[2024] JMCA Civ 44

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MRS JUSTICE V HARRIS JA

SUPREME COURT CIVIL APPEAL NO 58/2018

BETWEEN	**LLEWELYN BAILEY**	**APPELLANT**
AND	**SHARON COLQUHOUN BAILEY**	**RESPONDENT**

Dr Lloyd Barnett and Mrs Yualande Christopher instructed by Yualande Christopher & Associates for the appellant

Miss Catherine Minto instructed by Nunes, Scholefield, DeLeon & Company for the respondent

29, 30 November 2022 and 20 December 2024

Civil law - Matrimonial property - Husband and wife separated - Entitlement to the family home - Application of the equal share rule - Variation of the equal share rule - Whether it would be unreasonable or unjust for the equal share rule to apply - Factors to be considered - Marriage of short duration - Family home owned by one spouse before marriage - Contributions to the family home - Intention of the spouses - Sections 2, 4, 6, 7, 12(2), 13 and 14 of the Property (Rights of Spouses) Act 2004

MCDONALD-BISHOP JA

[1] I have read, in the draft, the judgment of V Harris JA and agree with her reasoning and conclusion regarding the disposition of the appeal and counter-notice of appeal. However, I am compelled to add that I wholeheartedly endorse her interpretation and application of section 7(1) of the Property (Rights of Spouses) Act ('PROSA') regarding the factors that would permit a variation of the equal share rule in relation to the family home. The section reads:

> "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;
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> (b) that the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation;
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> (c) that the marriage is of short duration." (Emphasis added)

[2] Having regard to the emphasised portions above in section 7(1), I firmly associate myself with the reasoning of my sister V Harris JA at paras. [30] – [32] and [136] – [148] regarding the pronouncements of Brooks JA (as he then was) in **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47 ('**Stewart v Stewart**') at para. [34] that:

> "... the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration."

[3] Regrettably, I have found it challenging to accept Brooks JA's reasoning and conclusion that "[i]t is at the stage of assessing one or other of those factors, **but not otherwise**" (emphasis mine), that the court is permitted to consider other matters before there can be a variation of the equal share rule. Given the plain and unambiguous meaning of the statutory provision and the clear intention of Parliament regarding the court's treatment of spousal property within the statutory scheme, fairness, reasonableness, and justice form the bedrock of the statute. Against that background, the restrictive interpretation ascribed to the factors to be considered in **Stewart v**

Stewart is, unfortunately, antithetical to the ethos of PROSA and is, therefore, insupportable if the court is to ensure just outcomes in spousal property disputes governed by the statute.

[4] Accordingly, I cannot endorse the court's view in **Stewart v Stewart** that one or other of the three listed factors in section 7(1) provides a gateway through which other factors may be considered and not otherwise. In departing from this position, I would reiterate my viewpoint expressed as a judge of the Supreme Court in **Donna Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court, Jamaica, Claim No 2006 HCV 03158, judgment delivered 8 April 2008 ('**Graham v Graham**'), on which I continue to stand:

> "27. It is noted that the Act, in indicating some relevant considerations for the court in deciding whether the rule should be departed [from] under section 7, has not sought to present a closed category of the considerations that would be relevant. It expressly identifies three relevant factors that may be considered by the court. … The fact that the category of factors is not closed by the statute is taken to mean that the court may take into account other considerations that arise in the circumstances in determining whether the application of the 50/50 rule should be departed from. Under section 14(2) certain factors are listed as relevant when the issue concerns division of property other than the family home. None of these factors are expressly stated as being applicable in respect of the family home when there is an application under section 7 to vary the rule. It stands to reason, therefore, that in considering an application under section 7, it is for the court, in its own discretion, to determine what considerations in the circumstances would be relevant in order to produce a fair and just result. I conclude that had the legislature sought to provide a closed statutory list of relevant considerations in respect of the family home then that might have resulted in a fetter on the exercise of judicial discretion in determining what is reasonable or just under section 7. The legislature, clearly, did not so intend."

[5] Therefore, I concur with V Harris JA's opinion, which is fully expressed in para. [147] below, that in the public interest, and, I would add, in the interests of justice, this court should depart from the principle earlier stated in **Stewart v Stewart** that the

factors listed in section 7(1) provide a gateway for the court to consider other factors in determining whether to vary the equal share rule. The factors listed in the section are only three relevant factors, of a non-exhaustive list, that the court may consider in treating with the family home. Therefore, the absence of any or all of them in the circumstances of a given case should not preclude the court from varying the equal share rule based on any other pertinent factor if it is considered just or reasonable to do so.

EDWARDS JA

[6] I, too, have read in draft the judgment of McDonald-Bishop JA and the more fulsome decision of V Harris JA. I do agree with the conclusions and orders arrived at, but I wish to say only one thing with regard to the conclusions arrived at on the statement made by Brooks JA (as he then was) in **Stewart v Stewart**. In that case, Brooks JA said:

> "[34] … the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. **It is at the stage of assessing one or other of those factors, but not otherwise**, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration." (Emphasis added)

[7] I find nothing unfair or unjust in the statement made in the first sentence of this quote, and it is a correct statement of the law. Also, in principle, in my view, the factors listed in section 7(1) do provide a gateway through which the court can embark on a consideration of whether to adjust the equal share rule under section 7. The section of this quote that creates the difficulty highlighted by McDonald-Bishop JA and V Harris JA is where Brooks JA states that "[i]t is at the stage of assessing one or other of those factors, but not otherwise", that other matters may be considered. I agree that, to the extent that that aspect of Brooks JA's statement can be interpreted to mean that the

three factors listed are the only gateways through which section 7 may be invoked, the approach would be incorrect. I do agree that the categories of relevant factors are not confined to the three listed in the statute and that by using the language "including", Parliament has made it clear that the categories of relevant factors are not restricted to the three named therein.

[8] I do, however, for my part, agree with Brooks JA that there must be a gateway for entry into section 7, and the person relying on that section must identify relevant factors that can cause the court to embark on the consideration of whether to adjust the equal share rule. Care must be taken in expressing the "departure" from Brooks JA's reference to the need for a gateway; for a gateway, there must be. The legislature provides for the equal share rule to be the default position. To open the gate to review that default position, the key must be the identification of some reason (relevant factor(s)) why this gate should be open for a departure. I, therefore, do not wish the takeaway from this decision to be that there is no gateway into section 7, despite the eloquent formulation of the position by my sister V Harris JA at para. [148]. The take away must be that the three factors listed by Brooks JA, from those set out in section 7, are not the only relevant (key) factors to engage the court in a consideration of a departure from the equal share rule. Brooks JA himself recognised this when he concluded at para. [76] of **Stewart v Stewart** that a factor listed in section 7 or some "similar factor" must exist.

[9] McDonald-Bishop JA has cited her own judgment in **Graham v Graham** in support of her position. I do agree that the statement quoted from para. [27] of that judgment, for the most part, accurately reflects the law, but, in my view, since language is very important in the interpretation of the law, I believe it is important to clarify one aspect of the statements in that paragraph. There, McDonald-Bishop J (Ag) (as she then was) says:

> "… **It stands to reason, therefore, that in considering an application under section 7, it is for the court, in its own discretion, to determine what considerations in the**

> **circumstances would be relevant in order to produce a fair and just result.**" (Emphasis added)

[10] Since we are taking the opportunity to clarify the position regarding this issue, I do admit to some disquiet with this statement since, in my view, it is the person relying on section 7 who ought to raise factors to the court for the court to consider whether they are indeed relevant or not. It is only after these factors are highlighted that the court, after considering them, in its discretion, makes the determination. It is not for the court, of its own initiative, to raise and consider factors that may or may not be relevant. I would hate to think a litigant could come before the court, on the basis of this, to argue that the court failed to exercise its discretion by failing to consider whether relevant factors existed or not, in circumstances where none was identified by the defendant for the court to consider and possibly vary the equal share rule.

[11] In the premise, I agree with the outcome of the case and the orders suggested by V Harris JA and as set out by McDonald-Bishop JA.

V HARRIS JA

[12] The appellant, Mr Llewelyn Bailey, has appealed to this court against the decision of Laing J ('the learned judge') made in the Supreme Court on 23 April 2018, whereby he varied the parties' interests in the family home in favour of the respondent, Mrs Sharon Colquhoun Bailey. That decision is also being challenged by Mrs Colquhoun Bailey in her counter-notice of appeal.

The factual background

[13] The relationship between Mr Bailey and Mrs Colquhoun Bailey began in 1979. For most of their liaison, Mr Bailey was married and lived with his first wife. During that time, the parties welcomed a daughter ('LB') on 4 June 1993.

[14] Over the course of their affair, Mrs Colquhoun Bailey solely acquired a two-bedroom, one-bathroom house in 1989. In 2004, she sold that house and applied the net proceeds of the sale, along with a loan from Jamaica National Building Society ('JNBS')

(more specifically JN Fund Managers), towards the purchase of land situated at Lot 2, 4 Plymouth Way, Widcombe, Kingston 6, in the parish of Saint Andrew, registered at Volume 1394 Folio 796 of the Register Book of Titles ('the Plymouth property'). On 6 March 2006, Mrs Colquhoun Bailey became the sole proprietor of the Plymouth property.

[15] Having been granted early possession of the Plymouth property in December 2005, Mrs Colquhoun Bailey commenced her endeavours to construct a dwelling house thereon. She received additional loans from JNBS to finance the construction, which Mr Bailey guaranteed. On or about 18 July 2008, when the dwelling house was substantially completed, Mrs Colquhoun Bailey and LB moved into the Plymouth property.

[16] The parties are at odds as to when Mr Bailey moved into the Plymouth property. However, it is accepted that he initially lived at a house in Smokey Vale, Kingston 8 ('the Smokey Vale property'), which he shared with his children and first wife until her passing in 2007. Mr Bailey subsequently moved into the Plymouth property in 2008, and the parties were married on 3 May 2009. Together, they continued to reside at the Plymouth property and contributed to its maintenance and the family's expenses.

[17] On 5 March 2014, four years and 10 months after their marriage, Mrs Colquhoun Bailey left the Plymouth property. Following their separation, the Plymouth property became a point of contention between the parties. Mrs Colquhoun Bailey rented separate premises while Mr Bailey and LB continued to reside at the Plymouth property. On 12 March 2015, Mrs Colquhoun Bailey served Mr Bailey's attorneys-at-law with a notice for Mr Bailey to vacate the Plymouth property in approximately three months.

[18] With the intention of securing his interest in the Plymouth property, on 30 June 2015, Mr Bailey filed a fixed date claim form in the court below pursuant to section 13 of PROSA for the division of matrimonial property. At the time of filing, the stipulated time frame of 12 months from the termination of cohabitation had already passed (section 13(2) of PROSA). For that reason, Mr Bailey sought and was granted an extension of time to file the claim.

[19] By way of his claim, Mr Bailey sought a declaration that he was beneficially entitled to a 50% interest in the Plymouth property on the basis that it was the family home, along with several additional orders consequent on that declaration. Mrs Colquhoun Bailey resisted his claim, asserting that she was entitled to the whole interest in the Plymouth property.

[20] Further to a trial that commenced on 4 December 2017, the learned judge, on 23 April 2018, delivered his judgment and made the following orders:

> "1. [Mr Bailey] is entitled to a ten (10) percent [sic] share of the legal and beneficial interest of [Mrs Colquhoun Bailey] in the property known as 4 Plymouth Way, Kingston 6 in the parish of Saint Andrew being all that parcel of land part of Barbican known as Barbican [sic] now known as Barbican Heights in the parish of Saint Andrew being the lot numbered two on the plan of Lots 463,464 and 465 Plymouth Avenue part of Barbican Heights ('the Property').
>
> 2. The value of the legal and beneficial interest of [Mrs Colquhoun Bailey] in the Property as at the 5th March 2014, taking into account any outstanding mortgage obligation to any bank or other financial institution in respect thereof as at that date, is to be ascertained by a licensed valuator to be agreed by both parties or in the absence of agreement chosen by the Registrar of the Supreme Court. The cost of the valuation is to be borne equally by both parties.
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> 3. [Mrs Colquhoun Bailey] is to pay [Mr Bailey] ten percent [sic] (10%) of such sum as determined by the valuator within six (6) months of the receipt of the valuation report and if there is a failure to make this payment, [Mr Bailey's] interest is to be noted on the Certificate of Title in respect of the Property by the Registrar of Titles.
>
> 4. Each party to bear his/or her own cost."

The appeal

[21] Dissatisfied with that decision, Mr Bailey filed his notice and grounds of appeal on 1 June 2018. He sought to dispute orders 1 to 3 based on several aspects of the learned judge's findings of law and facts, which he proffered in these 19 grounds of appeal:

"(1) The findings of fact and conclusions listed at 2(a)1-11 above [in the notice of appeal] are unreasonable, contrary to the weight of the evidence and the learned Judge misdirected himself in making the said findings and conclusions.

(2) The learned Judge erred in law in holding that the Respondent had sufficiently communicated her intention to vary the 50:50 rule although there was no such pleading, claim or application as is required by section 7 of PROSA.

(3) The learned Judge erred in holding that the Respondent had sufficiently communicated her intention to vary the 50:50 rule although her application was to the effect that the Appellant had no interest whatsoever and she did not ask for any such Order in accordance with the provisions of PROSA.

(4) The learned trial Judge erred in holding that the Respondent satisfied the relevant gateway conditions and that it was open to the Court to disapply the equal share rule. [As amended]

(5) The learned Judge erred in equating the computation of the five years of cohabitation for the purpose of the section 6 application of the 50:50 rule with the assessment of the short duration of the marriage or cohabitation as a factor for consideration in determination [sic] whether it is just or equitable to vary the rule.

(6) The learned trial Judge erred in construing section 7(1)(c) of PROSA as regards the assessment of the period of cohabitation so as to exclude the period of the marriage from the assessment of its duration.

(7) The learned Judge erred in treating the marriage to be of short duration on the basis that the immediately preceding period of cohabitation should be excluded from the computation, although the entitlement to the family home granted by section 6 relates to spouses, which include cohabiting single persons.

(8) The learned trial Judge held that the marriage was of short duration by separating the period of cohabitation while unmarried, from the period of cohabitation while married, although continuous.

(9) In particular the learned trial Judge stated that "later that year the Claimant moved in with the Defendant and their child" when the evidence was that there was no appreciable difference between the time they all moved into 4 Plymouth Way.

(10) The learned Judge erred in holding that the relative age and financial circumstances of the parties to be [sic] of no significance or that the Appellant had been able to accumulate assets, without considering the evidence that the Appellant had made sacrifices to facilitate the acquisition and maintenance of the family's lifestyle and standard of living.

(11) The learned Judge misdirected himself on the facts in holding that without the Appellant's assistance the Respondent would have been able to take care of the mortgage payments although it is clear that she would not have been able to do so without his assuming the responsibility for other necessary family obligations, such as their child's education.

(12) The learned Judge erred in treating as irrelevant any assistance given by the Appellant to the Respondent in securing the mortgages although the Appellant in addition to other administrative and technical assistance undertook the obligation of guarantor of the mortgages.

(13) The learned Judge erred in law in proceeding on the basis that any assistance given by the Appellant was irrelevant if there was no agreement that it should be rewarded by an interest in the property, although PROSA makes it clear that the rules of law and equity are now inapplicable.

(14) The learned Judge erred in holding that the philosophical and legal justification for the equal entitlement rule was absent and that it was unreasonable and unjust not to vary that rule.

(15) The learned Judge erred in seeking to determine the matter by taking into account that the title to the property was in the Respondent's name alone and that this was a relevant factor because it was indicative of the Party's intention although under PROSA this is irrelevant.

(16) The learned Judge erred on the facts in holding that the parties separated their financial responsibilities when it was clear that they divided the responsibilities on the basis of convenience and operated in a practical manner which resulted in the Respondent being primarily responsible for the mortgage payments, the Appellant for their daughter's university expenses, and a significant share of other domestic and personal expenses, none of which required a joint banking account, whereas the Appellant had voluntarily included the Respondent's name in his investment accounts.

> (17) The learned Judge erred in holding that the Appellant's evidence was to the effect that he had decided unilaterally to convert his loan into an interest in the subject property.
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> (18) By failing to recognise the Appellant had temporarily advanced funds to the Respondent, which were earmarked to satisfy his portion of the family expenses, the learned [judge] erred in failing to take into account that these funds were not treated in the normal way of commercial loans.
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> (19) The formation of the Orders fails to ensure that the Claimant receives the share of the property to which he is entitled."

[22] At the hearing of the appeal, counsel for Mr Bailey sought and was granted permission to amend ground (4) and to abandon grounds (2) and (3).

[23] The appeal and counter-notice of appeal (which will be addressed in due course) have raised significant matters for this court's resolution. I am grateful to counsel for the parties for their industry in preparing their submissions and providing the relevant authorities. They have all been duly considered. I also wish to offer my profound apology for the delay in the delivery of this judgment.

The relevant statutory framework

[24] The enactment of PROSA ushered in a reformed approach to resolving disputes between spouses regarding the ownership of matrimonial property. Mr Bailey's claim was made pursuant to section 13(1)(c) of PROSA, which entitles a spouse to apply for the division of matrimonial property where the husband and wife have separated and there is no reasonable likelihood of reconciliation. For that purpose, PROSA has established specific provisions for the division of the family home, which are distinct from other matrimonial property.

[25] The "family home", being a new concept introduced with the promulgation of PROSA, is necessarily defined as (section 2(1)):

> "… 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;"

[26] The court is empowered to make an order for the division of the family home in accordance with either section 6 or 7 of PROSA. Section 6 provides:

> "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** —
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> > (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." (Emphasis added)

[27] The statutory presumption created by section 6(1) is often referred to as "the equal share rule", which means that upon separation, the beneficial and legal interest in the family home will be divided equally between the spouses. The scope of the equal share rule was examined by McDonald-Bishop J (Ag) (as she then was) in **Graham v Graham**, which has been repeatedly cited with approval by this court. She had this to say:

> "15. By virtue of the statutory rule, the claimant would, without more, be entitled to her 50% share in the family home as claimed and this is regardless of the fact that the defendant is [the] sole legal and beneficial owner. It is recognized that the equal share rule (or the 50/50 rule) is derived from the now well established view that marriage is a partnership of equals (See **R v. R** [1992] 1 A.C. 599, 617 per Lord Keith of Kinkel). So, it has been said that because marriage is a partnership of equals with the parties committing

> themselves to sharing their lives and living and working together for the benefit of the union, when the partnership ends, each is entitled to an equal share of the assets unless there is good reason to the contrary; fairness requires no less: per Lord Nicholls of Birkenhead in **Miller v Miller**; **McFarlane v McFarlane** [2006] 2 A.C. 618,633."

[28] That presumption can, however, be displaced on a successful application by an interested party (such as a spouse) under section 7 of PROSA, which stipulates:

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

Discussion

[29] It is undisputed that the Plymouth property served as the family home. Mr Bailey invoked the equal share rule in order to obtain a declaration that he is entitled to a one-half share of the legal and beneficial interest therein. In response, Mrs Colquhoun Bailey (the spouse and qualified interested party) applied for the equal share rule to be varied. Although it was initially argued that she did not formally make that application, those grounds have since sensibly been abandoned. It follows that the remaining question and the primary issue on this appeal is whether, in the circumstances of this case, it would

be unreasonable or unjust for each spouse to be entitled to one-half of the interest in the Plymouth property.

[30] The construction of section 7(1) of PROSA is essential to answering that question. It has been the subject of two authoritative decisions from this court, **Stewart v Stewart** and **Claudette Crooks-Collie v Charlton Collie** [2022] JMCA Civ 7 ('**Crooks-Collie v Collie**'). Both authorities have contributed significantly to a greater understanding of the intended application of section 7(1). Nevertheless, this is a provision that lends itself to further discussion.

[31] In **Stewart v Stewart**, in the course of an extensive analysis on the interpretation and application of section 7(1), Brooks JA (as he then was) observed as follows (at para. [34]):

> "… the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration."

[32] On a careful examination of section 7(1), however, I find myself at variance with such a restrictive interpretation. I believe that the plain language of that section empowers the court to consider any factor it deems relevant in determining whether preserving the equal share rule would be unreasonable or unjust, which includes the three circumstances identified (in section 7(1)). Therefore, one of the stated factors in section 7(1) does not need to exist on the evidence for the equal share rule to be varied. It is also my view that once the court decides that a relevant factor exists in the "elements of the relationship between the spouses", such as "the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings", which would make it unreasonable or unjust for the equal share rule to be preserved, it

may make adjustments to the equal share rule and determine the legal and beneficial interests of each spouse in the matrimonial home. I will elaborate further on this in the counter-notice of appeal (at paras. [121] to [148] below).

[33] That being said, I am mindful that the learned judge was bound by the law as it is explicated in **Stewart v Stewart** when he embarked on an exercise to consider a departure from the equal share rule. He cannot be faulted in this regard, and this court will evaluate his findings accordingly.

The learned judge's decision

[34] In determining whether the application of the equal share rule would be unreasonable or unjust, the learned judge considered factors he deemed relevant, including whether the Plymouth property was inherited by one spouse, the Plymouth property was already owned by one spouse at the time of their marriage, or the marriage was of short duration.

[35] In arriving at his conclusion, the learned judge found that two of the three factors listed in section 7(1) were relevant considerations. Specifically, he found that Mrs Colquhoun Bailey already owned the Plymouth property at the time of marriage (the second factor listed at section 7(1)(b)) and that the marriage between the parties was of short duration (the third factor listed at section 7(1)(c)). The first factor listed at section 7(1)(a) did not arise on the evidence, and so it is not relevant to this analysis.

[36] Having so found, the learned judge went on to consider other "elements of the relationship between the spouses" (per Brooks JA at para. [34] of **Stewart v Stewart**) that arose on the evidence. He examined the parties' contribution to the acquisition of the Plymouth property and its household expenses, their conduct and intention, as well as their respective ages, health, and financial positions. The learned judge demonstrated how he treated with the evidence and indicated what evidence he accepted and its significance or lack thereof. Ultimately, he decided that, in the circumstances of this case, it would be unreasonable or unjust for the interest in the Plymouth property to be divided

equally between the parties. In order to do justice between them, he declared that Mr Bailey was entitled to a 10% interest in the Plymouth property, thereby allocating the remaining 90% interest to Mrs Colquhoun Bailey.

The remit of this court

[37] It is well known that an appellate court will not lightly interfere with findings of fact made by a judge at first instance who has had the benefit of observing the witnesses (**Watt (or Thomas) v Thomas** [1947] AC 484). This court would need to identify a mistake in the learned judge's evaluation of the evidence that is sufficiently material to undermine his conclusions to the extent that we are satisfied that he was "plainly wrong" (**Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303 and **Beacon Insurance Co Ltd v Maharaj Bookstore Ltd** [2014] UKPC 21).

The issues

[38] Bearing in mind the remit of this court and the grounds relied on in this appeal (many of which overlap), I have consolidated the grounds and arguments into these four issues:

a. Whether the learned judge erred in finding that the Plymouth property was owned by one party at the time of the marriage (grounds (1), (4), (14), (15), (19));

b. Whether the learned judge erred in finding that the marriage was of short duration (grounds (1), (4), (5), (6), (7), (8), (9), (19));

c. Whether the learned judge erred in his treatment of the evidence of the parties' contributions (grounds (10), (11), (12), (13), (16), (17), (18), (19)); and

d. Whether the learned judge erred in considering the parties' intentions (grounds (1), (15), (16), (17), (18), (19)).

[39] The evidence in this matter came from affidavits filed by both parties and their cross-examination. I will not comment on all the evidence put before the court, but I will specifically address the evidence germane to the resolution of each issue under their corresponding headings.

a. Whether the learned judge erred in finding that the Plymouth property was owned by one party at the time of the marriage (grounds (1), (4), (14), (15), (19))

[40] The second factor listed at section 7(1)(b) of PROSA, that being whether "the family home was already owned by one spouse at the time of the marriage or the beginning of cohabitation", emerged on the evidence.

[41] The first house purchased by Mrs Colquhoun Bailey in 1989 was sold approximately 15 years later, in 2004, for $6,900,000.00. When the Plymouth property was identified, it was vacant land for which Mrs Colquhoun Bailey was granted early possession in 2005 to facilitate the construction of the dwelling house thereon. She utilised the net proceeds of the sale of her first house and obtained two mortgages from JNBS to satisfy the purchase price of US$130,833.33 and the construction costs for the Plymouth property. By March 2006, the Plymouth property was transferred to Mrs Colquhoun Bailey (then "Sharon Angela Colquhoun"). The mortgages, which were solely in her name, were guaranteed by Mr Bailey and endorsed on the certificate of title for the Plymouth property (dated 28 November 2007 and 19 May 2008 for $28,530,000.00 with interest and $8,000,000.00 with interest, respectively).

[42] Despite the parties' intermittent yet persistent relationship, Mr Bailey was never registered as a co-owner or co-mortgagor of the Plymouth property. Nonetheless, he has asserted that he acquired an equitable interest in the Plymouth property by way of his contributions to its acquisition and the construction of the dwelling house.

The findings of the learned judge

[43] The learned judge observed that the legal title to the Plymouth property was exclusively vested in Mrs Colquhoun Bailey, and it was subject to mortgages held solely

by her. Furthermore, he accepted Mrs Colquhoun Bailey's evidence that she and their daughter had moved into the Plymouth property before Mr Bailey, as at that time, he was still living in the Smokey Vale property he shared with his first wife. Accordingly, the learned judge concluded that at the time of the parties' marriage, Mrs Colquhoun Bailey was the sole owner of the Plymouth property, thereby satisfying the condition listed in section 7(1)(b) of PROSA.

Submissions on behalf of the parties

[44] Before us, learned counsel, Dr Lloyd Barnett, submitted on behalf of Mr Bailey that the learned judge erroneously concluded that Mrs Colquhoun Bailey already owned the Plymouth property before the parties' marriage. The reasons posited were that (a) the parties' relationship had been established long before the acquisition of the Plymouth property; (b) Mr Bailey had been involved in financing the acquisition of the Plymouth property and construction of the dwelling house, which subsequently became the family home; and (c) the parties resided at the Plymouth property together with their daughter.

[45] Moreover, he submitted that sections 6 to 8 of PROSA do not relate to the land but rather the family home. On a proper interpretation, he submitted that section 7(1)(b) does not apply because when the dwelling house was constructed on the Plymouth property, the parties commenced living there together, and it became the family home. It could not then be said that Mrs Colquhoun Bailey solely owned the family home at the time of the marriage or the beginning of cohabitation. In any event, Dr Barnett contended that section 6 of PROSA creates the equal share rule irrespective of how the legal interest is held. The case of **Stewart v Stewart** was cited in support.

[46] On the other hand, learned counsel, Miss Catherine Minto, submitted on behalf of Mrs Colquhoun Bailey that at the time the Plymouth property was acquired and the loans for the construction of the dwelling house were being negotiated and secured, the parties had not yet married. Moreover, Mr Bailey was residing with his first wife at that time and could not have been regarded as Mrs Colquhoun Bailey's spouse under PROSA. She further contended that Mr Bailey had not obtained an equitable interest in the Plymouth

property since he did not contribute financially to its acquisition or the construction of the dwelling house. Additionally, his non-financial contributions prior to their marriage would not suffice.

Law and analysis

[47] Section 68 of the Registration of Titles Act stipulates that the certificate of title is conclusive evidence that the person named as the proprietor of the land described therein is seised or possessed of such estate or interest or has such power. This vests the legal and beneficial interest of property in the person(s) registered as the proprietor thereof.

[48] It is without question that the legal title to the Plymouth property was solely in the name of Mrs Colquhoun Bailey. However, according to Mr Bailey, his equitable interest was derived from his contributions to the acquisition of the Plymouth property and the construction of the dwelling house (factors that I will return to in due course). In support of that assertion, he relied on their relationship, which subsisted from 2005 to 2008, the period during which the land was purchased and the dwelling house was constructed.

[49] The argument on Mr Bailey's behalf is that, notwithstanding the fact that Mrs Colquhoun Bailey is the only registered owner of the Plymouth property, since he held an equitable interest, it was not wholly owned by her before their marriage. In any event, Dr Barnett has also contended that section 6 of PROSA creates the equal share rule regardless of how the legal interest is held.

[50] That principle is clearly implicit in section 8 of PROSA, which recognises the rights of a spouse even when the family home is solely registered in the other spouse's name. Accordingly, if the legal title to a property was held by one spouse prior to marriage and the property subsequently becomes the family home, the equal share rule would be applicable. However, this would not alter the fact that <u>one spouse legally owned the property before the marriage</u>. Furthermore, the belated claim of being a co-owner prior to their marriage cannot now be given credence in circumstances where Mr Bailey, despite

his involvement with the Plymouth property, did not take any action to have his purported equitable interest recognised.

[51] The contention that sections 6 to 8 of PROSA relate to the family home separate from the land is also devoid of merit. As I understand the argument, although Mrs Colquhoun Bailey is named as the sole proprietor of what was merely land at the time of the transfer, the parties had equal ownership of the dwelling house that was subsequently constructed. No authorities were provided to bolster this contention, and understandably so, since in the light of the law, as it currently stands, this line of reasoning is not supported.

[52] I say so because if the Plymouth property is to be regarded as the family home, as put forward by Mr Bailey and accepted by the learned judge, it would fall within the definition of "the family home" as set out in section 2(1) of PROSA (see para. [25] above), which comprises the dwelling house (owned wholly by one or both spouses) together with the land appurtenant to the dwelling house (see **Hyacinth Gordon v Sidney Gordon** [2015] JMCA Civ 39 and **Patsy Powell v Courtney Powell** [2014] JMCA Civ 11) where this court found that the 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").

[53] Therefore, Mr Bailey's evidence, taken at its highest, would have no notable effect on how the legal interest in the Plymouth property was held. Also, I do not find the fact that the parties were in a relationship at the time of the acquisition of the land or the construction of the dwelling house to be of any moment. It is indisputable that Mr Bailey, being the guarantor of the mortgage, would not be entitled to an interest in the Plymouth property on that basis. Despite their relationship and Mr Bailey's alleged involvement with the Plymouth property, the parties did not see it fit for his name to be endorsed on its certificate of title as a co-owner.

[54] In the impressive and scholarly judgment of **Crooks-Collie v Collie** (which bears similarities to this case in terms of its facts and corresponding issues), this court upheld the finding of the trial judge that the family home was solely owned by Mrs Crooks-Collie prior to the marriage. This was in circumstances similar to this case, where the parties were engaged in an extramarital affair for several years and shared a child at the time the family home was purchased. That state of affairs had no bearing on the finding that the family home, which was registered in the name of Mrs Crooks-Collie, was owned solely by her before the marriage.

[55] PROSA (by virtue of section 7(1)(b)) has established that the ownership of the family home by one spouse prior to marriage is a circumstance worthy of consideration in determining whether the equal share rule would yield an unreasonable or unjust result. In my judgment, the learned judge was entitled to find that the Plymouth property was, in fact, owned solely by Mrs Colquhoun Bailey before the parties' marriage. He properly considered that finding in conjunction with other factors before making his decision. Against this background, it cannot be said that he was plainly wrong.

b. Whether the learned judge erred in finding that the marriage was of short duration (grounds (1), (4), (5), (6), (7), (8), (9), (19))

[56] The third factor identified for the court's consideration when an application is made for the displacement of the equal share rule is where the marriage is of short duration (section 7(1)(c) of PROSA). As already established, the parties were married for four years and 10 months at the time of separation; as such, the learned judge examined the relevant law in determining whether that period should be regarded as being of short duration.

The findings of the learned judge

[57] In his deliberation of whether that factor was relevant in the instant case, the learned judge noted that PROSA does not define the interval that constitutes a "short duration" for marriage. To ascertain what is to be regarded as a "short duration", the learned judge undertook a comprehensive analysis of the language of PROSA. He

observed that subsection 7(1)(b) explicitly referred to the "time of the marriage" as distinct from "the beginning of cohabitation" and concluded that if the legislators had intended the reference to "marriage" in section 7(1)(c) to include the period of cohabitation, then the provision would have been drafted accordingly. In this context, he determined that the date of the parties' marriage would be the appropriate commencement date for measuring the duration of the marriage.

[58] Having identified the starting point, the learned judge considered whether the years that had passed by the time the parties separated would cause their marriage to be classified as one of short duration. He found guidance in the case of **Margaret Gardner v Rivington Gardner** [2012] JMSC Civ 54 ('**Gardner v Gardner**'), which construed PROSA's recognition of spouses who have cohabited for no less than five years as providing a logical and reasonable benchmark for a marriage less than five years to be regarded as being of short duration. Notwithstanding, the learned judge opined that in the absence of a period explicitly defined by statute, that decision did not impose "an inflexible standard which invokes the guillotine only at the end of the five year calendar period".

[59] In any event, the learned judge, having regard to all the circumstances of the parties' marriage, saw no reason to depart from the view that the marriage, which ended before five years had passed, was of short duration. Consequently, he found that this factor was a relevant consideration in determining whether the application of the equal share rule would be unreasonable or unjust.

Submissions on behalf of the parties

[60] In opposition to the learned judge's approach, Dr Barnett submitted that the learned judge erred in rigidly considering five years of marriage to be of short duration. He also argued that the learned judge incorrectly excluded the period of cohabitation from the computation of the duration of the marriage. Counsel contended that the court should also have considered the evidence that the parties were in a relationship for 35 years, during which they jointly raised and cared for their daughter and, by the time of

separation, had "joint association" with the Plymouth property for 10 years. This, he argued, was especially significant since the marriage was only a few months short of five years, and the combined term of cohabitation and marriage was approximately six years. Counsel commented that otherwise, it could be said that the marriage weakened Mr Bailey's entitlement because, had the parties continued to cohabit, the relevant period would have exceeded the five years.

[61] Counsel Miss Minto objected to the suggestion that the 10 months of cohabitation should be included in the computation of the length of the marriage. At any rate, she submitted, the parties disagreed regarding the period and nature of their cohabitation. Counsel highlighted that when Mrs Colquhoun Bailey acquired the land and began constructing the dwelling house, Mr Bailey was married to his first wife. She argued that PROSA recognises two forms of union: marriage and cohabitation between a single man and a single woman for not less than five years. She submitted that the statute's language does not support the merging of those periods. Therefore, the period of marriage must be ascertained from the date of marriage up to the point when the marriage ended, which is not the time of the petition for divorce or grant of the decree nisi or decree absolute, but the date of separation. Although PROSA did not define a "short marriage", in keeping with the authorities (such as **Gardner v Gardner**), the parties' marriage, which fell a little short of five years, should be regarded as a marriage that is of short duration.

Law and analysis

[62] In a most impressive review of the history of the law and the mischief PROSA sought to remedy, Morrison JA (as he then was) in **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12 ('**Brown v Brown**') discussed the composite approach adopted by Parliament. The composite approach confers on the court a discretion to divide matrimonial assets according to specified criteria, with the exception of the family home, which should generally be shared equally. In keeping with that approach, PROSA, in its construction, is undeniably thorough in nature. It introduced new concepts such as "the family home", cautiously defined more common terms, and established principles such as

the equal share rule. Several of its provisions delineate the specific criteria for the court's consideration, while in other respects, the court is given a wide margin of discretion.

[63] Whereas parties to a marriage are commonly referred to as "spouses", the definition of "spouse" was expanded in PROSA to include a single man and a single woman who cohabit for a period not being less than five years (section 2(1)). PROSA did not, however, define a marriage of short duration. In an effort to ascertain the same, our courts have sought enlightenment in the statutory recognition of cohabiting spouses. In **Gardner v Gardner** (which was cited in **Crooks-Collie v Collie**), Edwards J (as she then was) examined New Zealand's Matrimonial Property Act 1976 (which was amended and is now the Property (Relationships) Act of 1976), in which section 2E(1) (then section 13) defined a marriage of short duration as being "(i) for a period of less than 3 years; or (ii) for a period of 3 years or longer, if the court, having regard to all the circumstances of the marriage …, considers it just to treat the marriage … as a relationship of short duration". That section also regards the relationship of "de facto partners", persons living together as partners (which can be likened to cohabiting spouses), as being of short duration by the same measurement. Following that, Edwards J reasoned that since a common law relationship in Jamaica is recognised from five years, a marriage of less than five years would reasonably be a marriage of short duration. Both the court below and this court have widely accepted this rationalisation.

[64] I concur with the learned judge that the application of this principle is not intended to be inflexible. To my mind, this lacuna in PROSA was intentional. Certainly, in exercising its discretion under PROSA, the circumstances of the marriage in a particular case could potentially influence whether the court would regard it as a marriage of short duration or not. This approach was also established in New Zealand's Property (Relationships) Act of 1976, which stipulates that a relationship of three years or longer could still be considered to be of short duration if the court so deems it, having regard to all the circumstances of the marriage (see para. [63] above).

[65] The circumstances of the parties' marriage were placed at the forefront of our deliberation. Dr Barnett urged the court to consider the length and nature of their relationship and the period of cohabitation that immediately preceded their marriage. He argued that a rigid application of the principle that a marriage of less than five years is of short duration could possibly (and did on the facts of this case) lead to inequity.

[66] On the specific facts of this case, Mr Bailey, who was married to his first wife for most of the parties' relationship, could not have been regarded as Mrs Colquhoun Bailey's spouse until they were married. Their period of cohabitation was 10 months at best (on Mr Bailey's case), and their marriage ended a few months shy of five years. Even measured against their own relationship of approximately 35 years, the duration of the parties' marriage and cohabitation in the Plymouth property would objectively seem short.

[67] Additionally, as correctly observed by the learned judge, the legislators have referred explicitly to "marriage" as separate from "cohabitation" throughout PROSA. In fact, in section 7(1)(b), reference is made to "the time of the marriage or the beginning of cohabitation". Further down in section 14(2)(c) (which lists factors to be considered with respect to the division of property other than the family home), "the duration of the marriage" is a separate concept from "the period of cohabitation". It would not, therefore, be appropriate to read words into section 7(1)(c) to include the period of cohabitation in ascertaining the duration of the marriage. Accordingly, I am satisfied that the duration of the marriage excludes the period of cohabitation.

[68] In any event, it is generally recognised that even if the court finds that a marriage is of short duration, it should be reluctant to depart from the equal share rule. The court is empowered to take into account additional relevant factors to determine if it would be unreasonable or unjust to apply the equal share rule. Therefore, a finding that a marriage is of short duration would not preclude the court from further considering evidence of a period of cohabitation in the family home before marriage as a relevant factor (pursuant to its broad discretion under section 7(1)). In this case, however, the parties' brief period

of cohabitation before marriage would not have had any significant bearing on the court's determination.

[69] Given all the circumstances, I am not convinced that applying the prevailing notion in our jurisdiction, which defines a marriage of less than five years as short, would pose any significant risk of injustice. Consequently, I am of the view that the learned judge's finding that the parties' marriage was of short duration cannot be impugned.

c. Whether the learned judge erred in his treatment of the evidence of the parties' contributions (grounds (10), (11), (12), (13), (16), (17), (18), (19))

[70] The parties' contribution to the family home is not a factor listed in section 7(1) of PROSA. However, the court is empowered by the words of that provision to "make such order as it thinks reasonable taking into consideration such factors as [it] thinks relevant". Both parties presented substantial evidence of their contributions to support their respective claims. Having found that the Plymouth property was owned by one spouse prior to a marriage that was of short duration (two factors listed under section 7(1)), the learned judge determined that the equal share rule should be varied, and the evidence as to the parties' contributions was relevant to ascertaining their respective interests. To avoid repetition, the evidence of the parties' respective contributions is set out below in the learned judge's findings and the analysis of this issue.

The findings of the learned judge

[71] It appears from the judgment that the learned judge accepted Mrs Colquhoun Bailey's significant contribution to the acquisition and maintenance of the Plymouth property since the focus of his assessment was on Mr Bailey's contributions, which he divided into three categories:

i. Assistance in securing financing
ii. Providing management expertise
iii. Financial contribution

[72] Having considered the evidence, the learned judge did not find that Mr Bailey's assistance in securing financing for the Plymouth property or the management and/or the oversight he provided regarding the construction of the dwelling house were contributions for which he should be credited. The learned judge also gave due attention to Mr Bailey's assertions that he contributed financially to the retaining wall, staircase, courtyard, and the repair of Mrs Colquhoun Bailey's motor vehicle. He found, however, that these expenditures were loans to Mrs Colquhoun Bailey, a portion of which she had already repaid in accordance with his demand. Notably, the learned judge took the view that Mr Bailey could not unilaterally convert the unpaid loan amount into an interest in the Plymouth property since he had no such discussion or agreement with Mrs Colquhoun Bailey. His reasons in this regard are worth setting out in full (at para. [45] of his judgment):

> "It is this Court's opinion that it is impermissible for [Mr Bailey] to unilaterally convert the loan obligation of [Mrs Colquhoun Bailey] to an interest in the Property. It is also this Court's view that in the circumstances of this case, there is no legal or equitable basis for the Court to use the fact that [Mrs Colquhoun Bailey] might not have satisfied her loan obligations in full, as a factor which influences positively the percentage share to be accorded to [Mr Bailey]. This is not to suggest that in an appropriate case the conduct of a party in refusing to repay his/her loan obligations to the other might not be conduct which the Court can consider in adjusting the parties respective interests. However, in this case, the Court is mindful of the fact that there is no evidence that [Mr Bailey] expressed his intention to seek to convert the loans to an interest if he was not repaid, or repaid within a certain time. It would therefore be inequitable to confer an interest in the Property on [Mr Bailey] based on these loans without [Mrs Colquhoun Bailey] having had a say in the matter or an opportunity to prevent the acquisition by [Mr Bailey] of any interest in the Property as a result of this debt. The Court also noted that [Mrs Colquhoun Bailey] appears to have made bona fide attempts to repay these debts, even after the parties separated."

[73] The learned judge accepted Mr Bailey's evidence of his contributions to the household and LB's educational expenses, but he did not believe that Mr Bailey paid those expenses exclusively. He rejected Mr Bailey's evidence that his contributions were

pursuant to an agreement with Mrs Colquhoun Bailey that he was to bear the burden of those expenses in order to allow her to pay the mortgage. Instead, the learned judge found favour with Mrs Colquhoun Bailey's account that Mr Bailey's contributions were a natural result of "a responsible partner living in a household recognising that he ought to contribute to the expenses for utilities and other benefits which he also enjoyed". He agreed that Mr Bailey's contribution would have allowed Mrs Colquhoun Bailey greater disposable income to make mortgage payments but essentially concluded that it was "counterbalanced" by his incidental benefits from living at the Plymouth property since he was able to rent his Smokey Vale property. The above considerations seemed to have significantly influenced the learned judge's resolution of this issue before him.

Submissions on behalf of the parties

[74] Counsel Dr Barnett contended on Mr Bailey's behalf that, by considering the parties' contributions, the learned judge erred in treating and applying the evidence before him as "other property" when the family home should not be dealt with in that manner. It was also his submission that the learned judge overlooked the fact that the parties entered their marriage freely, and there was a level of mutual trust that the relationship would have endured. In that vein, Mr Bailey's contributions were due to his being fully invested in his marriage and building a life with Mrs Colquhoun Bailey.

[75] Dr Barnett took specific issue with the learned judge's conclusion that Mr Bailey's expenditure on the repairs around the Plymouth property were loans for which he expected repayment and asserted that he was more than a responsible partner contributing to the expense of the household he lived in. To this end, counsel submitted that the learned judge ignored the evidence that Mr Bailey fully participated in the operation of the Plymouth property by equally assuming responsibilities and expenses. He regarded those contributions as significant and contended that the fact that Mr Bailey did not exclusively pay household expenses and the parties did not pool their resources or have a joint bank account was immaterial. Their financial independence was not so peculiar to them and extraordinary as to displace the equal share rule, counsel argued.

The learned judge also misconstrued the evidence when he stated that Mrs Colquhoun Bailey was primarily responsible for their child's education expenses. In his estimation, had the learned judge properly considered all the factors and circumstances holistically, he would have found that the evidence was insufficient to rebut the presumption of the equal share rule.

[76] The position Mrs Colquhoun Bailey took, as contended by her counsel, Miss Minto, was that Mr Bailey did not hold any interest in the Plymouth property. In support of that assertion, she relied on the evidence that Mrs Colquhoun Bailey solely acquired the Plymouth property before their marriage. In addition, she submitted that Mr Bailey did not contribute to the acquisition of the land or construction of the dwelling house. She contended that the contributions Mr Bailey claimed to have made were in the form of loans to Mrs Colquhoun Bailey, for which he continued to demand repayment even after they were married. Regardless, Mrs Colquhoun Bailey denied that any sums were outstanding.

[77] Aside from those loans, Mrs Colquhoun Bailey admitted that Mr Bailey had acquired a moveable shed and made a few nominal payments towards the mortgage loans. She also endorsed the evidence that Mr Bailey shared the family expenses, such as the bills for the household and LB's maintenance. Moreover, counsel impressed upon us that Mr Bailey sought to rely on "contributions" made after separation, including mortgage payments, car repairs, and household expenses, in contravention of section 12(2) of PROSA (she also relied on **Graham v Graham**). In any event, she concluded that Mr Bailey's contributions to the Plymouth property would have been for a short period and certainly would not merit the application of the equal share rule.

Law and analysis

[78] The preliminary criticism was that "contribution" was not a relevant factor specified under section 7(1), and as such, the learned judge should not have taken it into account. Throughout PROSA, the only express references to the contribution of spouses in the determination of their respective interests in matrimonial property are in relation to

property other than the family home (sections 14(2), 14(3), and 14(4)). In the light of that omission and the statutory presumption of equal shares for spouses in the family home, how should evidence of the parties' contribution be treated?

[79] I agree with Edwards JA's exploration of this point in **Crooks-Collie v Collie**, where she pronounced that although "contribution" is not listed as a factor (to be considered in section 7(1)), a judge can consider it without referring to section 14 when apportioning the interest in the family home (see paras. [74] to [78] of the judgment). (This dictum also aligns with Brooks JA's opinion in **Stewart v Stewart** at para. [34] (see para. [31] above)). A view could be taken that the deliberate omission of contribution (as a factor under section 7(1)) was intended to signify how little weight it should carry in redistributing the interest in the family home. It is evident that section 7(1) does not mandate that the court compare the parties' contributions and allocate a share to each in proportion to their contributions.

[80] I am also mindful of Brooks JA's remark in **Stewart v Stewart** on the philosophy of the equal share rule, where he stated that "the contribution that a spouse makes to the marriage entitles that spouse to an equal interest in the family home". Numerous cases further underscore the principle that the presumption of a beneficial joint tenancy is implicit in the nature of the couple's intimate relationship as they embark on a joint venture to purchase a house in which to live together (**Midland Bank plc v Cooke** [1995] 4 All ER 562 and **Jones v Kernott** [2012] 1 All ER 1265). Accordingly, the court should be reluctant to undergo a detailed examination of their respective contributions (**Stack v Dowden** [2007] UKHL 17 and **Stewart v Stewart**).

[81] Given the factual circumstances of this case, an examination of the parties' respective contributions would be warranted. I say so because the Plymouth property was not acquired in contemplation of marriage, nor was it jointly purchased after marriage. The evidence highlighted the parties' direct and indirect contributions to the acquisition, development, maintenance, and improvement of the Plymouth property. In circumstances where the court found that the Plymouth property was wholly owned by

Mrs Colquhoun Bailey prior to the parties' marriage, which was of short duration, it is apparent that their respective contributions are of relevance. Therefore, I am of the view that it was open to the learned judge to consider contribution as a relevant factor. This would also be appropriate under the **Stewart v Stewart** construction of section 7(1) since the learned judge correctly found that two of the listed factors (that the family home was owned by one spouse prior to the marriage and that the marriage was of short duration) were applicable.

[82] In his assessment of the evidence, the learned judge did not restrict his analysis to the financial contribution of the parties. He also reflected on the evidence of non-financial contributions and had regard to the contributions to the family's welfare and the household's expenses.

[83] The treatment of such evidence was pellucidly illustrated in **Crooks-Collie v Collie**. In that case, Dr Collie was married to another woman when he and Mrs Crooks-Collie began their extramarital affair. They had a child together in 1999. He did not separate from his first wife until 2003, when she left their matrimonial home. Mrs Crooks-Collie had purchased and renovated the disputed property (also located in the Plymouth area) in 2003, but Dr Collie did not move in with her until 2008. For six months in 2011, Dr Collie left the property. He did not finalise his divorce from his first wife until October 2011. In 2012, he returned to the property, and by March 2012, he and Mrs Crooks-Collie were married. By August 2013, the marriage had broken down irretrievably. Dr Collie vacated the property, which served as their family home, in November 2013. Subsequently, he filed a fixed date claim form in the Supreme Court pursuant to section 6 of PROSA for a declaration that he was entitled to 50% ownership of the family home. Mrs Crooks-Collie applied under section 7 of PROSA for a variation of the equal share rule on which he relied. She maintained that the property was exclusively owned by her, that it was not intended to be the family home, and that the marriage was of short duration. The learned judge found that the property was indeed the family home, but he varied the equal share rule to award Dr Collie 20% of the interest therein.

[84] On appeal from that decision, this court found that the judge was plainly wrong in his treatment of the evidence and conclusion. Edwards JA, in her judgment, demonstrated how Dr Collie's evidence proved to be highly inconsistent and unsupported by documentary evidence. She elucidated as follows:

> "[208] If we were to look only at the contributions made by [Dr Collie] during the marriage, taken at its highest, all there would be in this marriage of short duration, are: the intermittent payment of telephone, electricity and gardener bills for about 16 months, and the ordinary day to day assistance around the house that did not involve any 'heavy lifting'. With regard to the premarital contributions after 2008, those would be the payment of a few bills, the paving of the yard to the kitchen area for the birthday party, contribution to the tiling around the pool and patio for the wedding reception, the painting of the house or portions of it, construction of a dog house and installation of air conditioning units in his bedroom. I cannot agree with the learned judge, who, having admitted that the 'improvements' were cosmetic, found they were not insignificant. These were, indeed, insignificant when considered, as the learned judge did consider, the expense and time put into the property by [Mrs Crooks-Collie] before the parties were married and even before [Dr Collie] moved in 2008, as well as the value of the property. [Dr Collie] himself, admitted that he was not there when the house was bought or structurally renovated and he made no contribution to either. He also admitted that the renovations made by [Mrs Crooks-Collie] were extensive and that they brilliantly 'transformed' the property from the way it was when it was purchased and that the transformation was 'unbelievable'. All this took place without his help and all occurred before 2008."

[85] Ultimately, the judge's decision was set aside, and the court declared that the only reasonable and just order in the circumstances of that case would be for Mrs Crooks-Collie to retain her whole interest in the property.

[86] It is the uncontroverted evidence in this case that when the Plymouth property was acquired, it was agreed between the parties that the expenses associated with its acquisition were to be the sole responsibility of Mrs Colquhoun Bailey. In that vein, she was named the sole proprietor and mortgagor on the loans. Mr Bailey averred that through his senior position at JNBS, he assisted Mrs Colquhoun Bailey with procuring the

loans and guaranteeing two of them. He claimed to have leveraged his expertise and business relationships in order to identify the land, commission the services of an architect and contractor, and supervise the construction of the dwelling house.

[87] Mr Bailey also gave evidence of his expenditure on the Plymouth property. In support of this, he provided the court with several receipts, some of which were dated after the parties' separation. Notably, he claimed to have paid:

a. $200,000.00 to secure the purchase of the land;
b. $1,000,000.00 (approximately) to clear Mrs Colquhoun Bailey's debt;
c. $2,098,465.24 to repair and reinforce the retaining wall;
d. $267,698.83 to repair the staircase; and
e. $57,820.00 to remove and replace damaged tiles.

[88] Receipts dated between 2009 and 2011 were also tendered in varying amounts for the installation of security cameras, as well as for the construction of an entertainment area and "external work". In relation to repairs to Mrs Colquhoun Bailey's motor vehicle, Mr Bailey exhibited several invoices from 2011 to 2013. He asserted that he was responsible for the daily expenses related to the household and the family's maintenance, which included utility bills, grocery bills, overseas health and medical insurance, and their daughter's education. By doing so, he enabled Mrs Colquhoun Bailey to meet her loan requirements, he averred. Although Mrs Colquhoun Bailey ordinarily made the mortgage payments, it was Mr Bailey's evidence that he also contributed, on average, $30,000.00 towards those payments. I note, however, that he did not state the frequency of his contributions to the mortgage payments but presented documentary evidence of a few payments from 2012 to 2013, ranging from $18,341.08 to $63,972.45.

[89] As anticipated, Mrs Colquhoun Bailey's account is vastly different. It was her evidence that Mr Bailey did not contribute to the acquisition of the Plymouth property or the construction of the dwelling house thereon. She further averred that she provided him with the $200,000.00 he claimed to have paid to secure the land (the learned judge

accepted this evidence). When she was given early possession in December 2005, Mr Bailey was married and lived with his first wife. When construction began, she recalled that they had broken up, although they continued to communicate as friends, and he would offer useful assistance, guidance, and recommendations during the process. Beyond that, he offered to be the guarantor of two loans to enable her to secure further sums to complete the construction of the dwelling house.

[90] Mrs Colquhoun Bailey asserted that she financed the acquisition and construction of the Plymouth property with her loans, investments, salary, and bonuses. She is solely responsible for the repayment of the mortgage loans, the term of which will end in 2034. As at 30 October 2015, she had made mortgage payments for 116 months, ranging between $358,629.60 and $470,000.00 each month. The mortgage was paid by manager's cheque, which she sometimes requested in Mr Bailey's name (because he worked at JNBS), and which he paid on her behalf. Mr Bailey, on her evidence, paid a sum of $18,341.08 on six occasions.

[91] Apart from paying the mortgage, she furnished, landscaped, and improved the Plymouth property. In addition to paying their helper and gardener, she also paid utility and grocery bills. She averred that Mr Bailey's financial contributions to the Plymouth property were either by way of loans for which he demanded repayment or because of his appreciation that he had to contribute to his expenses while living there.

[92] Since the application of PROSA relates to the value of the interests held in the family home at the date on which the parties terminated cohabitation and effectively separated (section 12 of PROSA), I will disregard the evidence as to contributions made after their separation on 5 March 2014. For instance, the invoice for the repairs to the staircase was dated 26 September 2014, after the parties had separated. The parties' entitlement at separation cannot be influenced by contributions made after the separation, as was plainly stated in **Stewart v Stewart** (at paras. [67] to [73]).

[93] I am also hesitant to attach importance to the alleged pre-marriage contributions of Mr Bailey to the acquisition of the Plymouth property since, at that time, he could not be regarded as Mrs Colquhoun Bailey's spouse, and he was married to someone else. Even so, I agree with the learned judge that Mr Bailey's assistance in securing financing for the acquisition of the land and construction of the dwelling house, as well as his management and oversight, could not be regarded as sufficient contribution to maintain the statutory presumption.

[94] The evidence also supports the finding that the majority of Mr Bailey's pre-marriage financial contribution took the form of loans. That state of affairs appeared to continue during their marriage. In an email correspondence between the parties dated 3 January 2012, Mr Bailey detailed certain expenses he had either covered as an "advance" or expected Mrs Colquhoun Bailey to pay, including the courtyard tiling and settling credit card balances. The court was not provided with sufficient information to ascertain any outstanding sum owing to Mr Bailey. It stands to reason that even if those loans were not repaid, Mr Bailey could not unilaterally convert them into an interest in the Plymouth property.

[95] I have also given consideration, as did the learned judge, to Mr Bailey's claim that in order to enable Mrs Colquhoun Bailey to pay the mortgage, he bore the burden of paying the household expenses as well as LB's educational expenses. I find that to be incredible in light of the evidence of Mrs Colquhoun Bailey's earnings and the fact that, save for the evidence of what could be described as nominal payments made by Mr Bailey between 2012 and 2013, Mrs Colquhoun Bailey exclusively paid the significant mortgage loans even before their cohabitation and marriage. Nevertheless, I have duly noted an email between the parties, dated 1 November 2013, in which Mrs Colquhoun Bailey referred to Mr Bailey's monthly contribution to the mortgage payment and the household and utility bills. It is common ground between the parties that they had never had a discussion, agreement, or mutual understanding that Mr Bailey would become a joint

contributor/investor or pay the household expenses to enable Mrs Colquhoun Bailey to pay the mortgage.

[96] Regarding LB's educational expenses, the learned judge seemed to have mistakenly referred to Mrs Colquhoun Bailey instead of Mr Bailey as being primarily responsible for the same. Be that as it may, that contribution does not provide much assistance to his claim. The arrangement between the parties as to the payment of LB's tuition and associated expenses existed prior to the acquisition of the Plymouth property and the parties' marriage. It was not contemplated as a necessary arrangement of the parties' financial obligations for the smooth operation of the family unit. To now rely on that undertaking to secure an interest in the Plymouth property offends the purpose of PROSA.

[97] It is evident that there is a disparity in the parties' respective contributions; however, this does not in itself justify a departure from the equal share rule. During their marriage, the parties operated as an economic unit in relation to their contributions to the welfare of the family. Concerning the Plymouth property, their contributions are considerably imbalanced, especially in the context of its purchase by Mrs Colquhoun Bailey prior to their short marriage. It is uncontested that while they shared the household expenses, Mrs Colquhoun Bailey bore the sole responsibility for the payment of the mortgage. There has been no indication that Mr Bailey would continue to assist with those payments for the remainder of the extensive loan periods. Mrs Colquhoun Bailey has approached the court seeking relief that is not only commensurate with her contribution to date but also her continuing contribution to the Plymouth property, notwithstanding the cessation of their marriage. As a result, given the circumstances in their entirety, Mr Bailey's contribution to the Plymouth property was valued at 10%. I cannot form a more generous view than that given by the learned judge on this aspect of the case.

[98] Given the factual context of this matter, the learned judge's consideration of the parties' contributions in determining whether it would be unreasonable or unjust to maintain the equal share rule cannot be impeached. There was also sufficient material

on which he could properly conclude that Mrs Colquhoun Bailey's contributions to the Plymouth property significantly outweighed those of Mr Bailey. The variation of Mr Bailey's presumed interest in the Plymouth property to 10% certainly seems like a more reasonable and just conclusion. In light of the foregoing, this issue is without merit.

d. Whether the learned judge erred in considering the parties' intentions (grounds (1), (15), (16), (17), (18), (19))

[99] The intention of the parties was not specifically listed in section 7(1) of PROSA, but it presented itself on the evidence as a relevant factor for the learned judge's consideration. However, the learned judge did not consider the parties' intentions about the ownership of the Plymouth property as a separate factor but instead referred to that evidence while assessing other relevant factors.

The findings of the learned judge

[100] At the outset of his assessment of the contribution to the Plymouth property, the learned judge recognised that when Mrs Colquhoun Bailey acquired the land, Mr Bailey was living with his first wife. Further to this, he observed that "[t]he acquisition of the [Plymouth property] therefore does not fit squarely within the more usual pattern of two persons acquiring a home with the common intention that they will inhabit it together as a couple".

[101] The learned judge reminded himself of Mr Bailey's evidence that initially, they both intended that the Plymouth property would be financed solely by Mrs Colquhoun Bailey and that the interest therein would also be owned exclusively by her. He also noted Mr Bailey's evidence that he did not initially expect compensation or benefit when he offered his expertise and influence. The learned judge commented on this aspect of the evidence, stating that Mr Bailey was belatedly trying to "retrospectively put a price tag on his prior acts of generosity".

[102] In his conclusion, the learned judge stated:

> "[54] Having reviewed the evidence I am of the view that although the parties were *'for all practical purposes equal partners in marriage'* (R v R [1992] 1 AC 599,617), this was not a marriage in which the parties were living and working together for the benefit of the union. Although they may have shared the household expenses, there was no general pooling of resources. There was no mention of the parties having a joint account for example. It seems to have mattered greatly to them which party paid which expenses and who made small purchases for example of a fan. They kept tabs on minute expenditure in favour of each other which they raised during the proceedings. They were fiercely independent in their financial affairs and this is patently evident by the loans [Mr Bailey] made to [Mrs Colquhoun Bailey].
>
> [55] At the time of marriage the parties had been in a relationship for many years and shared a child together. However, they were not young people starting a life together. [Mr Bailey] sought to assist [Mrs Colquhoun Bailey] where he could but this is nothing unusual in the context of an intimate relationship, illicit or otherwise. The [Plymouth property] was acquired before the parties were married and I accept the evidence of [Mrs Colquhoun Bailey] that it ended up being the matrimonial home because she did not wish to reside at [Mr Bailey's] residence in Smokey Vale. [Mr Bailey] admitted in cross examination that there was nothing preventing his name being added to the title for the [Plymouth property] or preventing the parties from having applied for a joint mortgage. I find that they not having done either, is consistent with the other evidence that **the [Plymouth property] was intended to be owned by [Mrs Colquhoun Bailey] solely**." (Emphasis added)

Submissions on behalf of the parties

[103] The grounds relied on by Mr Bailey sought to scrutinise several findings of fact that ultimately supported the learned judge's conclusion that the common intention was for the Plymouth property to be solely owned by Mrs Colquhoun Bailey. Counsel Dr Barnett directly opposed the view taken of the parties separating their financial responsibilities and proposed instead that their division was for the convenient and practical operation of the family. He also criticised the learned judge for failing to appreciate that the funds advanced to Mrs Colquhoun Bailey were not treated as commercial loans; they were earmarked to satisfy Mr Bailey's share of the family's expenses.

[104] The position taken by Mrs Colquhoun Bailey, as contended by her counsel, Miss Minto, was that at the time of the acquisition of the Plymouth property, the governing law for Mr Bailey to acquire a share or interest (based on his contributions) was the common intention and mutual understanding of the parties. Counsel relied on **Evans v Hayward** [1995] 2 FLR 511 and **Lloyds Bank plc v Rosset** [1991] AC 107 132. She argued that Parliament did not intend for PROSA to have a retroactive effect (**Secretary of State for Social Security and another v Tunnicliffe** [1991] 2 All ER 712).

[105] It was further submitted that Mr Bailey himself stated that the parties' understanding was that Mrs Colquhoun Bailey would solely own the Plymouth property. Therefore, further discussions would have been necessary to change that initial position. Mr Bailey could not unilaterally change their common intention regarding how the Plymouth property would be owned, especially since sections 10 and 14 of PROSA recognise premarital arrangements that do not need to be in writing, counsel argued. Miss Minto concluded her submissions on this issue by reiterating that the equal share rule ought not to be applied since the Plymouth property was acquired before the parties' marriage and the conduct of the parties at the time of the acquisition and construction, including Mr Bailey's non-financial contribution, displays a lack of intention to share the ownership of the Plymouth property.

Law and analysis

[106] PROSA came into operation on 1 April 2006, following the acquisition of the Plymouth property on 6 March 2006. Miss Minto has sought to preface her contentions on this issue by first advancing that the division of the Plymouth property is subject to the common law that was relevant at the time of its acquisition. Section 4 of PROSA, however, stipulates:

> "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."

[107] It was established in **Brown v Brown** that, by virtue of that section, the provisions of PROSA now represented an entirely new and different approach to deciding issues of property rights between spouses. In **Suzette Ann Marie Hugh Sam v Quentin Ching Chong Hugh Sam** [2018] JMCA Civ 15 ('**Hugh Sam v Hugh Sam**'), Edwards JA (Ag) (as she then was) addressed the court's approach:

> "[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."

[108] Accordingly, the significance of the common intention of spouses under the old rules and presumptions at common law to the distribution of matrimonial property has been replaced, and it is now exclusively governed by sections 6 and 7.

[109] The relevance of "common intention" under this new regime was the topic of extensive discussion in **Crooks-Collie v Collie**. Edwards JA clarified that it "must be an expressed or implied intention common to both parties, either at the time of the acquisition or at some identifiable period thereafter" (at para. [127] of that judgment). After discussing the decisions in **Miller and another v Miller and another** [2017] UKPC 21, an appeal from the judgment of this court to the Privy Council, as well as **Hugh Sam v Hugh Sam** and **Brown v Brown**, she elucidated:

> "[104] It seems to me, therefore, that a trial judge, in the circumstances of a particular case, in considering whether to vary the equal share rule in an application under section 7, is permitted, where appropriate, to consider the common intentions of the parties

> as to their beneficial interest, as a starting point. He or she must only do so insofar as it is relevant and necessary to meet the justice of the case, as long as the interests of the parties are not determined by any presumption and/or principle of common law and equity perceived to have arisen from those intentions. The mutual intentions of the parties must be considered in light of all the evidence in the case and is but one factor to be considered alongside all the other factors."

[110] That dicta further illustrated that where spouses (even those who were engaged in an extramarital affair) had a settled common intention at the time of the acquisition of the property that it should be the family home in which they would share the legal and beneficial interest, that shared intention could potentially be a relevant factor. In my judgment, the converse must also be true. If spouses had a settled common intention at the time of the acquisition that the interest in that property would not be shared between them, that evidence could also be relevant.

[111] At the time of the acquisition of the Plymouth property, the parties' common intention was unequivocal. Despite their long-term intimate relationship, further to which they shared a child, it was settled between them that the Plymouth property was to be owned solely by Mrs Colquhoun Bailey as her place of residence with LB. In keeping with that intention, the financing for acquiring the land and constructing the dwelling house was to be solely borne by her. Mr Bailey admitted, as acknowledged by the learned judge, that at that time, any assistance he bestowed upon Mrs Colquhoun Bailey was not intended to represent an interest in the Plymouth property.

[112] Their common intention seemed to diverge when Mr Bailey perceived that Mrs Colquhoun Bailey could not afford the construction of the dwelling house and would need his substantial financial involvement. He averred, much to the dissent of Mrs Colquhoun Bailey, that he then became a contributor and investor, and at some point before the completion of the construction of the dwelling house, he became "fully and jointly involved". Mrs Colquhoun Bailey has denied any such turning point at which they formed the common intention that he had acquired an interest in the Plymouth property. The

parties have, however, concurred that they at no time discussed and agreed to the sharing of the beneficial interest in the Plymouth property.

[113] As already established, when Mr Bailey moved into the Plymouth property in 2008 and during their marriage, he contributed to the household and family expenses. Mrs Colquhoun Bailey continued to pay the mortgage loans. The parties did not expressly agree to such an arrangement. Their state of affairs was such that, at times, Mr Bailey assisted with the mortgage loan payments, and Mrs Colquhoun Bailey likewise contributed to the expenses of the household and family.

[114] As a result of their marriage, any intention the parties harboured, shared or otherwise, would have diminished in importance since it was presumed that the spouses were entitled to equal shares in the family home. The import of section 7, however, is to provide a route through which that presumption can be rebutted as a starting point.

[115] The aforementioned evidence would have reasonably raised the question of the intended entitlements to the Plymouth property. However, while there is no evidence of expressed intention shared between them, it can be inferred from their respective roles and conduct in the operation of their family unit that Mr Bailey did not regard himself as being a co-owner of the Plymouth property.

[116] The parties kept their finances separate; they had no joint bank accounts, and quite contrary to the philosophy of the "joint hopes and aspirations" of spouses, they routinely monitored their respective contributions with great detail. Concerning the improvement and maintenance of the Plymouth property, the evidence supports the view that both parties regarded that as Mrs Colquhoun Bailey's obligation. For instance, the evidence that Mr Bailey expected to be repaid for removing and replacing damaged tiles.

[117] The learned judge also accepted Mrs Colquhoun Bailey's evidence that Mr Bailey's contributions to household expenses were "a natural result of a responsible partner living in a household recognising that he ought to contribute to the expenses for utilities and other benefits which he also enjoyed". Notwithstanding, he found that such an

arrangement would be mutually beneficial since Mrs Colquhoun Bailey would have a greater disposable income from which to pay the mortgage, and Mr Bailey could receive rental income from the Smokey Vale property (which he used for his expenses). On account of those findings, the learned judge concluded that during their marriage it remained their shared intention that the Plymouth property was to be solely owned by Mrs Colquhoun Bailey.

[118] Bearing in mind the significance of the equal share rule, that finding could not on its own defeat the statutory presumption. The court's broad discretion under section 7(1) would have enabled the learned judge to consider evidence of the parties' shared intention as a pertinent factor. This is especially so in circumstances where he also found that Mrs Colquhoun Bailey solely owned the Plymouth property before the marriage, and Mr Bailey's contributions could not be regarded as significant during their short marriage. Accordingly, the examination of the parties' common intention and the corresponding implications was merited. Taking all of the above into account, I cannot fault the learned judge's decision in this regard.

Conclusion on the appeal

[119] The learned judge did not err in his consideration and consequent finding under section 7(1) of PROSA that the Plymouth property was owned by Mrs Colquhoun Bailey prior to the parties' marriage and that their marriage was of short duration. Furthermore, according to the court's judicial discretion contained in that same provision, he was entitled to consider the parties' contributions and intentions as relevant factors. Although the learned judge mentioned the parties' age, health, and financial circumstances in his reasons for judgment, in the end, he correctly found that they were insignificant matters in the circumstances of the case.

[120] Upon examining the relevant factors noted above, it cannot be said that the learned judge was plainly wrong in finding that it would be unreasonable and unjust to retain the equal share rule. Given that finding, the learned judge was further empowered by section 7(1) to exercise his discretion to discharge the statutory presumption and vary

the interests of the parties. I can find no basis for this court to interfere with his apportionment to Mr Bailey of a 10% interest in the Plymouth property. In light of the foregoing, I would dismiss the appeal and affirm the learned judge's decision.

The counter-notice of appeal

[121] The learned judge's decision was also contested by Mrs Colquhoun Bailey; on whose behalf a counter-notice of appeal was filed on 15 June 2019. Counsel, Miss Minto, did not take issue with the departure from the equal share rule pursuant to section 7(1) of PROSA but rather the apportionment to Mr Bailey of a 10% interest in the Plymouth property. If successful, she has asked this court to, among other things, set aside the decision of the learned judge and declare that Mrs Colquhoun Bailey is entitled to a 100% interest in the Plymouth property.

[122] The counter-notice of appeal set out the following grounds:

> "a. The Respondent's challenge is in relation to the law on which the learned judge's decision was made, or the judge's interpretation of the law which led the learned judge to exercise his discretion to grant the Appellant a ten percent [sic] share in the property.
>
> b. The Respondent will be contending that once the Respondent satisfies one of the factors in section 7 of the Property (Rights of Spouses) Act then the Appellant should have been disqualified from a share or interest in the property altogether, especially, given the peculiar facts of this case, including (but not limited to) the Appellant's treatment of any financial contribution which he made as loans for which he expected re-payment.
>
> c. The Appellant's position and stance was [sic] not consistent with a spouse who truly believed he had an interest in the property. Further, the Appellant's position and stance was [sic] not consistent with a spouse who considered the relationship to be a partnership of equals with the parties committing themselves to owning the subject property, jointly."

[123] It is worth noting that those grounds were not vigorously advanced by Miss Minto, and Dr Barnett's submissions in response were comparatively terse. I also observe that

ground c has been adequately addressed on the appeal, so I will offer my opinion on the issues raised in grounds a and b.

Submissions on behalf of the parties

[124] Miss Minto questioned the concept of the "gateway provision" as enumerated in **Stewart v Stewart**, further to which she contended that the court below incorrectly interpreted the word "including" (in section 7(1) of PROSA) as providing the gateway for applying that provision. Alternatively, she posited that it meant that factors other than the three outlined could cause the displacement of the equal share rule.

[125] Counsel further submitted that, on a reading of section 7(1), once Mrs Colquhoun Bailey satisfied one or more of the factors listed, Mr Bailey should have been disqualified from a share or interest in the Plymouth property, especially given the facts of this case. She supported that position with the further contention that, similar to the facts of **Crooks-Collie v Collie**, Mr Bailey did not treat the Plymouth property as his own, but rather, his expenditure on same took the form of loans for which he demanded and received repayment.

[126] Conversely, Dr Barnett distinguished **Crooks-Collie v Collie** from the case at bar on the bases that in this case, the combined duration of cohabitation and marriage was longer, the parties jointly assumed the financial obligations of the family, and Mr Bailey assisted in the acquisition and maintenance of the Plymouth property. He also criticised Miss Minto's suggestion regarding the parties' separate affairs by asserting that spouses often make arrangements as to how to finance their respective expenses. Dr Barnett advanced on Mr Bailey's behalf that the burden was on Mrs Colquhoun Bailey to prove that the equal share rule would be "unreasonable or unjust" (**Selma Clarke v Edward Clarke** [2016] JMSC Civ 45 was cited in support). Mrs Colquhoun Bailey needed to present cogent evidence to show that the issues and circumstances of this case warranted a departure from the equal share rule. However, she failed to discharge that burden, he argued.

[127] It was also submitted that the existence of one or more of the factors listed in section 7 of PROSA would not automatically lead to the whole interest in the family home being allocated to one spouse. If any of those factors existed, fairness would require the court to have regard to all the circumstances of the case to decide whether it would be unreasonable or unjust to maintain the equal share rule (**Stewart v Stewart**).

Law and analysis

[128] The overarching issue that has materialised from the grounds and corresponding arguments in the counter-notice of appeal is whether the learned judge misunderstood and/or misapplied the law in exercising his discretion to award Mr Bailey a 10% interest in the Plymouth property. For ease of reference, I will reproduce section 7(1), which reads:

> "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." (Emphasis added)

[129] In his judgment, the learned judge stated the law as follows:

> "[14] A reading of section 7 would tend to suggest that the determination of whether it would be unreasonable or unjust to apply the equal share/one half rule is to be based on a global assessment, independent of the existence of the section 7(1) (a) - (c) factors, with the possibility that, any one or all of those three factors may be taken into consideration in determining the appropriate apportionment of the parties respective interests.
>
> [15] However, it is clear from **Stewart v Stewart** that the Court of Appeal views the existence of any one of the 7(1)(c) [sic] factors,

> as, to adopt the phrase used - a *'gateway provision'* and *'any one of them, if shown to exist, may allow the Court to depart from the equal share rule'…* ." (Italics as in the original)

[130] As already established, the learned judge found that two of the section 7(1) factors were indeed relevant. As such, he proceeded to consider other factors he found relevant based on the factual circumstances. Having done so, he exercised his discretion to vary the statutory entitlement of the parties, awarding 10% of the interest in the Plymouth property to Mr Bailey, with the remainder to Mrs Colquhoun Bailey.

[131] Ms Minto indicated in the counter-notice and grounds of appeal that the learned judge's pronouncement of the law at the time of the judgment was accurate, and they accepted his findings of fact. However, they sought clarification on the law, particularly the concept of "gateway provision".

[132] The term "gateway provision" in relation to the interpretation of section 7(1) surfaced in **Stewart v Stewart**. In that case, the spouses were joint owners of the family home that was purchased after they were married. They lived together in the family home for approximately 15 years until Mrs Stewart relocated. Following their separation, Mrs Stewart sought a declaration for a one-half beneficial interest in the family home. The judge, at first instance, varied their statutory entitlement to award Mrs Stewart a 25% interest in the family home.

[133] On appeal, this court sought to determine whether that decision was in accordance with section 7(1) of PROSA, that is, whether it would have been unreasonable or unjust to apply the equal share rule in the circumstances. In his analysis, Brooks JA observed that the three factors listed were not conjunctive, so if any of them existed on the facts, the court could consider a departure from the equal share rule. Additionally, he stated that the list was not exhaustive given the provision's wording; however, a common theme amongst all three factors could not be identified.

[134] Following a detailed examination of the relevant provisions of PROSA and its supporting principles, Brooks JA pronounced as follows:

> "[34] The third point to be noted is that the existence of one of those factors listed in section 7 does not lead automatically to the entire interest being allocated to one or other of the spouses. What may be gleaned from the section is that **each of these three factors provides a gateway whereby the court may consider other elements of the relationship between the spouses in order to decide whether to adjust the equal share rule. It is at the stage of assessing one or other of those factors, but not otherwise, that matters such as the level of contribution by each party to the matrimonial home, their respective ages, behaviour, and other property holdings become relevant for consideration.** For instance, the family home may have been inherited by one spouse, but the other may have, by agreement with the inheriting spouse, solely made a substantial improvement to it at significant cost. In such a case the court would be unlikely, without more, to award the entire interest to the spouse who had inherited the premises.
>
> …
>
> [50] Based on the analysis of the sections of the Act, it may fairly be said that the intention of the legislature, in sections 6 and 7, was to place the previous presumption of equal shares in the case of the family home on a firmer footing, that is, beyond the ordinary imponderables of the trial process. **The court should not embark on an exercise to consider the displacement of the statutory rule unless it is satisfied that a section 7 factor exists.**" (Emphasis added)

[135] The circumstances of that case were such that none of the factors listed in section 7(1) were present. The trial judge nevertheless considered the spouses' contribution to the acquisition and maintenance of the family home and their family expenses. The court concluded that the trial judge should not have considered the spouses' contribution in determining whether to depart from the equal share rule since none of the factors listed under section 7(1) were present.

[136] Evidently, the judicial interpretation of that statutory provision (section 7(1)) has serious implications for its application. Assuming the position taken by this court in **Stewart v Stewart**, the equal share rule will persist in the absence of at least one of

the factors listed. I, however, harbour some doubts about the correctness of that principle.

[137] When tasked with interpreting the provisions of PROSA, all three justices of appeal (Cooke, Morrison, Phillips JJA) in **Brown v Brown** referred to the following dicta of Brandon J in **Powys v Powys** [1971] 3 All ER 116 (page 124 e):

> "The true principles to apply are, in my view, these: that the first and most important consideration in construing an Act is the ordinary and natural meaning of the words used; that, if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it."

[138] That approach to statutory construction has been reproduced in several judgments in this court. In **Jamaica Public Service Company Limited v Dennis Meadows and Others; The Attorney General of Jamaica v Dennis Meadows and Others** [2015] JMCA Civ 1, Brooks JA (as he then was) reviewed and approved of the following summary of the rules of statutory interpretation as outlined in the 3rd edition of Cross Statutory Interpretation:

> "[54] …
>
> '1. The judge must give effect to the grammatical and ordinary or, where appropriate, the technical meaning of words in the general context of the statute; he must also determine the extent of general words with reference to that context.
>
> 2. If the judge considers that the application of the words in their grammatical and ordinary sense would produce a result which is contrary to the purpose of the statute, he may apply them in any secondary meaning which they are capable of bearing.
>
> 3. The judge may read in words which he considers to be necessarily implied by words which are already in the statute; and **he has a limited power to add to, alter or ignore statutory words in order to prevent a provision from being unintelligible, absurd or totally unreasonable, unworkable, or totally irreconcilable with the rest of the statute.**…' " (Emphasis as in the original)

[139] The following explication of the intent of PROSA by McDonald-Bishop J (Ag) (as she then was) in **Graham v Graham** is also valuable in understanding its objectives:

> "17. Jamaica has adopted the line similar to New Zealand and Scotland, that is, a mixture of legislative prescription with the scope for the exercise of judicial discretion added on. Our statute is clear that in respect of the family home, the equal share rule must be taken as the general rule and should only be departed from if the parties by written agreement seek to oust its operation pursuant to section 10 or where, in the opinion of the court, it would be unreasonable or unjust to apply it. The principle of equality has thus been enshrined within our jurisprudence not as a mere aid to analysis but as the rule by which all considerations in respect of the entitlements to the family home must be governed. The legislature has sought to limit the broad exercise of judicial discretion in respect of adjustment of the family home. Unlike in the U.K. and Australia, our courts are obliged to start with and heed the rule that the family home is to be shared equally. The legislature, however, has not ousted altogether the input of judicial wisdom in dealing with issues concerning the entitlement to the family home and so the rule is made subject to the discretion of the court when it is such that to apply it in the circumstances of a particular case would be unreasonable or unjust."

[140] If we were to give effect to the grammatical and ordinary meaning of the operative word "including" (in section 7(1)), it is commonly known to mean "comprising but not limited to". When "including" precedes a list, it is an indication that the list is not exhaustive. If literally construed, section 7(1), by using the words "such factors as the Court thinks relevant **including the following**" (emphasis added), bestows a discretion on the court to consider not only the factors listed but also any other factor it may deem relevant. There are no additional words that require the existence of one or more of the listed factors. It is my understanding that the list is illustrative and is intended to offer judicial guidance. Therefore, while it may be imperative that the court consider whether any of the three factors are present, even if they do not exist on the facts of the case, it is still open to the court to consider other relevant factors.

[141] I find it worth noting that prior to **Stewart v Stewart**, section 7(1) was not construed in a restrictive manner. For instance, in **Graham v Graham**, the wife applied

to the court for a declaration that she was entitled to a 50% interest in the family home. The husband took the view that she was not entitled to an equal share. None of the factors listed in section 7(1) arose from the evidence and consequently were inapplicable. Nevertheless, the court below still considered whether the equal share rule should be departed from on the basis that to apply it would be unreasonable or unjust in the circumstances. McDonald-Bishop J (Ag) reasoned as follows:

> "27. It is noted that the Act, in indicating some relevant considerations for the court in deciding whether the rule should be departed [from] under section 7, has not sought to present a closed category of the considerations that would be relevant. It expressly identifies three relevant factors that may be considered by the court. [Mr Graham] cannot and did not seek to argue that any of those considerations applies to his situation. The fact that the category of factors is not closed by the statute is taken to mean that the court may take into account other considerations that arise in the circumstances in determining whether the application of the 50/50 rule should be departed from. Under section 14(2) certain factors are listed as relevant when the issue concerns division of property other than the family home. None of these factors are expressly stated as being applicable in respect of the family home when there is an application under section 7 to vary the rule. It stands to reason, therefore, that in considering an application under section 7, it is for the court, in its own discretion, to determine what considerations in the circumstances would be relevant in order to produce a fair and just result. I conclude that had the legislature sought to provide a closed statutory list of relevant considerations in respect of the family home then that might have resulted in a fetter on the exercise of judicial discretion in determining what is reasonable or just under section 7. The legislature, clearly, did not so intend."

[142] In the final analysis, she considered other factors that emanated from the evidence, and having determined that it would be unreasonable or unjust to maintain the equal share rule, she varied the wife's share in the property to 40%. Although that application of section 7(1) was implicitly overruled by this court in **Stewart v Stewart**, I find that it lends support to my perspective.

[143] Also, I am somewhat fortified in my view as to the proper interpretation to be given to section 7(1) by the opinion of Edwards JA in **Crooks-Collie v Collie**:

> "[68] Therefore, if a court is of the view that it would be unreasonable or unjust, in the circumstances of a particular case, to apply, what is often referred to as 'the equal share rule', it may, upon the application of an interested party, make an order in any terms it thinks reasonable, taking into account any factor it thinks relevant. **The section sets out three relevant factors, but these are not exhaustive**." (Emphasis added)

[144] In my judgment, it is quite obvious that the learned judge of appeal did not refer to the factors listed in section 7(1) as providing the "gateway" for displacing or varying the equal share rule. She made it quite plain that the court may consider any relevant factor, including those delineated in section 7(1), to arrive at a reasonable or just outcome. I agree.

[145] Nonetheless, I am aware that the doctrine of *stare decicis* constrains the approach of this court and binds the court below to adhere to the exposition of the law in **Stewart v Stewart**. In limited circumstances, however, this court is permitted to depart from its previous decision (**Thorpe v Molyneaux** (1979) 16 JLR 295, **Collector of Taxes v Winston Lincoln** (1987) 24 JLR 232 and **Ralford Gordon v Angene Russell** [2012] JMCA App 6).

[146] When considering whether this court will follow its previous decision even when it thinks that decision is wrong and concluded, Phillips JA (in the case of **Ralford Gordon v Angene Russell**) cited Carberry JA in **Thorpe v Molyneaux** (page 332); he said:

> "I am of opinion that the doctrine of stare decisis as practised by the Privy Council, (our final Court of Appeal), and now by the House of Lords, … should be and remain our guide. This court should reserve the power to correct its own mistakes and to refuse to follow previous decisions when they are manifestly wrong, and it is in the public interest that they should be corrected."

[147] The ordinary language of section 7(1) is plain and unambiguous, and it does not result in any absurdity or inconsistency with the purpose of PROSA. Alternatively, a narrow construction of that provision would be contrary to the intention of PROSA, as it would fetter the court's discretion and possibly result in unreasonable or unjust outcomes.

Therefore, it is my opinion that it is in the public interest that this court should depart from the earlier statement of principle that the factors listed in section 7(1) provide a gateway for the court to consider other factors in determining whether to vary the equal share rule, as laid down in **Stewart v Stewart**.

[148] In its stead, I propose a construction that the factors listed, along with any other relevant factors, simply aid the court in determining the true question, which is whether it would be unreasonable or unjust for each spouse to be entitled to a one-half share of the family home. If the court finds that the equal share rule would be unreasonable or unjust in the circumstances, it is those same factors that will influence the extent to which the respective interests will be varied. For the avoidance of doubt, I would like to emphasise that, bearing in mind the diverse circumstances in such cases, it is not inherently implied that a decision that followed **Stewart v Stewart** was incorrectly decided.

Conclusion on the counter notice of appeal

[149] As already stated, the learned judge cannot be faulted for his application of the law in exercising his discretion to grant Mr Bailey a 10% interest in the Plymouth property. He correctly found that two of the factors listed in section 7(1) were relevant and proceeded to consider other factors he also found to be relevant: the parties' respective contributions as well as their common intention. The mere presence of any of the factors listed in section 7(1) would not automatically lead to the displacement of the equal share rule. All relevant considerations simply aid the court in deciding the paramount issue of whether it would be unreasonable or unjust for each spouse to be entitled to a one-half share in the interest of the family home. If the court finds, as the learned judge did in this case, that the equal share rule should be varied, those same considerations would guide the court's determination of an apportionment that would not lead to an unreasonable or unjust outcome.

[150] The merit in these grounds is confined to a reconstruction of the operation of section 7(1); that is, the equal share rule can still be displaced even if none of the factors

listed are present since the court has a broad discretion to consider any relevant factor. In this case, however, the learned judge correctly found that two of the specified factors were relevant to his consideration. This means that even under the restrictive application of section 7(1), it was open to him to consider other relevant factors in arriving at his decision.

[151] In my opinion, the counter-notice of appeal has not provided any valid reason for this court to disturb the findings of the learned judge. Consequently, it should be dismissed, and the decision of the learned judge affirmed.

[152] Given the nature of these proceedings and the fact that the parties are unsuccessful on the appeal and counter notice of appeal, I would propose that there be no order as to costs on the appeal and counter notice of appeal.

MCDONALD-BISHOP JA

ORDER

1) The appeal and the counter-notice of appeal are dismissed.

2) The orders of Laing J made on 23 April 2018 are affirmed.

3) No order as to costs.