The said option to be exercised within thirty (30) days after Notice of Valuation being given, failing which the said properties be sold on the open market by private treaty or public auction.

11. That the Defendant has the first right of refusal to purchase the properties, shares and interest referred to and mentioned at paragraphs three (3), four (4), five (5) and six (6) above. The said right to be exercised within (30) days after notice of valuation has been given, failing which the said properties be sold on the open market by Private Treaty or by Public Auction."

The properties that were the subject-matter of the appellant's claim therefore, included real property, companies or shares in those companies and a motor vehicle.

[6] Having heard the parties, the judge made the following orders:

"(1) The claimant is entitled to one-half interest in all that parcel of land situate at Lots 15 and 16 Peter's Rock in the parish of St. Andrew registered at Volume 1189 and Folio 95 and Volume 1178 Folio 458 of the Register Book of Titles.

(2) This property is to be valued by a reputable valuator to be agreed by both parties and in the absence of an agreement; by a valuator appointed by the Registrar of the Supreme Court. Cost of the valuation to be borne equally by the parties.

(3) The claimant has the first option to purchase the property. Said option is to be exercised within thirty (30) days after notice of valuation is given. If the option is exercised and the defendant refuses or neglects to sign the documents to effect this sale and

transfer the Registrar of the Supreme Court is empowered to sign.

(4) In the event the claimant does not exercise the option, the defendant is given the option to purchase the property within thirty (30) days of the expiration of the time given the claimant;

(5) If neither party seeks to purchase the property then the property is to be sold on the open market by private treaty or public auction and the proceeds of this sale is to be shared equally between the parties;

(6) The claimant is entitled to 50% interest in the shares of Clean Chem Limited in the name of Quentin Hugh Sam;

(7) Liberty to apply;

(8) No order as to costs."

[7] The appellant was, therefore, only successful in relation to her claim for a share in two of the properties, namely, Peter's Rock and Clean Chem Limited.

The appeal

[8] In the notice of appeal filed on 27 January 2015, the appellant listed some 23 grounds of appeal which were stated as follows:

"a) The Learned Judge erroneously characterized the Appellant's claim in respect of the property at 4 Dillsbury Avenue as being limited to the land alone and not inclusive of the townhouse built thereon; having stated that 'it is agreed that the townhouse unit that the parties occupied had to be completed by them' (paragraph 19 of the Reasons for Judgment) and the Claimant participated in the construction. (Paragraph 34 and 100 of the Reasons for Judgment)

b) The Learned Judge failed to have regard to the distinction between legal and equitable interests in real property;

c) The Learned Judge failed to have sufficient regard to the principles of **Abbott v Abbott** Privy Council Appeal No. 142 of 2005 in respect of gifts;

d) The Learned Judge erred in failing to take into account or credit the Appellant with the appreciation in value of the Hopefield property when the evidence was that the property at Hopefield Avenue was acquired for $7,002,000.00 as the home the family resided in for more than a decade until its sale for $17M in 2010 when the family moved into the property at 4 Dillsbury Avenue;

e) The Learned Judge erred in failing to find that the Appellant was not entitled to a one-half share of the Respondent's interest in Hoven Limited;

f) Having accepted the evidence of Alva Lobban that the several businesses were operated by the respondent as a single enterprise, the Learned Judge erred in failing to find that the appellant was entitled to a share in the other businesses or a share of the interest of the Respondent in those businesses;

g) The Learned Judge erred in failing to have sufficient regard to section 14 of the Property Rights of Spouses Act (PROSA);

h) Having found that there was no family home, the Learned Judge erred in failing to properly consider the factors under Section 14 of the PROSA, especially the factors stated at sections 14(2)(a), (b) and (d).

i) Having found that the property at Peter's Rock was bought from the co-mingled resources of the Appellant and Respondent, the Learned Judge erred in finding that the parties' resources were not mingled to acquire other properties held in the respondent's name;

j) Having found that the property at Peter's Rock was bought from the mingled resources of the Appellant and Respondent, the Learned Judge erred in finding that the source of the funds, i.e. income earned from the relevant businesses, were not also mingled.

k) The Learned Judge erred in not applying the principles of **Prest v Prest** [2013] 2 AC 415 to determine the true interest of the parties in the companies;

l) The Learned Judge erred in failing to have sufficient regard to the Respondent's email dated February 17, 2011 in finding that it was not relevant because it was not a binding agreement when the said email should have been considered as evidence of the Respondent's contemporaneous understanding of the parties' interest in the relevant businesses;

m) Having accepted the evidence that the businesses were co-mingled (Reasons for Judgment: paragraph 113) the Learned Judge erred in limiting the value of the appellant's contribution to Clean Chem Limited only;

n) Having accepted the evidence of the Appellant that she was the principal caregiver for her children (Reasons for Judgment: paragraph 114) the learned judge erred in failing to take into consideration that that allowed the Respondent to spend more time in the businesses than the Appellant;

o) The Learned Judge erred in not awarding the Appellant an interest in the Land Rover motor vehicle on the basis that it was in the name of a company in which the Respondent owns shares.

p) The Learned Judge erred in ruling that the Appellant was not entitled to an interest in the shares in companies owned by the Respondent;

q) In accepting the evidence of Mrs. Lobban that the several businesses were intermingled as a single enterprise, the Learned Judge erred in not ordering an account of the profits of the companies;

r) The Learned Judge erred in failing to award costs to the Appellant having [sic] succeeded on some aspects of the claim;

s) Having accepted that the Appellant did not earn a salary for whatever work she did, the Learned judge

failed to have regard to the contribution of her time and efforts in the businesses;

t) The Learned Judge erred in failing to have regard to the evidence that the Respondent was able to grow the business during the period of the marriage;

u) The Learned Judge erred in permitting the Respondent's case to proceed in breach of a specific disclosure order of the Court dated October 16, 2013 without any consequential relief, sanction or without drawing any adverse inference from that failure to disclose in respect of the Respondent's case;

v) The Learned Judge preferred the evidence of Mrs. Lobban as to failure of the Appellant to make any meaningful contribution to these businesses in light of the internal contradictions and inconsistencies of that evidence. (paragraph 109)

w) The Learned Judge preferred the Respondent's unsupported oral evidence as to matters of corporate record, without disclosure of documentary evidence in support of the facts stated. (paragraphs 42, 44, 46)."

Preliminary Issue

[9] Queen's Counsel Mr Shelton, at the start of the hearing of the appeal, sought permission, on behalf of the appellant, to amend the notice of appeal by reference to a further amended notice of appeal filed on 21 June 2016. The proposed amendments related to the orders sought in paragraphs ii), iii), iv), v) and vii). The amendments were to allow for:

(a) reference to the lot number of the property at 4 Dillsbury Avenue, that being lot number "8", in paragraph ii);

(b) an amendment to the number of the property at Barry Street to read 107 and 105 instead of 103-105, at paragraph iii);

(c) a reference to the number of the property at South Race Course which is number "16" , in paragraph iv);

(d) the removal of the claim for an interest in Clean Chem Limited and an interest in one-half of the net annual interest and profits in the businesses and replace it with a claim to one-half of the respondent's interest and shares in the businesses, at paragraph v);

(e) the removal of the claim for an interest in a Land Rover truck in paragraph vii), and, resulting from that removal;

(f) the word "properties" to be amended to "property" in what then became paragraph ix) and in what then became paragraph xiii to add the words "and shares in the companies".

[10] Queen's Counsel for the appellant argued that the amendments were necessary and were a matter of form and not substance.

[11] Counsel for the respondent, however, objected to the amendments; firstly, on the basis that no claim for shares or for 107 Barry Street was ever made in the court

below. With respect to Barry Street, counsel for the respondent submitted that the claim was for 103-105 Barry Street. He pointed out that 103-105 and 107 Barry Street were two separate properties with separate titles. Both properties, he said, belonged to Microage Enterprises, but no evidence had ever been led in the court below as to 107 Barry Street. Counsel also argued that despite what the judge below did with respect to Clean Chem Limited, on the face of the pleadings, there had been no claim for a share in the shares owned by the respondent in any of the companies.

[12] In response, Queen's Counsel for the appellant argued that, pursuant to PROSA, the only property the court was empowered to divide, was property to which the respondent was entitled. He submitted that the appellant was seeking a share of the respondent's shares and interest in the other businesses and that the appeal was about the value of the respondent's shares and interest in those businesses. Queen's Counsel pointed to paragraph 11 of the fixed date claim form which asked for the respondent to have the right of first refusal to purchase, inter alia, shares as an indication that a division of shares was always contemplated.

[13] Queen's Counsel for the appellant eventually withdrew the request to amend the notice of appeal to include 107 Barry Street and abandoned the claim to that property in paragraph iii).

[14] After giving serious consideration to the issue, we permitted the amendment regarding the claim for a share in the respondent's interest and shares in the businesses. Ground of appeal p) challenges the failure of the judge below to grant the

appellant a share in the respondent's shares in the other companies and in Xtra-Supercentre which was an unincorporated business. The respondent submitted to this court that there was no claim for a share of the respondent's shares in the companies, in the court below. However, it seemed to us that the judge appeared to have taken the view that the pleadings were wide enough to encompass a claim for shares, when she granted the appellant 50% of the respondent's shares in Clean Chem Limited. No complaint was made by the respondent about the judge's approach in the court below and there is no cross appeal on that point. When we looked at paragraphs 5 and 11 of the fixed date claim form, we concluded that, although the form of the pleading was inelegant and poorly drafted to say the least, it did contemplate a division of the shares held by the respondent in the companies named in the claim.

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

[16] We considered that any claim to interests and shares could only relate to the respondent's interests and shares in the companies. We, therefore, took the view that where in paragraph 11 of the fixed date claim form it requested that the right of first refusal to purchase the properties, shares and interest in the companies be granted to the respondent, the words "shares and interest" referred to therein, more specifically spelt out exactly what the appellant had been seeking in the court below viz; a share in the shareholding of the company held by the respondent which contemplated a division of those shares in relation to paragraph 5 of the fixed date claim form and a declaration of interest in any other property owned by the parties.

[17] We also granted the remaining amendments, agreeing with Queen's Counsel for the appellant that it was a matter of form rather than substance and we saw no injustice to the respondent in granting the amendments as prayed.

Issues

[18] The general issue to be determined in this appeal is whether or not the judge erred in finding that the appellant was only entitled to a share of the two lots at Peter's Rock and a 50% share in the respondent's shares in the company Clean Chem Limited. Within this broad issue are several sub-issues which arise for consideration. These are:

1. Whether the judge erred in not awarding the appellant an interest in the property at lot 8, 4 Dillsbury Avenue;

(a) whether a claim had been made for a share in the property at Lot 8, 4 Dillsbury Avenue on the basis that it was the family home;

(b) whether the learned trial judge erred in not awarding the appellant an interest in lot 8, 4 Dillsbury Avenue pursuant to section 6 of PROSA;

(c) whether the appellant was entitled to a share of lot 8, 4 Dillsbury Avenue pursuant to section 14 of PROSA.

2. Whether the judge erred in not awarding the appellant a share of the respondent's shares in the other companies and properties under and by virtue of section 14 of PROSA;

    (a) are the general rules and presumptions of common law and equity of any relevance to the division of matrimonial property under PROSA?

3. Whether the judge erred in not taking into consideration the respondent's failure to comply with a court order for specific disclosure.

4. Whether the judge erred in not making an order for costs in the appellant's favour.

Issue 1: whether the judge erred in not awarding the appellant an interest in the property at lot 8, 4 Dillsbury Avenue- grounds a) – c), g), h) and l)

Appellant's submissions

[19] Queen's Counsel submitted, on behalf of the appellant, that the learned judge erred in characterizing the appellant's claim to a share in lot 8, 4 Dillsbury Avenue as being limited to the land and not as including the townhouse built on the land. Queen's Counsel also argued that the reference to "all that parcel of land" in paragraph 2 of the appellant's fixed date claim form filed on 4 July 2012 should be interpreted as including the town house constructed on that land. It was also submitted that the evidence and the law established that the appellant's claim included the townhouse which was built on the Dillsbury land and that the claim should not have failed. In support of this, Queen's Counsel placed reliance on the decision from this court in **Patsy Powell v Courtney Powell** [2014] JMCA Civ 11 which applied the decision in **Minshall v Lloyd** (1837) 2 M & W.

[20] Queen's Counsel submitted further that the property at Lot 8, 4 Dillsbury Avenue was the family home within the meaning of section 2 of PROSA and therefore, pursuant to section 6(1) of PROSA, the appellant was entitled to a one-half share of the said property.

[21] Queen's Counsel argued that based on the authority of **Thelma May Whilby-Cunningham v Leroy Augustus Cunningham** (unreported) Supreme Court, Jamaica, Claim No 2358 HCV 2009, judgment delivered 16 September 2011, the fact that the land was not wholly owned by one or both parties (as the respondent's father

had purchased the land and placed his and the respondent's name on the title) did not preclude a finding that the townhouse thereon together with the appurtenant land was the family home. Queen's Counsel relied on the decision in **Abbott v Abbott** [2007] UKPC 53, in support of this submission.

[22] He argued further that although the definition of "family home" in section 2(1) of PROSA excludes a "dwelling house which is a gift to one spouse by a donor who intended that spouse alone to benefit", it did not address the scenario in this case where it was the land which was the gift and not the dwelling house which was constructed on it. The appellant contended that the preponderance of the evidence negatived the notion that the intention was for the respondent alone to benefit, which was an argument on which the respondent relied in order to deprive the appellant of a share in the family home.

[23] It was further argued that the mere fact that the land was in the names of the respondent and his father is not sufficient to demonstrate that it was a gift and that the alleged donor intended only for the respondent to benefit. Queen's Counsel asked this court to accept that the father of the respondent was only a nominal owner and that a gift was intended for both the appellant and the respondent, which had not been perfected. He also pointed to the fact that the respondent, during cross-examination, had stated that he considered the property as the family home, and intended for his wife and children to live there with him (see page 358 of the record of appeal). It was also submitted that the contents of the email dated 17 February 2011, sent to the

appellant by the respondent, also proved this (see pages 126 - 127 of the record of appeal).

[24] Queen's Counsel also submitted that the email was a declaration against interest and was corroborative of the appellant's evidence that the townhouse was to be transferred to the respondent and herself. Further, that the content of the email showed that the respondent recognized her proprietary beneficial interest in all the properties referred to therein, which included the Dillsbury Avenue property.

[25] Queen's Counsel submitted, in the alternative, that in the event that the Dillsbury Avenue property did not satisfy the definition of family home under PROSA, the appellant would be entitled to a share in the respondent's share of the property pursuant to section 14(1)(b) of PROSA. Queen's Counsel then submitted that the factors on which the appellant was relying under PROSA were pursuant to section 14(2) in respect of:

A. contributions made by her to the acquisition, conservation or improvement of the Dillsbury Avenue property;

B. the finding of the lower court judge that there was no family home; and

C. an agreement with respect to the ownership and division of the property.

[26] Queen's Counsel, in arguing that the Dillsbury Avenue property could be treated as 'other property' pursuant to section 14 of PROSA, relied on the decisions in **Greenland v Greenland** (unreported) Supreme Court, Jamaica, Claim No 02805 HCV 2007, judgment delivered 9 February 2011 and the case of **Cunningham v Cunningham**, based on the appellant's contribution to the construction of the townhouse and her role as a homemaker and principal caregiver for the parties' children.

[27] Queen's Counsel submitted that the learned judge had erred and that the appellant was entitled to at least 25% of the Dillsbury Avenue property.

Respondent's submissions

[28] In addition to the submissions made before this court, counsel for the respondent also relied on the closing submissions presented in the court below. Counsel argued that the Dillsbury Avenue property could not come within the definition of family home based on section 2 of PROSA, since it was jointly owned by the respondent and his father, as noted on the certificate of title. Counsel submitted that once the judge found that the land was jointly owned by the respondent and his father, this inevitably took the property out of the realms of section 6 of PROSA. Counsel contended that the approach by the judge is supported by the decision in **Pameleta Marie Lambie v Estate Evon Lambie (Deceased)** [2014] JMCA Civ 45, as it relates to her ruling that the property at Dillsbury Avenue was not the family home within the meaning of PROSA.

[29] Counsel pointed out, that in order to overcome this hurdle, the appellant was asserting that the property was a gift to both parties. Counsel submitted that the case of **Corrine Griffiths-Brown v Conard James Brown** [2015] JMSC Civ 172, was useful in analysing the method a court ought to employ when assessing whether or not a gift had been granted. Counsel argued further that the only evidence in relation to this "gift" came from the appellant and the judge in the court below was correct to have rejected it, in the light of the appellant's lack of credibility and the fact that there was no documentary proof of it being a gift. Counsel also argued that **Abbott v Abbott** was irrelevant as it was a case decided under the English Married Women's Property Act.

[30] Counsel submitted that the email could not support the appellant's contention that it was a gift. One reason for this, counsel argued, was that the words 'your home' used by the respondent in the email to the appellant, merely meant the place where you live, not necessarily a place one owns. Further, that this email was not sufficient to enable the court to make a finding that the respondent's father made a gift of the land and townhouse to the respondent and the appellant. Counsel also pointed this court to the judge's finding that there was no legally binding or enforceable agreement created by the email.

[31] Counsel argued that based on the findings of the trial judge, the appellant's claim under section 14 could not succeed either, as the extent of her contribution was that she recommended a construction company and that she visited the site from time to time. In addition, it was argued that the only conclusion that a court could draw from

the evidence, was that the appellant made very little contribution to the acquisition, conservation or improvement to the Dillsbury Avenue property, given the factors that the court had to consider. Further, that based on these factors the appellant would not be entitled to any interest in the property.

[32] Counsel submitted that the case of **Cunningham v Cunningham**, which was relied on by the appellant to support the submission that the court could separate the land from the dwelling house and thus find that she had an interest in the dwelling house only, could be distinguished from the facts in the instant case. Counsel argued that in the instant case, the judge had found on the facts, that the townhouse was not "wholly owned" by the respondent and that it was in fact also owned by the appellant's father. It was further submitted that there was no evidence in the instant case that the father relinquished his interest in either the land or the dwelling house. Counsel also pointed to the fact that in **Cunningham v Cunningham** the court had found that both parties had made significant contributions to the construction of the house in question, and the findings in that case were based on the particular facts of that case. In any event counsel pointed out that, in this case, the father had not been made a party to the claim, which counsel submitted, was fatal to the claimant's claim to a share in property owned by him.

Analysis and decision on grounds a)-c), g), h) and l)

[33] In my view, the issues raised by these grounds give rise to the following questions:

A. did the judge err in finding that the appellant's claim in respect of lot 8, 4 Dillsbury Avenue was for the land only? if yes,

B. was the claim in respect of lot 8, 4 Dillsbury Avenue made on the basis that it was the family home? if yes,

C. was lot 8, 4 Dillsbury Avenue indeed the family home as defined by PROSA? and if not,

D. is the appellant entitled to share in lot 8, 4 Dillsbury Avenue as 'other property' under and by virtue of section 14 of PROSA?

E. was there evidence on which the judge could have found that lot 8, 4 Dillsbury Avenue was a gift to the appellant and the respondent?

[34] It is important to note that section 2 of PROSA, which is the definition section of the Act, includes in the definition of property, that it must be property "to which the spouses or either of them is entitled".

A. *Did the judge err in finding that the appellant's claim in respect of lot 8 Dillsbury Avenue was for the land only.*

[35] In dealing with the appellant's claim for a 50% share in the Dillsbury Avenue property, the judge took the view that the claim related to the land only and not to the townhouse situated on it. The question is whether she fell into error in that regard.

[36] The evidence in the court below was that the Dillsbury Avenue property was acquired in two phases. Number 4 Dillsbury (the land) was acquired by the respondent's father and title was registered in the name of the respondent and his father as joint tenants in 2000. Townhouses were subsequently built on the land by the respondent's father in partnership with a developer. Splinter titles were generated for all the lots numbered 1-9 in the name of the respondent and his father in 2006. Splinter titles were transferred to some of the purchasers of these townhouses, whilst number 8 remained in the joint names of the respondent and his father up to the time of the hearing of this appeal. The parties lived at townhouse numbered 8, from 2009 until the respondent left the premises in 2012.

[37] In order to determine the first question as to whether the application was in respect of the land only, it is necessary to examine the fixed date claim form that was filed. The claim for a share in the Dillsbury Avenue property was set out as follows:

> "That the [c]laimant is entitled to one-half interest in all that **parcel of land** situate at Lot 4 Dillsbury Avenue, Kingston 6 in the [p]arish of Saint Andrew registered at Volume 1209 Folio 156 of the Register Book of Titles." (Emphasis added)

[38] The appellant retained this form of the claim throughout the trial and up to the filing of the notice of appeal.

[39] Queen's Counsel for the appellant rested his argument that the claim for the land included a claim for the townhouse on this court's decision in **Patsy Powell v Courtney Powell** where the principle in **Minshall v Lloyd** that "[w]hatever attaches to the soil becomes a part of it" was applied. In this regard Queen's Counsel was on

firm footing for that principle has been cited with approval and applied in several cases in this jurisdiction.

[40] In **Hyacinth Gordon v Sidney Gordon** [2015] JMCA Civ 39, Brooks JA, in considering the claim for a house built on what was described as 'family land', said:

> "[25] "There is a general principle that what is affixed to the land, as in this case, a concrete structure, becomes part of the land. Williams J in **Greaves v Barnett** (1978) 31 WIR 88 at page 91j, expressed the principle this way:
>
> > '[t]he general rule is that what is affixed to the land is part of the land so that the ownership of a building constructed on the land would follow the ownership of the land on which the building is constructed'."

[41] In my view, the answer to the first question can be disposed of in short order. Once there is an application in respect of 'all that parcel of land', the subject of such an application would not only include the land but also any building which is affixed to the land and there would be no necessity to indicate that it includes the dwelling house built on it. The judge therefore, erred in this regard.

B. *Was the claim in respect of Lot 8, 4 Dillsbury Avenue made on the basis that it was the family home?*

[42] This second question is somewhat more difficult. The appellant argued that based on the principle in **Minshall v Lloyd** there was an application for a share in the family home as defined under PROSA.

[43] The family home is a specifically defined specie of property under PROSA to which there is a specific entitlement and it is desirable that any application for the

division of the family home should so clearly state. This serves several useful purposes. Firstly, it complies with the rule that a claim by fixed date claim form for statutory relief should state the enactment under which such relief is sought, the question which the claimant wants the court to decide and the remedy which the claimant is seeking along with the legal basis for the claim to that remedy (see rule 8.8 (a), (b) and (c) of the Civil Procedure Rules (CPR)). Secondly, it alerts the defendant to the claim he has to meet and any defences he needs to put forward to such a claim. For instance, a claim to 50% of the family home can be met by an application to vary the half-share rule under section 7 of PROSA. If a defendant is not alerted to the fact that the claim is for a share to the family home or that the claimant is asking the court to treat a particular property as the family home, then a defendant will not be alerted as to how to meet that claim. To merely state that that the application is for a share in all that parcel of land could not alert anyone, including the court, that such a claim was based on section 6 of PROSA, which deals with the division of the family home as opposed to a claim for a share under section 14, which deals with 'other property'.

[44] In dealing with the issue of pleadings, Lord Woolf in **McPhilemy v Times Newspapers Ltd and others** [1999] 3 All ER 775 stated at pages 792 – 793 that:

> "The need for extensive pleadings including particulars should be reduced by the requirement that witness statements are now exchanged. In the majority of proceedings identification of the documents upon which a party relies, together with copies of that party's witness statements, will make the detail of the nature of the case the other side has to meet obvious. This reduces the need for particulars in order to avoid being taken by surprise. This does not mean that pleadings are now superfluous.

> **Pleadings are still required to mark out the parameters of the case that is being advanced by each party. In particular they are still critical to identify the issues and the extent of the dispute between the parties. What is important is that the pleadings should make clear the general nature of the case of the pleader**. This is true both under the old rules and the new rules." (Emphasis added)

[45] However, despite the fact that it was not indicated in the claim that the property at Dillsbury Avenue was to be treated as the family home, in my view, there was nothing to prevent the judge from considering whether or not the property fell to be treated was the family home.

[46] The right to apply for division of property under PROSA is created by virtue of section 13. When that application is made, the court which hears the application then looks to section 14(1) which directs the court as to the approach to take to such an application. According to section 14(1)(a) and (b), on receipt of the application by a spouse for division of property, the court may make an order in accordance with section 6 or 7, which is the division of the family home, or division of property other than the family home, as it thinks fit. See the reasoning of Brooks JA in **Hyacinth Gordon v Sidney Gordon**.

[47] Therefore, in this case, met with an application to divide property on which the evidence indicated there was a dwelling house and one party was claiming on the evidence that it was the family home, the judge was duty bound to consider whether it was in fact the family home and whether an order could be made under section 6 or 7 of PROSA. The judge was therefore wrong not to have considered this question.

[48] Since this failure forms the basis of a complaint before this court, I will now consider whether there was sufficient evidence before the judge on which she could have made an order under section 6.

C. *Was lot 8, 4 Dillsbury Avenue the family home as defined by PROSA?*

[49] In resolving this issue, it is now necessary to set out the relevant provisions of PROSA as it relates to a claim for an interest in the 'family home'. The relevant sections are sections 2, 6 and 7.

[50] The relevant parts of section 2 states as follows:

> " 2-(1) In this 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** ..." (Emphasis supplied)

[51] Sections 6 and 7 state as follows:

> "6-(1) Subject to subsection (2) of this section and sections 7 and 10, each spouse shall be entitled to one-half share of the family home –
>
> (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
>
> (b) on the grant of a decree of nullity of marriage;
>
> (c) where a husband and wife have separated and there is no likelihood of reconciliation;

(2) Except where the family home is held by the spouses as joint tenants, on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.

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 with whom the Court is satisfied has sufficient interest in the matter."

[52] It is important to note that in relation to an application under section 6 contribution is not a factor once the property is found to be the family home, as contemplated by section 2 of PROSA. The effect of this was expressed by Morrison JA (as he then was) in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12, as follows:

"... [i]t introduces for the first time the concept of the 'family home', in respect of which the general rule is that, upon the

> breakup of the marriage, each spouse is entitled to an equal share."

[53] In the instant case, the judge had found that the application before her, being for land only was significant, as the "family home" is specifically defined under PROSA, and there is an emphasis on the dwelling house in section 2. The judge also pointed to what she considered to be two seemingly different approaches in the authorities from this court to the definition in section 2, as to the effect of the emphasis on the "dwelling house" namely: **Weir v Tree** [2014] JMCA Civ 12 and **Patsy Powell v Courtney Powell**.

[54] It is clear from the definition of "family home" in section 2 of PROSA that the appellant needed to show that the dwelling house together with any land, building or improvement appurtenant to it was "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...". The definition in PROSA recognises that most family homes in this jurisdiction are not chattel houses which are movable objects. They are by and large permanently affixed to land and therefore immovable. To distribute such property 50/50 between the parties, there should not (and under PROSA cannot) be third party interest in the house or the land on which it is permanently affixed. As a matter of policy, law and good sense, third parties are not liable to pay the debt owed by a husband to his wife, without more. The result is that if the dwelling house is constructed by one or both spouses, but the land on which it is constructed, is owned by someone-else, the house has to be divided as 'other property' and not as the family home under section 6.

[55] In **Lambie v Lambie** this court reiterated the importance of recognising the two elements to the definition of family home in section 2 of PROSA; the ownership element and the residence element. In **Lambie v Lambie** this court said:

> "It does appear, as advanced on behalf of Mrs Lambie, that the learned judge only applied the 'residence test' in determining whether the property was the family home and had failed to take into account the 'ownership' component of the definition up to the point he declared it to be so. For Farringdon to qualify as the family home, it must satisfy all the elements of the statutory definition and one of those elements is that it must be '*wholly owned by either or both of the spouses'*..."

Further at paragraph [58] the court held that:

> "It was not simply a matter of who resided there, the nature and quality of the residence and/ or who had contributed to its construction and maintenance; residence and contribution, without more, do not convey ownership in property."

[56] In this case there is no dispute that the residence element was satisfied as this was where the parties ordinarily resided with their children from 2009 to 2012. It is however, a matter of law and fact as to whether the ownership element was also satisfied. In the light of the appellant's submissions, it is important to look at PROSA and the decisions in **Patsy Powell v Courtney Powell**, **Hyacinth Gordon v Sidney Gordon**, **Weir v Tree** and **Cunningham v Cunningham**. All these decisions recognised the prominence given to the 'dwelling-house' in the definition of the 'family home' under section 2 of PROSA.

[57] In **Hyacinth Gordon v Sidney Gordon**, Brooks JA found that the property which was the subject of the application was not the family home as defined by section 2 of PROSA, as it was not owned solely by one or both of the parties. The unregistered land belonged to Mrs Gordon's great great grandparents, which one would suppose made it what is sometimes termed 'family land'. The house was built on the land from the finances of Mrs Gordon's family, without any financial contribution from either Mrs Gordon or Mr Gordon. Although it was the parties' matrimonial home, it could not be treated as the family home pursuant to PROSA.

[58] In **Patsy Powell v Courtney Powell**, Brooks JA in delivering the judgment of this court (in paragraph [3]) stated the issue on appeal in the following manner:

> "How should the court apply the principle [in **Minshall v Lloyd**] in determining what interest, if any, Mr Powell has in the premises, in light of the provisions of the PROSA?"

[59] This issue arose based on the learned trial's judge's finding that Mrs Powell was the sole owner of the land on which the dwelling house was situated and that Mr Powell was entitled to one-half of the dwelling house but obtained no interest in the land. One of the challenges to the trial judge's decision was her finding that the land on which the house was built was owned solely by Mrs Powell. Brooks JA held that a party claiming to be entitled to share equally in the family home pursuant to section 6 of PROSA must first satisfy the requirements under section 2, and show that property fell into the definition of family home under that section.

[60] After considering the facts on which the trial judge came to her conclusions Brooks JA stated at paragraph [21] that:

> "The learned trial judge found, as an issue of fact, that both parties had contributed to the construction of a concrete structure on land in which Mrs Powell held the sole legal interest. If a concrete structure which cannot be removed as a whole, is placed on land wholly owned by Mrs Powell, then according to the principle stated in **Minshall v Lloyd** *the structure becomes Mrs Powell's property as well*. It follows, therefore, that the learned trial judge was in error in finding that the structure was wholly owned by both Mr and Mrs Powell whilst being located on land wholly owned by Mrs Powell." (Emphasis added)

[61] Brooks JA went on to point out that this error was not fatal to the judgment, since the evidence of Mrs Powell's sole ownership of the land and co-ownership with Mr Powell of the dwelling house, was sufficient for the trial judge to have found that the dwelling house built on the land owned by Mrs Powell was the 'family home' as defined in PROSA. That scenario, he found, fell within the definition of 'family home' in section 2, as being one wholly owned by one of the spouses.

[62] The instant case can easily be distinguished from **Patsy Powell v Courtney Powell**, as the property at Dillsbury Avenue is not wholly owned by the respondent, being registered under the Registration of Titles Act in the name of the respondent and his father.

[63] The case of **Weir v Tree** was decided on an entirely different footing from **Patsy Powell v Courtney Powell** and the instant case. In that case Phillips JA, in giving the judgment of this court, did not consider whether the dwelling house built on

appurtenant land owned by a third party could be considered the family home. Instead what was considered was whether all 6 acres of land which was wholly owned by the wife was appurtenant to the dwelling house which she jointly owned with the husband; and whether, if so, it would entitle the husband to a half share of the 6 acres along with his half-share of the dwelling house. What is important in the case for the present purposes, however, is the recognition that the land on which the dwelling house is affixed forms part of the definition of 'family home'. See paragraph [63] of the judgment of Phillips JA in that case.

[64] **Cunningham v Cunningham** is a decision at first instance. In that case the wife applied to share equally in the house which had been built on unregistered land owned by the husband's family. Although the wife did not apply for a share under section 6 of PROSA, but simply applied for a share of the house, the learned trial judge rightly considered whether the house fell under the definition of 'family home' in section 2 of PROSA. Having found that both parties are entitled to an interest in the house, the learned judge then considered whether it was material that neither party owned the land on which the house was built. Having done so, the learned judge concluded (at paragraph [62]) that it was not material as there was "nothing in the Act to say the land must be owned by either party or both of them, it only states that the dwelling house should be".

[65] Having so found however, the learned judge went on to find at paragraphs [63]-[69] that on the evidence the husband and wife did in fact acquire either possessory title by dint of their years of open and undisturbed possession of the land or by virtue

of the acquisition of some other beneficial interest in the land by the husband under and by virtue of his entitlement under the estate of his late father for which he had 'papers'.

[66] However, to the extent that the statement by the learned judge at paragraphs [62] and [70] in **Cunningham v Cunningham** may be thought to be authority for the view that the land on which the dwelling house is appurtenant need not be owned by either party, to fall in the definition of 'family home' under section 2 of PROSA, it is wrong. For in that regard **Cunningham v Cunningham** is inconsistent with the decisions of this court in **Patsy Powell v Courtney Powell** and **Hyacinth Gordon v Sidney Gordon**.

[67] In **Mistelle Corine Brown West v Beresford Elisha West** [2014] JMSC Civ 166, Straw J declined counsel's invitation to follow the wider interpretation of the definition of 'family home' in **Cunningham v Cunningham,** noting that the decision having been made in 2011, the judge had not had the assistance of the decision in **Patsy Powell v Courtney Powell**.

[68] Accepting, as I do, that the principle of law that whatever is built on the land becomes part of that land is correct, in this case, the house and land is the property of the respondent and his father. It is not wholly owned by one or both spouses and does not therefore constitute the family home as envisaged by the definition in section 2 of PROSA.

[69] However, since the property at Dillsbury Avenue did not qualify as the family home, the judge was not precluded from determining whether there was sufficient evidence on which she could fairly divide the Dillsbury Avenue property as "other property" under section 14 of PROSA, taking into account the factors specified in subsection (2) of that section.

D. *Is the appellant entitled to a share of lot 8, 4 Dillsbury Avenue as 'other property' under and by virtue of section 14 of PROSA?*

[70] The judge did not consider whether the appellant would have been entitled to a share of the property based on her stated contribution to the construction of the house pursuant to section 14 of PROSA, having erroneously determined that the application was for a share of the land only. In treating the land as "other property" the judge found that, based on the evidence, the land was purchased by the respondent's father and that neither the respondent nor the appellant had contributed to its acquisition, conservation or improvement. As a result the appellant had not satisfied her that she was entitled to an interest in the parcel of land situated at lot 4 Dillsbury Avenue, based on the relevant factors.

[71] It is open to this court therefore to now consider, whether the appellant is entitled to a share of the Dillsbury Avenue property including the townhouse, taking into account the factors in 14(2) of PROSA.

[72] In dealing with the division of property between spouses, other than the family home, as defined under PROSA, the relevant sections are 13, 14, 15 and 23. Section 14 sets out the factors to be considered, whilst section 15 empowers the court to alter the

interest of either spouse in property other than the family home. Section 23 sets out the general powers of the court concerning the division of property.

[73] Section 14 states that:

> "(1) Where under section 13 a spouse applies to the Court for a division of property the Court may _
>
> (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or
>
> (b) subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),
>
> or, where the circumstances so warrant, take action under both paragraphs (a) and (b).
>
> (2) The factors referred to in subsection (1) are -
>
> (a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;
>
> (b) that there is no family home;
>
> (c) the duration of the marriage or the period of cohabitation;
>
> (d) that there is an agreement with respect to the ownership and division of property;
>
> (e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account.
>
> (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 dependent of a spouse;

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

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

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

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

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

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

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

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

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

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

[74] Section 15 states as follows:

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

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

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

(c) ...

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

(3) ..."

[75] The appellant's evidence regarding the construction of the house on the property at Dillsbury Avenue, as outlined by the judge, was that it was she who had identified and hired the first contractor to complete the house, as the developer had left the project incomplete. She also claimed to have visited the premises on a number of occasions and had "directed and supervised what was to be done to make the townhouse habitable and comfortable". The evidence, also highlighted by the judge, was that they had not resided in the property for very long as they had moved into the premises at a time when the marriage was "unravelling". She had also not made any financial contributions. There was evidence also that she was the primary caregiver for the children, as the husband travelled frequently and was an avid golfer.

[76] In **Greenland v Greenland** Brooks J (as he then was) held that Mrs Greenland had contributed to the conservation and improvement of the property. He therefore, found that she was entitled to a share of the property which he had found was not the family home, as it was not wholly owned by the husband either in law or equity. Brooks J took account of the fact that both Mr and Mrs Greenland had searched for and found the land. Mrs Greenland had also made minimal financial contributions to the

acquisition of the property. He also found she had minimal, what was described as "sweat equity" in the construction of the property which included carrying sand, water, carrying and mixing mortar and cooking for the workmen. He found that she was a homemaker, taking care of the house and six children. The husband was away from home for weeks at a time and only came home on alternate weekends. He found this to be a significant contribution. Mrs Greenland's contribution was quantified at 20% of the value of the property.

[77] In this case, the respondent and his father are joint owners of the entire Dillsbury Avenue property. Each joint tenant holds no identifiable share by himself but both own the entire estate together. The father was not named as a party to the claim in respect of this or any of the properties in dispute. The question therefore arises as to whether this property could be divided without the respondent's father being a party to the claim and without giving him an opportunity to be heard. In **Greenland v Greenland** the joint legal owners of the property, who were the children of the defendant Mr Greenland, had been joined in the claim.

[78] A similar issue arose in **Hyacinth Gordon v Sidney Gordon** where Brooks JA, in answering the question whether the husband could be awarded an interest in property belonging to a third party without the court giving that third party an opportunity to be heard, said at paragraph [20]:

> "It is a basic tenet of our common law that a person could not be deprived of his interest in property without having been given an opportunity to be heard in respect of any such deprivation. A court that is made aware of a person's

> interest in property should, therefore, make no order concerning that property, unless that person is given an opportunity to appear and make representation in that regard."

[79] That common law principle has not been repealed or abrogated by any provision in PROSA. In this case no order can be made to divide the Dillsbury Avenue property without giving the co-owner the right to be heard. The appellant however, failed to join the co-owner in the claim below.

[80] Brooks JA also considered whether any useful purpose would be served in sending the matter back for a re-trial. He found that it would not. He held that Mr Gordon had no claim in equity against the true owners. That the work done by Mr Gordon on the property of the third parties could not bind them as they had neither expressly or tacitly requested or approved such work. He was in fact, in my view, a volunteer as far as those third party owners were concerned. See **Falcke v Scottish Imperial Insurance Co** (1886) 34 Ch D 234 at page 248, cited at paragraph [26] of **Hyacinth Gordon v Sidney Gordon**.

[81] I have given grave consideration to the question whether the case should be remitted to the Supreme Court for the respondent's father to be joined at a rehearing on the issue of the division of the property at Dillsbury Avenue pursuant to section 14 of PROSA. The judge below had determined that the appellant's indirect contribution to the Dillsbury Avenue property was not sufficient to give her a share of that property. Her indirect contribution as a working wife, home maker and caregiver to the family was discounted by the judge for the reason that she had had help raising the children

and they had lived in that house for only a short while, most of which period the marriage was already deteriorating. The judge also found that she participated in the construction only to the extent of identifying and hiring the first contractor, visiting the premises and making it habitable for the family.

[82] As I said, the other owner of the Dillsbury Avenue property is not before the court. He is not responsible for the husband's debt. His presence at any future trial would only serve to bind him to any order the court may possibly make regarding the division of the property. All the matters between the respondent and the appellant have been litigated and aired in the trial in the court below. Though the trial judge failed to consider the claim against the house itself, the evidence of contribution was before her and was determined insufficient. Bearing in mind the relatively short period of time the parties resided in that house, that the contribution to the acquisition and construction of the house was *de minimis*, there seems to me no basis on which to disturb that finding by the judge. The situation is not likely to improve at a second trial.

E. *Was there evidence on which the judge could have found that lot 8, 4 Dillsbury Avenue was a gift to the appellant and the respondent?*

[83] In relation to the appellant's claim of an entitlement by way of gift from a third party, PROSA does not deal with the issue of an imperfect gift of property. In the definition of 'family home' in section 2, the family home does not include a dwelling house which was a gift to one spouse by a donor who intended that one spouse alone to benefit. That is not the case here. The appellant is claiming an entitlement by way of gift to both of them by a third party. PROSA also defines property to include real

property to which the spouses or either of them is entitled. This purported gift to the appellant, however, has not been perfected by the donor. There is no provision in PROSA covering such a situation.

[84] However, to the extent that PROSA is silent on the issue of a purported gift of real property to a spouse who would otherwise not be entitled to it, where such a gift has not been perfected, that issue has to be decided on the basis of common law and equitable principles.

[85] The evidence of the appellant is that there was a deal with the developer, the respondent and the respondent's father, that the developer would purchase the land and that one of the units would be transferred to the respondent and the appellant, on completion. As it turned out, it appears by the evidence that the land was never purchased by the developer and the unit was not transferred to the appellant and the respondent. The question would arise therefore, as to who were the parties to the 'deal' and who promised the transfer of the townhouse to the appellant and the respondent.

[86] Unfortunately, none of the other two parties to this deal was sued, and certainly not the other joint owner of the property. Therefore, at the outset, the appellant is faced with the insurmountable hurdle of asking the court to make an order against a person who is not before the court, which will likely serve to deprive him of property to which he is legally entitled.

[87] However, in my view, even if such an order could possibly have been made in the absence of the respondent's father, I hold the view that the appellant has not

shown that a gift of the townhouse was made to her and the respondent. **Abbott v Abbot** [2007] UKPC 53, on which the appellant has relied, does not assist her.

[88] In **Abbott v Abbott**, the land had been given to the husband by his mother for the construction of the matrimonial home. The trial judge found that there was no reason to believe that the land was meant to be a gift to the husband only, as there was every reason to believe it was meant as a gift to him and his wife in the early stages of marriage, to assist in the building of their home. There was evidence that the wife was charged jointly and severally for the repayment of the mortgage loan taken out to partly finance the construction of the house on the land. The security for the mortgage included insurance policies over both their lives. The wife worked and both their income was deposited in a joint account. At first instance Mitchel J applying the ordinary law of trust principles found that they both had an equal joint interest in the house and this decision was overturned by the Court of Appeal. On appeal to the Privy Council, Baroness Hale at paragraphs [17] and [18] in delivering the advice of the Board said:

> "...if a parent gives financial assistance to a newly married couple to acquire their matrimonial home, the usual inference is that it was intended as a gift to both of them rather than to one alone: see *McHardy and Sons (A firm) v Warren [1994] 2 FLR 338, at 340*....Furthermore, it was supported by the behaviour of both parties throughout the marriage until it broke down."

[89] There is nothing in the conduct of the parties, in this instant case, or in the conduct of the respondent's father which supports the claim of a gift for the benefit of both parties. The learned judge found as a fact that there was no evidence evincing a

gift from the father and it is difficult for this court to find any basis on which to fault that finding of fact. It was a mere unsupported assertion made by the appellant which was denied by the respondent. Neither was the respondent's father called as a witness and cross-examined with regard to this supposed gift.

[90] In **Corinne-Griffiths Brown v Conrad James Brown** the claim that the property was meant to be a gift was rejected because the conduct of the alleged donor was not consistent with gift-giving. In this case, I venture to say that the conduct of the respondent's father, the alleged donor, was also not consistent with the property being intended as a gift to the appellant and the respondent. The Dillsbury Avenue property was placed in the name of the respondent and his father twice, and not in the names of the respondent and appellant. Although the appellant claimed that the property was not transferred to their names because it was tied up in litigation, the documents show that all but three of the splinter titles were transferred to the owners before the parties separated. There was no litigation involving number 8 directly, although there is a charge over the property by the Real Estate Board pursuant to section 31 of the Real Estate And (Dealers and Developers) Act (as a result of monies received under prepayment contracts). There is no evidence either direct or inferential of any intention by the respondent's father to transfer the title to lot 8 number 4 Dillsbury Avenue to the appellant and the evidence given by the respondent in the court below (which was not challenged), is that his father would not have agreed to do so because he had no love for the appellant and for that reason he did not attend their wedding.

[91] Furthermore, the appellant did not act in any way to her detriment as a result of this gift, as the wife in **Abbott v Abbott** had done. There was no loan on the property taken out by the parties and no loan repayment obligation on the appellant in the instant case as in **Abbott v Abbott**. Equity cannot perfect an imperfect gift unless the donee has acted to her detriment as a result of the promise. It was entirely open to the judge to reject the appellant's claim as being unsupported by any other independent evidence.

[92] With regard to the claim that the respondent recognised her interest in the house by his admissions in the email, I will only state that the intention of the respondent from his evidence was that the house would be the family house and that the wife and children should live there. The email does not evince any declaration otherwise. It does not and cannot provide proof of his intention that she should have a beneficial interest in the house. The judge appears to have accepted his explanation that the letter was written to reassure the wife that at the event of his death, the children would be adequately looked after. I agree with counsel for the respondent that to say it is "your home" in the email is not the same as saying you "own" it.

[93] Section 14(2)(d) of PROSA refers to any agreement for division of property by the parties but I would venture to say that a letter from one party to the other, after the breakdown of the marriage, would hardly qualify as an agreement for the division of property.

[94] There is therefore, no basis on which this court can disturb the learned judge's finding that the appellant was not entitled to share in the property at 4 Dillsbury Avenue by way of gift.

Issue 2: whether or not the appellant was entitled to a share of any of the other properties and companies pursuant to section 14 of PROSA

A. *Grounds d) and e) - Hopefield property and Hoven Enterprises Limited*

Appellant's submissions

[95] Queen's Counsel complained, on behalf of the appellant, that the learned judge erred in failing to find that the appellant was entitled to one half share of the respondent's interest in Hoven Enterprises Limited. He argued that the learned judge erred when she failed to consider that the Hopefield property had appreciated in value and further failed to credit the appellant with that appreciation in value. Queen's Counsel pointed out that the property had been bought for JA$7,200,000.00 as the family home and was sold for US$320,000.00 in 2010. Queen's Counsel submitted that section 2 of PROSA clearly provided for beneficial ownership and as Hoven Enterprises Limited was merely a nominee owner holding on trust for the respondent, he was the beneficial owner. The appellant he asserted, was therefore entitled to 50% of the respondent's share in the company or alternatively that he be made to account for the proceeds and it be divided equally.

Respondent's submissions

[96] Counsel for the respondent, however, pointed out that the Hopefield property was owned by a company and shareholders do not have an interest in a company's

property. He noted that, in any event, the company was not joined as a party in the court below. Counsel further asserted that the Hopefield property was bought in the name of Hoven Enterprises Limited with funds borrowed from the respondent's father which he, the respondent, alone repaid and that the shares in the company are in his name only.

Analysis and decision on grounds d) and e)

[97] The learned judge found that the property at Hopefield was bought and registered to Hoven Enterprises Limited and that the respondent owned all the shares in the company. Hoven Enterprises Limited was incorporated in 1998 for the sole purpose of acquiring the Hopefield property in which the parties were residing at the time. This was done for tax purposes. This was the finding of the trial judge and was not in dispute. This was a joint decision by the parties, and the judge referred to the fact that the appellant said she had signed the incorporation documents and had also suggested the name of the company. The respondent exhibited share certificates which proved that he was the sole shareholder of the company with 50,000 shares.

[98] The judge found also that the Hopefield property served as the family home until 2009. She accepted that the property was bought for JA$7,200,000.00 and sold in 2010 for US$320,000.00. The judge took the view, however, that because it was owned by Hoven Enterprises Limited it could not be considered the family home. She also took the view that the appellant had not provided any funds towards its purchase nor had she shown any other basis on which she could stake a claim in the property owned by

the company. The respondent's evidence, which the trial judge accepted, was that the house was purchased from a loan to him made by his father.

[99] The judge found that the appellant was seeking an interest in property owned by a company, a claim which she could only successfully maintain if her claim had been made against the company, relying on this court's decision in **Harley v Harley** [2010] JMCA Civ 11. At paragraph [118] of her judgment the learned judge stated that:

> "Hoven Enterprises had the defendant as its shareholder. The house this company once owned may have been considered the family home but for the fact that it was not owned wholly by either party. This meant that the claimant could not have claimed any entitlement to that house. There seems to be no basis on which she can thereafter seek to establish an entitlement in the company."

[100] However, in so far as the evidence is that both parties took the decision that a company be formed to hold, what turned out to be its only asset, which was the dwelling house in which the parties lived as husband and wife and which was bought for that purpose, the judge was wrong to find that the appellant could not seek to establish a stake in Hoven Enterprises Limited on any basis.

[101] It is clear to me that the company was merely a nominee of the respondent holding the property for his benefit. The company was merely the husband's agent in the purchase of the property. I am fortified in this view by the fact that the respondent claims that it was his father who had lent him the money to purchase the house. There was no loan to the company. It was his evidence also that it was he, and not the company, who paid back the loan to his father.

[102] There is no evidence that this company did any trading or any business whatsoever. It appeared to have been merely the vehicle through which the purchase was made. The family lived in that house from 1998 until 2009. The house was sold in 2010 to the appellant's family members. There is no evidence as to what became of the proceeds of that sale.

[103] No shareholder has any right to company property and whilst the Hopefield property has been sold, the proceeds of sale has to be accounted for. The shareholders have no right to the proceeds unless it is being held on trust for them. They are only entitled to a share in the distribution of the surplus assets if the company is wound up (see **Macaura v Northern Assurance Co Ltd and others** [1925] AC 619 at 626). There is no evidence this company was wound up. The respondent had maintained in evidence that the company is still in existence.

[104] Despite the urging of counsel in the court below, the judge did not lift the corporate veil to find that the respondent was the true owner of the Hopefield property. The judge was altogether correct not to have taken that course, as there was no basis in law, principle or policy to so do (see **Prest v Petrodel Resources Limited and others** [2013] UKSC 34). There was no evidence that the respondent in incorporating the company was hiding assets or that it was formed to evade any existing liability or for wrongdoing.

[105] However, I take the view that the judge could have taken the course adopted by the United Kingdom Supreme Court in **Prest v Petrodel Resources Limited and**

others to grant the wife in that case, a remedy she would otherwise not have been able to achieve in her application for ancillary relief after divorce. The wife was seeking an interest in a number of properties, including the matrimonial home, which were owned or were in the names of several companies that, the judge at first instance, found to be wholly owned and controlled, whether directly or indirectly by the husband. Most importantly, these companies were all joined as respondents to the wife's application for ancillary relief. The judge ordered that seven of those companies were to transfer property to the wife to satisfy her claim for ancillary relief, having purported to lift the corporate veil to find that the husband was the true owner of those properties. The Court of Appeal agreed with that decision.

[106] On appeal by the companies to the Supreme Court of the United Kingdom, Lord Sumption SCJ identified the issue to be determined on appeal before the Supreme Court in the following manner:

> "[t]he question on this appeal is whether the court has power to order the transfer of these seven properties to the wife given that they legally belong not to him but to his companies."

[107] The court held that, in order to pierce the corporate veil, the court had to apply general company law principles and that the bases on which those principles allowed the corporate veil to be pierced did not exist in that case. The Supreme Court, however, found, that based on the circumstances of the case, the companies were the legal owners but the husband was the beneficial owner of the properties.

[108] The Supreme Court also found that all but one of the companies that owned property in which an interest was being claimed, had purchased or acquired the property either for a nominal sum, or at a time when the company was not in operation and so was not generating any income to purchase the properties. This led the court to infer that the husband had provided the monies to acquire or purchase the properties and was therefore the beneficial owner.

[109] In relation to the company that was generating income at the time the purchase was made, the court held that based on the husband's approach or history of dealings with the other properties, in the absence of evidence to the contrary, the husband was the beneficial owner of that property as well. As a result of these circumstances and the presumptions in equity, the court found that the husband was at all relevant times the beneficial owner.

[110] It is important to point out that the appellant in the instant case, has to satisfy the requirements under PROSA in order to establish an entitlement to an interest or share in the companies claimed.

[111] In my view, in this case, it is not necessary to lift the corporate veil to give the appellant a remedy. We have no difficulty in finding that the company was formed with the concurrence of both parties at the start of their married life to hold the family home on their behalf. The company is merely the respondent's nominee and held the property on trust for him. This situation is quite different from the Dillsbury Avenue property,

where the father can in no way be described as a mere nominee or trustee of the respondent.

[112] In the case of Hoven Enterprises Limited, the question is whether the appellant was entitled to take a share of the respondent's shares in the company or in the proceeds of the sale of the house. The company not having been made a party to this claim, there can be no consideration given to a claim for a share in the proceeds of the sale.

[113] The company however, still exists and the respondent is the sole shareholder in this company. The shareholding in the company can therefore be treated as 'other property' and a determination can then be made under section 14 of PROSA.

[114] The appellant had asserted that the monies used to purchase the Hopefield property belonged to both of them and that they agreed that they would purchase the property for their home at the time. The learned judge had made no finding as to who she believed on this point, however, she had concluded that the appellant was not in a position to make a financial contribution to the acquisition of the properties she was making a claim to.

[115] The appellant also claimed that she assisted in naming the company Hoven and was asked to sign documents that would make her a shareholder.

[116] The learned judge found that the appellant's claim in relation to the companies would have to be based on non-monetary contributions. When one looks at the non-

monetary contributions made by the appellant, these also involved caring for the children, ferrying them to and from school and activities. In the early years of the marriage, there was no evidence that the appellant had helpers and nannies and even if she did it was clear from the evidence that she was the primary care-giver. The appellant began helping the respondent in Clean Chem Limited without a salary shortly after the birth of her second child in 2001. All that the parties achieved happened whilst they were at the Hopefield Property. It is also of note that the appellant's evidence is that she was the one who sent money annually overseas (to the company registry) to keep the company active and in good stead. The Hopefield property also increased in value whilst the parties were living there and maintaining it. The husband travelled frequently and the wife was the main caregiver.

[117] I also take into account that having sold Hopefield, there is no family home as defined under PROSA.

[118] In my view, the appellant was entitled to a share in Hoven Enterprises Limited by virtue of her contributions pursuant to section 14 of PROSA. I believe that since the decision to incorporate the company was a joint decision and that the company's sole purpose was to hold the family home in which the parties lived for the greater portion of their marriage, 50% of the shares in Hoven Enterprises is a fair apportionment between the parties.

B. *Grounds f), i), j), k), l), m), n), p), q), s),t) and v): appellant's interest in the companies: Sure Save Wholesale Limited, Xtra Supercentre Limited, Microage Enterprises Limited and properties owned by the companies*

Appellant's submissions

[119] It was submitted that the appellant was beneficially entitled to a share of the other properties owned by the respondent and his companies on the basis that she had contributed directly and indirectly to the acquisition, conservation and improvement of these businesses without a salary for several years during the marriage.

[120] Queen's Counsel also contended that there was a common intention between the appellant and the respondent that the appellant would be entitled to a beneficial share in these companies and the properties owned by the companies. It was also submitted that the common intention should be construed in accordance with the principles enunciated in **Hammond v Mitchell** [1991] 1 WLR 1127.

[121] Queen's Counsel relied for support on the decision in **Richard Lindsay Downer v Erica Anne Downer** (unreported) Supreme Court, Jamaica, Claim No E400/2002, judgment delivered 24 May 2007, to submit that the court could reasonably infer from the email sent by the respondent on 17 February 2011, that the respondent was acknowledging the appellant's beneficial interest in the companies and properties mentioned therein.

[122] It was also submitted that the fact that some of the properties claimed were owned by the companies should not preclude the court from assessing the specific circumstances behind that ownership to determine that the respondent has a beneficial

interest in those properties. The appellant relied on the decision in **Prest v Petrodel Resources Limited and others** in support of this submission.

[123] In addition, it was submitted that since the court had accepted the respondent's evidence that the appellant and the respondent's resources were co-mingled in relation to the businesses and, having found that the appellant was entitled to a 50% interest in Clean Chem Limited, the learned judge ought to have also found that the appellant was similarly entitled to 50% interest in the other businesses.

Respondent's submissions

[124] The respondent submitted that the appellant's evidence regarding her contribution to Sure Save Wholesale Limited and Xtra-Supercentre was discredited, as the learned judge preferred the evidence of the respondent's witness Mrs Alva Lobban.

[125] The respondent also submitted that there was no evidence presented to justify the learned judge making an order in the appellant's favour regarding these businesses. The respondent pointed to the fact that the judge had found that the evidence presented by the appellant as to her contribution was not sufficient to satisfy the requirements of PROSA. Counsel for the respondent also relied on a number of authorities in support of his contentions. I will make reference to those I consider necessary to determine the issues raised in these grounds.

Analysis of grounds f), i), j), k), l), m), n), p), q), s), t) and v)

A. Are the general rules and presumptions of common law and equity of any relevance to the division of matrimonial property under PROSA?

[126] One of the complaints in the grounds of appeal was that the learned judge failed to pay due regard to the distinction between legal and equitable interests in real property. Applications like the one in the instant case are necessary when the legal interest does not reflect the beneficial interest that the applicant is claiming to be entitled to. As between spouses these issues must, however, be settled or determined based on the provisions of PROSA, where an application is made under and by virtue of that statute.

[127] In discussing the law prior to PROSA, which he later termed the 'old regime' Morrison JA in **Annette Brown v Orphiel Brown** at paragraph [21] summarised it based on the decision in **Gissing v Gissing** [1970] 2 All ER 780, as follows:

> "... This case decided that the mechanism for the resolution of disputes between the husband and wife as to the beneficial ownership of property vested in the name of one or the other of them was to be found in the law of trust, in particular in the principles governing resulting, implied or constructive trusts ..."

[128] Section 4 of PROSA makes the post-PROSA position explicitly clear and beyond doubt. It states:

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

[129] Cooke JA in the said case observed that:

> "By section 4 of the Act, the legislature directed that there was to be an entirely new and different approach in deciding issues of property rights as between spouses. Section 4 is a directive to the courts as to what the approach should be ..."

[130] He then went on to say at paragraph [13]:

> "I have set out these sections in extenso to emphasize the dramatic break with the past as demanded by section 4 of the Act, which directs that it is the provisions of the Act that should guide the court and not, as before, 'presumptions of the common law and equity'."

[131] There is therefore no question that since the implementation of PROSA, the 'presumptions of common law and equity' are no longer applicable to transactions between spouses in respect of property and between them and third parties, where provisions are made for it by the Act. Therefore, all claims as to an entitlement to a share of the matrimonial property under PROSA must satisfy the factors set out in section 14, for property other than the 'family home' and section 6 and 7 where the division of the 'family home' is in issue. This means that submissions regarding any reliance on common law presumptions and equitable principles and the authorities dealing with those presumptions and principles are not relevant to transactions between spouses in respect of property for which and in cases where provisions have been made in respect thereof, by PROSA. All submissions must be referenced by the relevant factors as set out in PROSA, unless there are no provisions in PROSA covering that issue.

[132] This, of course, is subject to the caveat that issues relating to the common intention of the parties might be a relevant question of fact, as a starting point to show what the parties' interests were, even in a claim under PROSA, without having to resort to the rules or presumptions of common law or equity. See **Miller and another v Miller and another** [2017] UKPC 21, where the Privy Council commented that PROSA was a robust enactment which stood on its own two feet and there would rarely be any occasion to resort to English authorities under the Married Woman's Property Act. However, the Board did caution that the issue of the intention of the parties should not be disregarded, as it was an issue that could be considered as a question of fact as a starting point, without regard to the rules or presumptions of common law and equity.

[133] I accept that the intention of the parties in the ordering of their affairs is a relevant starting point whether it is being considered under PROSA or under the principles of equity or the common law presumptions. So, for example, if there is evidence of the parties' clear intention that one spouse should work outside the home and the other in the home and that the assets acquired during the marriage would belong equally to both spouses, it is difficult to see how the court would disregard that intention because the application was made under PROSA. So too, an agreement under section 14(2)(d) would be evidence as to the common intention of the spouses and any other evidence of intention can be taken into account under section 14(2)(e), if the justice of the case so requires.

[134] Nevertheless, in this particular case, the appellant's reliance on **Hammond v Mitchell** and the other authorities based on the application of common law and equitable presumptions is misconceived.

[135] Queen's Counsel also complained that the judge did not give sufficient weight to the email from the respondent, which he argued, showed the respondent's state of mind and the facts relevant to the companies and properties. He further argued that it supported the appellant's account of the state of affairs. I will, therefore, consider whether the judge was wrong in her treatment of the email.

[136] On 17 February 2011, the appellant received the following email from the respondent:

> "I know we have a hard time talking on many subjects, so I am writing you. I would like to put you at ease in respect to our children [sic] future.
>
> ....
>
> If something was to happen to me, do not worry either. Most of the money is sent back into the business to maximise our returns, especially at Sure Save. We take discounts for payments for cash, which gives us two to three time the return at any bank. If you need any money in a emergency, even very large sums, just ask Alva to arrange for you to get it. She will send it to Mopen in Mandeville, after which you can get it the next day at Alliance when Mopen updates their account at Alliance, or you can instruct her to send it to any bank.....
>
> I have had conversations with Alva, in the event of my death. She is to run the business and make sure that you and the kids are taken care of. However, it would be up to you if you want to keep the business, if not, we own the

> building in Mandeville and you would have the option to rent it or sell the business and building....
>
> In addition, the building at Barry Street will produce positive cash flow every month, even after the 5,500 that my mom get, you are left with about 3,500. In the event, she passes away, then you and the children would get the entire amount. This building will be paid off within the next 5 years. (Remember to keep the Companies live by paying the fees every year because the property are in the company name.)
>
> There is also a property on Barry Street that I own, however, my dad collect the rent now.
>
> Also, my dad and I own the Princess Street property where Pia is working. It is worth a bit.
>
> ....Your biggest expense which is your home is already taken care of.
>
> The apartment in Kendall is also in my name.
>
> I will do my will soon..."

[137] Queen's Counsel was of the view that this email was evidence that there was a common intention for the appellant to take a share in the companies. However, I am unable to see how this email provides proof of ownership, either as a question of fact or as a matter of intention. It certainly does not identify any starting point as to the parties' interest in any of the properties. In that regard **Downer v Downer** and the treatment by the court in that case of email messages from the husband, which was decided under ordinary legal principles, not the statutory provisions pursuant to PROSA, has no applicability to this case.

[138] In any event, the respondent's evidence was that it was written to reassure the appellant that she and the children would be taken care of in the event of his death.

This is partly substantiated by the reference at the beginning to the children, in the body of the mail to 'in the event of my death' and at the end, to the respondent making a will.

B. Whether the judge erred in not awarding the appellant a share of the respondent's shares in XTRA-Supercentre Limited, Sure Save Wholesale Limited and Microage Enterprises Limited under and by virtue of section 14 of PROSA

[139] Queen's Counsel anchored his arguments on the appellant's assertion that the products supplied to the businesses by Clean Chem Limited were not paid for and that there was co-mingling of resources between all the businesses.

[140] The issue the court had to decide with regard to the businesses was: how and when were these businesses acquired and what contribution, whether financial or otherwise, did the appellant make to the acquisition, conservation or improvement of them. Section 14(2) of PROSA lists the factors a court must take into account in dividing property as it thinks fit. Section 14(3)(a)-(i) defines what the Act recognises as 'contribution' by one party.

[141] I will consider each business enterprise in turn and the manner in which it was dealt with by the learned judge, to determine if she erred in not regarding the appellant as qualifying under section 14(3)(a)-(i) to share in these enterprises.

i. XTRA-Supercentre Limited/ trading as Xtra-Supercentre

[142] The appellant claimed that she and the respondent had commenced a business called Xtra-Wholesale, which, according to her, later became Xtra-Supercentre. She also claimed that she had left her studies to join the respondent in running the business in

which she worked tirelessly without pay from 8:00 am to 5:00 pm six days per week. However, the incorporation documents for Xtra-Wholesale showed that the business began in 1993, prior to the parties having met. The appellant eventually admitted this to be so. The evidence is that Xtra-Supercentre is a different company from Xtra-Wholesale. Xtra-Supercentre was incorporated much later. Xtra-Wholesale ceased operations in 2000. The judge accepted that the appellant worked at Xtra-Wholesale from 1997 to 1998.

[143] The appellant gave evidence that she did work for Xtra-Supercentre but the trial judge found that there was little detail as to the nature of that work. The judge accepted the evidence of Mrs Alva Lobban, the manager for Xtra-Supercentre, over that of the appellant on this issue. The clearest evidence of the appellant's contribution to Xtra-Supercentre, which the judge found, was that she visited the stores to arrange the shelves to allow it to sell groceries and chemicals without contamination. The appellant was also a signatory on the accounts of Xtra-Supercentre. The judge also found, correctly, that she was not a shareholder of the company.

[144] Mrs Lobban gave an overview of the management of these companies and the involvement or lack thereof of the appellant in their operations. She said that both enterprises were separate although they conducted the same business at the same location at one time. Mrs Lobban was initially employed to Xtra-Wholesale in 1995. In that same year she began working as the respondent's personal assistant, where she performed amongst other things, accounting functions for Xtra-Wholesale. In 1999 she commenced working for Xtra-Supercentre, as well, until 2000 when Xtra-Wholesale

ceased operations. Thereafter she worked for Xtra-Supercentre. She explained that at one time Xtra-Supercentre operated from at least six locations and she was involved in all of them. Three of these locations later closed after about a year of commencing operations. Their main business was in retail chemicals and groceries. The chemicals were taken from Clean Chem Limited but no payment was made to Clean Chem Limited for the products taken. Her explanation for this was that the companies all belonged to the respondent.

[145] After assessing the evidence in relation to Xtra-Supercentre and Xtra-Wholesale the learned judge found that, in relation to Xtra-Supercentre, it was a separate business from Xtra-Wholesale and that Xtra-Wholesale "was no longer operational". With regard to Xtra-Supercentre, the learned judge had to choose between the appellant's evidence and that of the respondent's witness Mrs Lobban. The learned judge found that Mrs Lobban was more knowledgeable and involved in the operations of this business and accepted her evidence to find that the appellant had failed to make any meaningful contribution to the business. Of Xtra-Supercentre the learned judge said:

> "When asked about the work she did at Xtra Supercenter, the claimant noted that she went to the stores to arrange them to allow them to sell groceries and chemicals to ensure there was no contamination. She could provide no other evidence as to what or how she contributed otherwise."

[146] The learned judge's findings, in my view, betray entirely a misunderstanding of the significance of the evidence regarding the way in which the parties ordered their business affairs (which is a factual starting point) and the operation of section 14(2) of PROSA. The evidence is that the appellant basically took charge of the operations of

Clean Chem limited to the extent that she undertook training in the subject of mixing chemicals. The evidence is also that the husband focussed mainly on expanding the wholesale business through the expansion of Xtra-Supercentre and others. Clean Chem Limited seemed to have operated as a central sorting office for the other companies and the respondent had his office there. All the bank books for the various entities were kept at the Clean Chem Limited location and all chequing accounts were in the joint names of the appellant and the respondent. The appellant was a signatory on all the accounts and she wrote cheques for Xtra-Supercentre. The respondent received a salary from all the businesses but the appellant received no salary.

[147] The appellant's evidence is that she concentrated on the business of Clean Chem Limited and later employed managers so she could spend time with the children. She later spent more time at home doing payroll, billing and other related activities. After the children got older she went to Clean Chem Limited three days per week in the mornings which allowed her more time to dedicate to the children and supervise their extra-curricular activities. She worked from home up to 2012, when she stopped working.

[148] Mrs Lobban did admit that the appellant was supposed to assist her in Xtra-Supercentre but said the appellant spent only three months at the office. There was acceptance by both the respondent and Mrs Lobban that the appellant showed interest in the business and wanted to learn it although they claimed that lasted only three months. However, there was no denial that the appellant's name was on the accounts for Xtra-Supercentre. Mrs Lobban admitted to interfacing with the appellant by phone

and would call her for orders for chemicals. She also admitted that the appellant signed cheques for Xtra-Supercentre, although she said this was only done on two occasions. More telling was the issue of the co-mingling of the resources by the businesses which took products from Clean Chem Limited for resale but never paid for them. The appellant was never paid for her work in Clean Chem Limited and was never paid for her work in Xtra-Supercentre.

[149] The judge failed to make any findings as to the significance of these factors. In my view, the judge was wrong to find that the appellant had not shown she was entitled to a share of this business.

[150] It seems to me that if the parties order their affairs in such a way that one party concentrates on one business and the other concentrates on another business, and these businesses co-mingle in the way described in the evidence, it would suggest that the spouses were working for the benefit of the family as a unit. The court should be slow to say that the spouse who has not concentrated on working in one of the family businesses but worked in another should be shut out of sharing in that business simply because that spouse did not contribute financially to its acquisition and/or expansion.

[151] The appellant was a wife and mother and for much of the relevant period she was a working wife and mother. Not only did she manage the household but she managed the affairs of the children as well, all the while contributing to the development and expansion of one of the family companies, where that company was contributing to the expansion of the other businesses by providing products free to

them for resale. There is no evidence that the respondent helped with the household or the children. He played golf. He travelled frequently. Both he and Xtra-Supercentre benefited from the appellant's work as a wife and her work in Clean Chem Limited.

[152] Section 14(2)(a) speaks to contribution financial or otherwise and subsection (3) defines contribution to include the care of any relevant child, the giving of assistance or support to one spouse to enable that spouse to carry on his occupation or business, the management of the household and the performance of household duties. Subsection (4) states that for the avoidance of doubt, there is no presumption that a monetary contribution is more valuable than non-monetary contribution.

[153] To my mind, the judge ought to have found that the appellant made valuable non-monetary contribution to the conservation and improvement of Xtra-Supercentre and that she was entitled to one half of the respondent's shares in that business.

ii. Sure Save Wholesale Limited

[154] The appellant's evidence is that Sure Save Wholesale Limited was purchased in 2001. It is a supermarket. She also claimed that they purchased the property from which it operated using capital from the business. However, this could not be so because evidence was that the property from which it operated was registered to Microage in 2007. The respondent's evidence is that Sure Save Wholesale Limited was indeed incorporated in 2001, the same time as Clean Chem Limited, but that it did not trade until 2004. The respondent claimed that the funds to invest in Sure Save Wholesale Limited came from his father. The property on which it operated was bought

by his mother, the sole shareholder of Microage. The respondent's explanation of his father's involvement in his dealings is that they are of "Chinese descent" and that that is "the Chinese way". That may very well be so.

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

[156] In assessing the appellant's claim for an interest in Sure Save Wholesale, the learned judge held that the claimant was not in a position to make any monetary contribution so her claim would have to be based on non-monetary contribution. The learned judge found that the appellant knew very little about Sure Save Wholesale Limited and was unable to state the cost to acquire it. The learned judge also pointed out that "[t]here was no evidence as to the contributions the claimant made to the "Sure Save business". She assessed the evidence by the respondent that his father had provided the money to acquire the business and the fact that the appellant was unable to challenge this assertion. With regard to Sure Save Wholesale the judge found that:

> "There was no evidence as to the contributions the claimant made to the Sure Save business. She merely said the business was purchased by them in 2001. She was not able to provide evidence as to how much it cost to acquire it and she did not work in it. She could not challenge the defendant's assertion that the money to acquire this business were provided by his father. This business was clearly being operated by Mrs Lobban with little or no input from the claimant."

[157] The evidence of Miss Lobban is that she did interface with the respondent whilst she was managing Clean Chem Limited. She also indicated that the other stores would take chemicals from Clean Chem Limited but there was no payment system in place. Although the learned judge discussed it at paragraph [113] and pointed out that Mrs Lobban confirmed this, she did not make any explicit finding on the general submission made that, based on the manner in which the companies were operated with the co-mingling of funds and profits, by virtue of that, the appellant would be entitled to a share of the respondent's shares in all the companies.

[158] The appellant claims that based on the fact that, (a) there was co-mingling, (b) she did the pay roll for Sure Save Wholesale, and (c) there was a central office for all the businesses at the Clean Chem Limited location, she was entitled to share in Sure Save Wholesale. She also claims that by virtue of being the principal care giver for the children and that the work done for these businesses was done without a salary, she qualified under 14(2) of PROSA for a percentage of the respondent's shares to the value of 33 1/3%.

[159] Given the evidence presented, I take the view that the judge erred in her decision not to grant the appellant a share of the respondent's shares in Sure Save Wholesale Limited. The appellant is entitled to share in the respondent's shares in Sure Save Wholesale Limited based on her non-monetary contributions. This business was acquired, and it is not necessary for this purpose to decide where the initial capital came from, during the marriage and at a time when the parties were operating in harmony and co-operation. For the same reason outlined for Xtra-Supercentre, the

respondent is entitled to a share of the respondent's shares in this company. I would hasten to say that, in this case, the share might not necessarily be as high as 50%, for the reason that the evidence is that she did more work for Xtra-Supercentre than she did for Super Save Wholesale Limited. I would be prepared to accept that she is entitled to at least 33 1/3%, as submitted by Queen's Counsel.

iii. Microage Enterprises Limited and the Barry Street properties

[160] The appellant had also claimed to be entitled to one-half interest in Microage Enterprises and the properties it owned at 103-105 Barry Street, in the parish of Kingston. The title to 103-105 Barry Street indicated it was transferred to Microage Enterprises Limited on 10 March 2006. The respondent's evidence was that Microage Enterprises Limited was a company owned by his mother. Microage Enterprises Limited was not a party to the claim and the orders sought against it were abandoned by the appellant.

[161] The judge referred to the claim regarding the properties owned the companies at paragraph [117] thus:

> "In this case, the [appellant] is seeking interest in lands owned by a company namely Microage, and in a vehicle owned by a company namely Sure Save Ltd. In the first company, the defendant himself does not have any interest. In the latter whilst he does own shares, the vehicle remains the property of the company against which the claimant has even failed to establish any entitlement."

[162] The appellant's decision to abandon these claims is not at all surprising as she could not show any basis on which she could sustain a claim against the respondent for property owned and controlled by a third party who is not before the court.

Issue 3: Whether the judge erred in not taking into consideration the respondent's failure to comply with the court order for specific disclosure Grounds u) and w)

Appellant's submissions

[163] As previously noted, at the hearing of this appeal, Queen's Counsel for the appellant indicated that that the appellant was abandoning the request for orders regarding a share in 103-105 Barry Street, Kingston, property at 16 South Race Course and Microage Enterprises Limited. Instead Queen's Counsel requested, in the alternative, that this aspect be remitted to the Supreme Court to be determined after specific disclosure is made. This Queen's Counsel claimed is based on the fact that the respondent had been in flagrant breach of a disclosure order made on 16 October 2013, by Harris J (Ag) (as she then was) regarding these properties. All these properties the respondent has consistently maintained do not belong to him.

[164] Queen's Counsel for the appellant submitted that the respondent had failed to comply with the order for disclosure made on 16 October 2013. He submitted that in the light of the respondent's breach of the specific disclosure order made on 16 October 2013, the learned judge ought to have considered this in assessing the credibility of some aspects of the respondent's evidence. It was also suggested that, as a result, greater weight ought to have been given to aspects of the appellant's evidence than to the respondent's unsupported oral evidence as to matters of corporate record.

[165] It was further submitted that the court could draw adverse inferences in relation to the respondent who had failed to provide the requisite disclosure as well as draw adverse inferences in relation to the absence of the documents. Queen's Counsel argued that since the court below had proceeded without information, this court should remit the matter back for hearing, as was done in **Lambie v Lambie**. Queen's Counsel complained that the judge erred in not imposing any sanction on the respondent for not doing so.

[166] Counsel for the respondent, however, submitted that although the alleged breach was raised by Queen's Counsel for the appellant prior to the commencement of the trial, it had not been pursued before the learned trial judge. Counsel argued that the appellant should not be allowed to raise the issue on appeal having gone to trial without objection.

[167] Counsel for the respondent also relied on the decisions in **Livesey (formerly Jenkins) v Jenkins** [1985] AC 424 and **Sharland v Sharland** [2015] UKSC 60, to argue that it was only where the failure to disclose resulted in the court making an order that is substantially different from the order which it would have made if the disclosure had taken place, that the court would set aside that order.

[168] Counsel for the respondent pointed out that **Jenkins v Jenkins** and **Sharland v Sharland** were cases dealing with applications for ancillary relief in matrimonial cases under the English Matrimonial Causes Act; and that separate proceedings had been filed for maintenance under the Matrimonial Causes Act. He submitted that the issue in

relation to this alleged breach, is what effect the non-disclosure complained of would have had on the making of the orders.

[169] Counsel for the respondent contended that the respondent had set out clearly what he owned in his affidavit dated 13 November 2013 and that it was the appellant who must prove to the satisfaction of the court that she has an interest in the property or properties. Further, that the appellant had not satisfied the court that she had any interest in those properties.

[170] It was also submitted that no useful purpose would be served in remitting the case for a rehearing as the respondent had always maintained that those properties do not belong to him and he was not a shareholder in Microage Enterprises Limited, which owned the properties. Counsel argued further that the appellant had not led any evidence that she was entitled to a share in the property at 103-105 Barry Street or the property situated at 16 South Race Course Road. It was also submitted that the appellant had disclosed everything relevant and required under PROSA, before the trial.

Analysis and decision of grounds u) and w)

[171] The general rule is that court orders are to be obeyed or complied with. Therefore, parties do not have the option of deciding which orders to obey. Court orders are mandatory in nature.

[172] The basis of disclosure is to do justice between the parties. It ensures that the parties operate on an even keel with both sides placing all the cards on the table. In so doing it provides the court with the opportunity to determine the issues between the

parties after assessment of all relevant information. The duty of disclosure is a continuous one which extends to the conclusion of the whole matter. Specific disclosure may be ordered where it is necessary to dispose of the case fairly.

[173] Rule 28.6(1) of the CPR governs the issue of specific disclosure. That rule provides that an order for specific disclosure is an order for a party to disclose documents or classes of documents specified in the order or one ordering the party to carry out a search for such documents as stated in the order and disclose any found as a result of the search. The application for specific disclosure may identify the documents to be disclosed by class or in any other manner but the documents required to be disclosed must be directly relevant to one or more matters in issue in the proceedings. Rule 28.7 sets out the criteria for ordering specific disclosure and rule 28.14 outlines the possible consequences for failing to disclose documents under an order for disclosure.

[174] The order for specific disclosure, in this case, was stated in the following terms:

> "1. That the defendant do file and serve on the Claimant's attorneys-at-law an affidavit disclosing and identifying full particulars of the Defendant's properties, the nature of both real and personal assets, whether located within or outside of the jurisdiction, and their whereabouts and whether the same are held in his own name or held jointly with others or held by nominees or otherwise on his behalf and without prejudice to the generality of the foregoing specifying:
>
> > The identity of all bank accounts in his sole name or jointly held or held by nominees or otherwise on his behalf and the sums standing to his credit in such accounts; and

> Any real property or personal property or other assets monetary or goods, owned by the Defendant, Mr Quentin Hugh Sam and the whereabouts of the same and the names and addresses of all persons who have and may be in possession or custody or control of any such assets, money or goods at the date of this Order.
>
> The information required herein is to be furnished by the Defendant to the Claimant's Attorneys-at-Law on or before the 13th day of November 2013 at 4:00 p. m."

[175] The respondent filed an affidavit in compliance with this order. However, I must make some observations in regard to the appellant's complaint that it was not obeyed. Firstly, there is no document specifically identified in the order, it is an order for general disclosure of property the respondent owns or has an interest in. Secondly, there is no indication as to why it is perceived that it was not obeyed. Thirdly, there is no indication that a complaint had been made to the judge below that an order of the court touching and concerning the proceedings had not been complied with, nor was any request made for an adjournment until compliance or for sanctions for non-compliance.

[176] Rule 28.14(2) of the CPR provides that a "party seeking to enforce an order for disclosure may apply to the court for an order that the other party's statement of case or some part of it be struck out". No such application was made by the appellant in the court below. There is also no complaint that the respondent did not comply with standard disclosure. This specific disclosure order, in the manner in which it is worded, in my view, covered matters and documents which ought to have been disclosed under standard disclosure, as a matter of course.

[177] In any event, the respondent alleged that there was nothing in the order to disclose any specific property. At paragraph 3 of the affidavit filed by the respondent on 13 November 2013, in compliance with the order for disclosure, he listed his assets in and outside of the jurisdiction as follows:

1. Clean Chem Limited;
2. Sure save Wholesale Limited;
3. XTRA-Supercentre;
4. Hoven Enterprises Limited;
5. 10 shares in Racers Apparel Company Limited;
6. 40 shares in Racers Water Company Limited;
7. Townhouse number 8 at 4 Dillsbury Avenue as joint tenant with father;
8. lots 1 and 16 Peter's Rock as joint tenant with appellant;
9. 59-61 Princess Street as joint tenant with his father;
10. 14 Orange Street, Kingston; and
11. Property at Kendall Miami United States of America.

[178] The respondent also listed various bank accounts both personal and for business purposes. Some documentation was also provided for the properties as well as the accounts.

[179] The appellant chose which of those properties or companies she wished to pursue a claim against. There was no specific order to disclose anything regarding Microage Enterprises Limited or the properties it owns and, since the respondent has maintained he is not a shareholder or has any interest in that company or its holdings, I cannot see what in the order would have placed any obligation on him to make any disclosure regarding Microage Enterprises Limited.

[180] Based on the unspecific nature of the order for specific disclosure, it is difficult to discern why the appellant was of the view that the order was not complied with. The properties owned by Microage Enterprises Limited are not owned by the respondent. There is no allegation that the respondent is a shareholder of that company and he has specifically denied being one. His evidence, which is not contradicted by the appellant, is that his mother is the sole shareholder of that company. The appellant admitted that she had heard that this was so. However, she based her suspicion of the respondent's involvement in the company on the fact that the company's address of incorporation is her mother's address in Canada and that it was incorporated in the British Virgin Islands in the same manner as Hoven Enterprises Limited. The appellant also claimed to be the one who sent the fees to maintain these companies on a yearly basis.

[181] In this case there is no evidence that Microage Enterprises Limited is held on beneficial trust by the mother for the benefit of the son and I cannot see how remitting the case back to the courts below for disclosure will assist. The appellant already knew that Microage Enterprises Limited existed. She already knew what property it owns. If she is claiming a share of those properties, it was for the trial judge to determine whether she had succeeded in that claim. I cannot see how any further disclosure would have aided her in her quest. The judge found that she had made no contribution to the acquisition of the properties owned by this company. There is no automatic equality entitlement to 'other property' under PROSA. If the appellant is unable to prove contribution in this round, the question is - will her position will improve in the second round? Disclosure does not mean that the property so disclosed is one to which the court will find the appellant is entitled. See the reasoning of Harris JA in **William Clarke v Gwenetta Clarke** [2014] JMCA Civ 14 at paragraph [48].

[182] At paragraph 24 of **Sharland v Sharland**, Lord Hale quoted the dictum of Lord Brandon at pages 445-446 of **Livesey (formerly Jenkins) v Jenkins** where the court gave a word of warning that:

> "It is not every failure of frank and full disclosure which would justify a court in setting aside an order of the kind concerned in this appeal. On the contrary it will only be in cases where the absence of full and frank disclosure has led to the court making, either in contested proceedings or by consent, an order which is substantially different from the order which it would have made if such disclosure had taken place that a case for setting aside can possibly be made good."

[183] This is a view which I totally endorse. The order in this case, does not place any obligation on the respondent to disclose anything regarding the properties owned by Microage Enterprises Limited, as it is not his case that he has a beneficial interest in them or that the owner is a mere nominee on his behalf. It is also unclear what more the appellant wished disclosed than what she already knows, that is, that the company exists and the properties are owned by it. It is now for her to show that she is entitled to take a portion of the shareholdings in the company. The only circumstance raised by the appellant in support of her claim, is that the company has its registered office at her mother's address. This is information which formed part of her evidence before the judge and which was not sufficient for the judge to find that the respondent was a shareholder in Microage Enterprises Limited or that the appellant contributed to its acquisition, improvement or expansion.

[184] There is no evidence provided by the appellant that she made any financial or non-financial contribution to the formation of Microage Enterprises Limited and the acquisition of any of the properties owned by it. If she is unable to do so at this stage, remitting the case back to the court below for disclosure on what we already know, to my mind serves no useful purpose. It is my view that there is no merit in these grounds.

Issue 4: Whether the judge erred in not making an award of costs in the appellant's favour?-ground r)

Appellant's submissions

[185] Queen's Counsel for the appellant submitted that the learned judge ought to have awarded the appellant some portion of her costs in light of the fact that she had succeeded on some of the orders sought in the claim and given the general principle that costs follow the event. Queen's Counsel submitted that there was nothing in the circumstances of this case that would have disentitled the appellant to an award of a portion of her costs.

Respondent's submissions

[186] In relation to the order made for costs, counsel for the respondent submitted that the appellant was unsuccessful in the majority of her claims. Counsel also pointed out that, at the start of the proceedings in the court below, the respondent conceded that the appellant had a 50% interest in the lots at Peters Rock. It was also submitted that the court's power in granting costs is discretionary and since the learned judge found the appellant's evidence to be less than credible and that she had led no evidence in relation to some of her claims, the judge was correct in making the orders that she did as to costs.

Discussion and decision on ground r)

[187] The issue of costs is governed by the Judicature (Supreme Court) Act (the Act) and Part 64 of the CPR. Section 28E of the Act provides that, subject to any other provisions in the Act or any other enactment and to the rules of Court, costs of and

incidental to all civil proceedings in the Supreme Court is at the discretion of the Court. It also provides that the Rules Committee of the Supreme Court is empowered to make provisions for regulating matters relating to costs of civil proceedings and subject to any such rules, the court may determine by whom and to what extent costs are to be paid. Section 47 of the said Act provides that, in the absence of express provisions to the contrary, the costs of and incident to every proceeding in the Supreme Court "shall be in the discretion of the Court." The question of whether to award costs or not, in any proceeding before the Supreme Court, is therefore, at the discretion of the judge.

[188] Rule 64.3 of the CPR provides that:

> "The court's powers to make orders about costs include power to make orders requiring any person to pay the costs of another person arising out of or related to all or any part of any proceedings."

[189] Rule 64.4 of the CPR also states that:

> "The court hearing an appeal may make orders about the costs of the proceedings giving rise to the appeal as well as the costs of the appeal."

Rule 1.18 of the Court of Appeal Rules (CAR) expressly states that the provisions of the CPR Parts 64 and 65 apply to the award and quantification of costs of an appeal subject to any necessary modifications and amendments set out in the CAR.

[190] Rule 64.6 (1) and (2) of the CPR preserves the general common law rule that the successful party is generally entitled to costs and provides that:

> "64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
>
> (2)The court may however, order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs."

[191] Rule 64.6(3) of the CPR provides as well that the court, in deciding who should be liable to pay costs, must have regard to all the circumstances. Rule 64.6(4) states that the court must pay particular regard to:

> "(a) the conduct of the parties both before and during the proceedings;
>
> (b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;
>
> (c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);
>
> (d) whether it was reasonable for a party-
>
> (i) to pursue a particular allegation; and/or
>
> (ii) to raise a particular issue;
>
> (e) the manner in which a party has pursued-
>
> (i) that party's case;
>
> (ii) a particular allegation; or
>
> (iii)a particular issue;
>
> (f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim."

[192] Rule 64.5 provides, inter alia, that:

> "The orders which the court may make under this rule include orders that a party must pay-
>
> (a) a proportion of another party's costs;..."

[193] Implicit in the statutory provisions and the rules is the fact that there is no entitlement to recover costs, although, as said in the English case of **Scherer v Counting Instruments Ltd** [1986] 1 WLR 615, the general rule does create a reasonable expectation of a costs order to the successful party. That was a case in which the English Court of Appeal set out the approach a court should take in the award of costs and accepted that although there was an unfettered discretion, it is one which should be exercised judicially.

[194] A judge of the Supreme Court, therefore, having unlimited discretion with regard to costs, has the power to determine which party is entitled to costs and to what extent they are so entitled. Although the general rule is that costs follow the event and the unsuccessful party must pay the successful party's costs, the court has the discretion to order otherwise. The question of which costs order is appropriate in the particular circumstances is at the discretion of the judge and this court is slow to interfere in the exercise of the judge's discretion without good reason.

[195] In the award of costs, a judge is required to take guidance from the Act and the rules. The proper approach by a judge in considering whether or not to award costs is

to first determine which party is successful, whether fully, substantially or partially. In deciding whether and how to exercise his discretion, the judge should begin with the general rule, then go on if necessary, to determine whether there is any reason to depart from it, having regard to all the circumstances. The circumstances of the case might be one in which the judge can and should make an order which accurately reflects the relative success of one party; in such a case a proportionate costs order can be appropriately made.

[196] The general rule will give way to the considerations in rule 64.6(3) and (4), especially where one party has only been partially successful. Generally, where a party has only been partially successful he is to be awarded only a percentage of the costs. Lord Woolf MR in **AEI Rediffusion Music Limited v Phonographic Performance Limited** [1999] 1 WLR 1507 in the English Court of Appeal recognised the necessity to move away from a position where any success was sufficient to obtain a costs order, to one which envisaged more partial orders for costs being awarded which more accurately reflected the level of success achieved by one party. This is the approach implicit in the expressed provisions of the rules.

[197] Apart from the question of whether any or which party has had substantial success, one other factor which a court (deciding a family matter and in the division of property, as in this case), may wish to take into account in awarding costs outside of the general rule, is whether to do so would affect the balance of what it is trying to achieve and whether to do so or not is in keeping with the overriding objective of dealing with cases justly.

[198] Where one party has been successful or partially successful and the judge decides to depart from the general rule that the successful party is to get his costs, it is desirable that reasons be given for doing so. The judge should determine who the successful party is, with reference to the whole matter and make an order, which in his discretion, achieves justice (see **In re Elgindata Ltd** (No 2) [1992] 1 WLR 1207).

[199] The question of who is the successful party takes on a different dimension in the peculiarity of family cases because of the myriad of issues which can arise on the case which makes them somewhat different from other civil proceedings. There may therefore, not appear on the face of it to be any clear winners or losers. In such as case it is left to the discretion of the court whether costs are awarded or not and this court will be reluctant to interfere in the judge's exercise of such a discretion once exercised judicially.

[200] In **Donald Campbell and Company Limited v Pollack** [1927] AC 732 Viscount Cave LC, giving judgment in the House of Lords regarding statutory provisions similar to those in the Act, cautioned that a plaintiff who took his case to trial had no right to costs until an order was made. However, if an order were to be made the court should order that costs follow the event unless there was reason not to do so and the circumstances suggested that a different order ought to be made. The Law Lord also cautioned that, since the trial judge was the person best in a position to judge the conduct of the parties (such conduct being only that which is connected with or leading up to the litigation) in order to determine the proper basis for the exercise of his discretion - the appellate court should not place a gloss on the statute which gave

unfettered discretion to the judge and so frustrate it's obvious purpose. However, it was recognised that such discretion must be exercised judicially and must be based on some grounds otherwise it is not judicially exercised. Although **Donald Campbell v Pollack** is a pre-CPR decision, it is still good law now (post CPR) as it was then. See also the decision of this court in **Director of State Proceedings and others v The Administrator General of Jamaica (Person entitled to a Grant of Administration in the estate of Tony Richie Richards)** [2015] JMCA Civ 15, judgment of McDonald-Bishop JA approving the principles in **Donald Campbell v Pollack**.

[201] Because it is also a decision specifically on costs, I will also make reference to the test expounded by Sir Murray Stuart-Smith in **Adamson v Halifax plc** [2002] EWCA Civ 1134 at [16] where he formulated it as follows:

> "16. Costs are in the discretion of the trial judge and this court will only interfere with the exercise of that discretion on well defined principles. As I said in Roache v News Group Newspapers Ltd [1998] EMLR 161, at 172:
>
> > 'Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in scale'."

[202] Also in **Islam v Ali** [2003] EWCA Civ 612 Auld LJ said that the English Court of Appeal should only interfere with the judge's exercise of his discretion as to costs, if he has exceeded "the generous ambit within which reasonable disagreement is possible".

[203] In **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1 Morrison JA (as he then was), in explaining the basis on which this court will interfere with the decision of a judge in the exercise of a discretion, after approving Lord Diplock's statement in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 said at paragraph [20] of his judgment that:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong or where the judge's decision is so "aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it."

[204] In **VRL Operators Limited v National Water Commission and others** [2015] JMCA Civ 69, this court, hearing an interlocutory appeal against a costs order made in the court below, held that a judge's decision on costs would only be interfered with if it was demonstrably wrong within the principles expounded by Lord Diplock in **Hadmor Productions Ltd and others v Hamilton and others**. F Williams JA, in giving the judgment of the court, found that the judge had failed to apply the principles applicable to the award of costs. He held that the proper course the judge ought to have adopted was to assess whether the general principle should be departed from, if the appellant was the successful party. The judge's decision on costs was overturned on the basis that it was plainly wrong.

[205] Let me state categorically that I do not believe that this court's approach is affected by whether a judge is exercising a discretion at the end of a trial or after an

interlocutory application. However worded, in my view, the overall approach in this court and in the English Court Appeal appears to be the same. The judge below must act judicially in exercising a discretion. There must be a basis for the decision. Therefore, if a judge fails to give due regard to the principles involved before making a decision in the exercise of his or her discretion or fails to give reason for a departure from the general rule, where the reason is not obvious on the evidence, this court will intervene. An appeal against costs will be allowed where the judge's decision was demonstrably wrong in principle or unjust because of serous procedural irregularity or if the discretion was not exercised judicially. In examining the costs order in this particular case, it seems to me, that this court cannot interfere with it (even if this court would have made a different decision) unless the judge's decision was plainly wrong in principle or on the evidence, that is, there is no grounds on which such a decision could have been made or where it is clear that the judge, in coming to that particular decision, failed to act judicially.

[206] In this claim for division of property under PROSA, the judge made no order as to costs but gave no reason for doing so. I think it is important to state that whereas under section 33 of the Matrimonial Causes Act it stated that each party shall bear its own costs in proceedings under that Act, no such provision exists under PROSA. A judge hearing an application under PROSA, is therefore, bound by the Act and the CPR, in the exercise of his discretion in awarding costs.

[207] Although the judge gave no reason for the departure from the general rule, it is difficult to say that the reason for the departure is obvious or that the decision to

depart from the general rule was a reasonable one to make. This was not one of those family cases where it was difficult to identify a clear winner or a loser. Looked at realistically, the appellant was successful in some aspects of her claim. A party who is substantially successful should be awarded all his costs and there is no rule requiring a reduction of a successful party's costs simply because he has lost on one or more issues. However, rule 64.6 (4) and (5) of the CPR requires the court to consider that the claimant was successful with only a proportion of her claim when making a costs order. Therefore, a proportional costs order is a perfectly proper order that a court can make and ought to consider making in the correct circumstances. There is nothing which suggest that an order which deprives the successful party of all her costs was necessary to achieve the overriding objective of dealing with cases justly.

[208] In this particular case the correct approach was for the court to determine that the claimant was only partially successful, followed by a consideration of what order for costs was required to be made in the interests of justice, in those circumstances. This would necessarily involve a determination whether the conduct of the claimant was such that she should be deprived of all her costs. There is no indication that this was the approach taken by the judge.

[209] In the absence of any clearly stated reason for the departure from the general rule, and in reviewing the matter afresh, it cannot be said that it was unreasonable for the appellant to have raised the issues on which she lost in the court below. Looked at in the round, I am unable to see any basis for determining that the order made by the

judge was the one which best met the justice of the case. There is therefore a proper basis for this court to interfere and set aside that order.

[210] If an appeal is successful this court may order the losing party to pay the costs here and in the court below. The appellant's success rate has increased on appeal. The appellant has been partially successful in her claim both in the court below and in this court. It is my considered view that she was entitled to half her costs in the court below. The substantive judgment having been varied and the appellant having had substantial success in this court, she is also entitled to half her costs of this appeal.

Disposal of the appeal

[211] I would, therefore, propose that the appeal be allowed in part and that orders 1-6 of the orders of P Williams J be affirmed and order 8 that there be no order as to costs be set aside and an order that the respondent pays 50% of the appellant's costs below be substituted therefor. I would also recommend that the decision of P Williams J be varied as follows:

(1) The appellant is entitled to 50% of the respondent's shares in Hoven Enterprises Limited.

(2) The appellant is entitled to 50% of the respondent's shares in XTRA-Supercentre Limited trading as Xtra-Supercentre.

(3) The appellant is entitled to 33 1/3 % of the respondent's shares in Sure Save Wholesale Limited.

(4) The respondent's shares in the companies are to be valued by a reputable valuator agreed by the parties. If the parties are unable to agree a valuator, either party may apply to the Registrar of the Supreme Court to appoint a valuator. The respondent is at liberty to purchase the shares of the appellant at full market value within 60 days after notice of valuation has been given, failing which the appellant is at liberty to sell the said shares on the open market by private treaty or by public auction.

(5) The respondent is to pay half the appellant's costs of this appeal.

PHILLIPS JA

ORDER

(1) The appeal is allowed in part.

(2) Orders 1-6 of the orders of P Williams J are affirmed.

(3) Order 8 that there be no order as to costs is set aside and an order that the respondent pays 50% of the appellant's costs in the court below is substituted therefor.

(4) The judgment of P Williams J is varied as follows:

(i) The appellant is entitled to 50% of the respondent's shares in Hoven Enterprises Limited.

(ii) The appellant is entitled to 50% of the respondent's shares in XTRA-Supercentre Limited trading as Xtra-Supercentre.

(iii) The appellant is entitled to a 33 1/3% of the respondent's shares in Sure Save Wholesale Limited.

(iv) The respondent's shares in the companies are to be valued by a reputable valuator agreed by the parties. If the parties are unable to agree a valuator, either party may apply to the Registrar of the Supreme Court to appoint a valuator. The respondent is at liberty to purchase the shares of the appellant at full market value within 60 days after notice of valuation has been given, failing which the appellant is at liberty to sell the said shares on the open market by private treaty or by public auction.

(5) The respondent is to pay half the appellant's costs of this appeal.