[2014] JMCA Civ 45

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 103/2008

BEFORE: THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA
THE HON MRS JUSTICE MCDONALD-BISHOP JA (Ag)

BETWEEN	**PAMELETA MARIE LAMBIE**	**APPELLANT**
AND	**ESTATE LEROY EVON LAMBIE (DECEASED)**	**RESPONDENT**

Mrs Margarette May Macaulay and Dr Randolph Williams for the appellant

Abraham Dabdoub and Mrs Laurel Gregg-Levy instructed by Hugh Abel Levy & Co for the respondent

22, 23 September & 14 November 2014

PHILLIPS JA

[1] I have had the opportunity of reading in draft the very thorough, detailed and well-reasoned judgment of my learned sister McDonald-Bishop JA (Ag). I agree with her reasoning and conclusion and I have nothing that I can usefully add.

BROOKS JA

[2] I have read, in draft, the comprehensive judgment of my learned sister McDonald-Bishop JA (Ag) and agree with her reasoning and conclusion. I have nothing that I can usefully add.

MCDONALD-BISHOP JA (Ag)

[3] This is an appeal brought by Pameleta Marie Lambie ('Mrs Lambie') against orders made by Pusey J on 12 August 2008. The orders were made upon an application brought by her then husband, Leroy Evon Lambie ('Mr Lambie'), now deceased, pursuant to the Property (Rights of Spouses) Act ('PROSA') for the division of property situated at 1 Farringdon Heights, St Andrew ('Farringdon').

[4] Farringdon is registered in the name of Mrs Lambie and her son from a previous relationship, Norson Othneil Harris ('Mr Harris'), as joint tenants.

[5] Mr Lambie died in 2009 while this appeal was pending. His estate has been substituted to carry on the proceedings in his stead.

The impugned orders of the learned trial judge

[6] The relevant orders made by the learned trial judge that now form the subject of this appeal are as follows:

> "(1) The property registered at Volume 1096 Folio 496 situated at 1 Farringdon Heights, Kingston 6 is the family home within the meaning of s 2(1) of the Property (Rights of Spouses) Act 2004.
>
> (2) That [Mr Lambie] is beneficially entitled to one half interest of the family home situated at 1 Farringdon Heights, Kingston 6 registered at Volume 1096 Folio 496.
>
> (3) That the transfer registered on the Certificate of Title Volume 1096 Folio 496 on the 7th of April 1997 [Mrs Lambie] Petitioner and her son Norson Othneil Harris be set aside…"

Consequential and ancillary orders were also made by the learned trial judge.

Grounds of appeal

[7] Three grounds of appeal were filed and argued on behalf of Mrs Lambie. They are as follows:

> "(i) The learned trial judge erred in law in concluding that 1 Farringdon Heights was the family home under the Property (Rights of Spouses) Act 2004 and therefore ought to be equally divided between the parties;
>
> (ii) The learned trial judge erred in law in concluding that the interest of Mr. Norson Harris had to be determined and in failing to apply the presumption against interference with vested rights, interference with property rights and retrospective effect in applying the Property (Rights of Spouses) Act 2004 to defeat the said interest;
>
> (iii) The learned trial judge erred in law when he failed to consider Section 13 (2) of the Act which prohibits the Respondent from making an application for division of property under the Property Rights of Spouses Act [sic] without the permission of the Court;"

[8] The following findings of fact and law are set out as being challenged:

> "**Findings of Fact**
>
> (i) 1 Farringdon Heights was the family home;
>
> (ii) No good reason has been presented to vary the equal share rule;
>
> (iii) There is no evidence that Mr. Harris is a bona fide purchaser;
>
> **Findings of Law**
>
> (i) 1 Farringdon Heights is the family home and the provisions of the Property Rights of Spouses Act [sic] have to be applied to this case;

(ii) 1 Farringdon Heights ought to be divided equally between the parties;

(iii) The interest of Mr. Harris had to be determined. The transaction should be set aside."

The undisputed factual background

[9] There is very little convergence in the facts presented by both sides on the application considered by the learned trial judge. However, there are some minor facts about which there is no controversy and which form part of the background to this appeal. They are outlined as follows.

[10] At the time the parties met in the mid 1980s, Mr Lambie was a businessman involved as a developer in the real estate industry with his primary sphere of operations being in Ocho Rios, St. Ann. He owned several properties in St Ann including Country Manor Apartments. He was residing in Ocho Rios at one of his apartments when he met Mrs Lambie. Mrs Lambie was, at the time, residing in Portmore, St Catherine and was the sole registered proprietor of Farringdon from 1981. At the time she acquired the property, there was no dwelling house on it but one was eventually erected that was to form part of the subject matter of Mr Lambie's application before the learned trial judge.

[11] At the time the parties started their relationship, Mr Lambie was married but separated from his then wife. He eventually obtained a divorce and on 11 March 1992, he and Mrs Lambie were married.

[12] On or around 7 April 1997, Mrs Lambie transferred Farringdon to herself and her son, Mr Harris, as joint tenants.

[13] There was eventually a breakdown in the marital union and on or around 4 August 2003, the parties separated although Mr Lambie remained at Farringdon until 2005. On 9 November 2006, Mrs Lambie filed her petition for dissolution of the marriage.

[14] On 11 May 2007, while the petition was pending, Mr Lambie filed his application for court orders pursuant to PROSA, and on 7 January 2008, he filed another application claiming a share in Farringdon on the basis of equity. Up to the filing of the second application, no decree for dissolution of the marriage was obtained.

Mr Lambie's notices of application

[15] On the first application of May 2007, and the one on which the learned trial judge granted his orders that are now being challenged, Mr Lambie sought the following orders as paraphrased: (1) a declaration that Farringdon is the family home within the meaning of section 2 of PROSA; (2) that he is beneficially entitled to a one half interest in the property; (3) that the transfer to Mr Harris be set aside; and (4) that the property be sold with the proceeds divided between Mrs Lambie and him in equal shares.

The single ground for that application was stated thus:

> "The grounds on which the Applicant is seeking the Order are that:-

1. The parties have separated."

[16] In making the second application filed in January 2008, Mr Lambie did not state that it was an amended or supplemental notice of application, and the first two paragraphs were not worded as if orders were being sought in relation to those matters. The application, simply, commenced:

> "(1) The Claimant, Leroy Evon Lambie is beneficially entitled to one half share of the property registered at Volume 1096 Folio 496.
>
> (2) The Defendant holds the legal estate on trust for the benefit of herself and [the] claimant in equal shares."

[17] Mr Lambie then asked that the property be sold and for other consequential orders to be granted that were similar to those he had set out in his previous application. The only order that was sought in the first application that was omitted from the second application was the one asking that the registered transfer of the property to Mr Harris be set aside.

[18] The grounds for this second application were set out as follows:

> "a. The parties have separated and are presently trying to obtain a Divorce herein.
>
> b. Further grounds are set out in the Applicant's Affidavit filed herein sworn to on the 11th day of May 2007 and Supplemental Affidavit filed herein sworn to on the 23rd day of November, 2007."

[19] It is useful to point out that from the terms of both applications, it is seen that Mr Lambie had approached the court for division of Farringdon on the basis that he

and Mrs Lambie were separated and were going through a divorce. This seems to indicate an acceptance on his part that there was no likelihood of reconciliation between them, which also would have formed the basis of Mrs Lambie's petition for a decree of dissolution of marriage that was not contested. The parties, evidently, were treating the union as being at an end just awaiting the court's sanction.

[20] Even without that, the fact that these applications were made four to five years after the parties had separated would lend itself to an objective conclusion that the relationship was over. This is an important observation which is relevant to the issues raised on ground three of the appeal and which will be addressed in more detail at that point in the consideration of that ground. It is relevant at this juncture, however, merely to place the decision of the learned trial judge and the grounds of appeal to be discussed in their proper perspective, factually and legally.

[21] It is interesting to note within this context too that although Mr Harris was, and still is, a registered joint owner of Farringdon with Mrs Lambie, he was never joined as a party to the proceedings and there is no indication that he was ever served with the applications as an interested third party. This is a second observation that assumes significance, as part of the background, in the light of the orders made by the learned trial judge and the resultant grounds of appeal.

[22] It is also clear from the terms of the applications that Mr Lambie was seeking a division of what he described as the 'matrimonial home' under the provisions of PROSA on the ground that it was the family home, as well as in equity, by claiming the

existence of a trust in his favour. There is no indication in the notes of proceedings forming the record of appeal that when the matter commenced, there was any discussion as to which application should have been heard or whether they should have been considered together. It is from the learned trial judge's judgment, however, that it is discerned that both applications were before the court for consideration where it is stated:

> "[T]he claim in this application is by Mr. Lambie alleging that he is beneficially entitled to a one half share of the property by virtue of the Property (Rights of Spouses) Act or in equity."

[23] The learned trial judge, therefore, viewed them as alternative applications that were before him for consideration. As a result, he proceeded to first consider the application made pursuant to PROSA and to make his findings. His findings on that application would have rendered unnecessary a consideration of the second notice of application brought in equity. It is, therefore, the orders made on the first application to which the appeal relates.

The evidence

[24] Mr Lambie's applications were supported by his own affidavits and those of his witnesses, Mr Hugh Levy, attorney-at-law, and Mrs Verona Hoo, a friend. Both applications, however, were hotly contested by Mrs Lambie and that resulted in a substantial dispute as to fact between the parties. A synopsis of each party's contention in relation to Farringdon should suffice to offer an insight into the case that

was before the learned trial judge and to promote a clearer appreciation of the matters raised in this appeal.

[25] It is considered prudent, however, to point out from the outset that based on the conclusion that I have arrived at as to the course that I would propose should be adopted in the disposal of this appeal, it would be undesirable for me to express any view on the merits of the competing claims more than will be necessarily required to examine the challenged aspects of the learned judge's decision and to explain my findings and conclusions.

Mr Lambie's case

[26] The main planks of Mr Lambie's case will now be outlined. He owned, operated and built many businesses for over 40 years. When he met Mrs Lambie in 1985, he had substantial assets in real estate. Mrs Lambie was already the sole registered owner of Farringdon and she asked him to design and assist in building the dwelling house, which he did. By that time, they were engaged. The design of the house bears close similarities to the designs of his properties in Ocho Rios that he had designed himself (he exhibited photographs in support of this assertion).

[27] The construction of the house was completed in 1990 and he made substantial financial contribution towards the construction. He did so from proceeds he received from sale of real property and from his business ventures. He purchased fixtures and appliances for the house. Mrs Lambie's contribution towards construction of the house was from proceeds from the sale of her house in Portmore and a mortgage that she

had obtained. Mrs Lambie had no other source of income apart from assisting him in his business and being a housewife. His financial contribution towards the construction and maintenance of the house was more than Mrs Lambie's. He can produce no records of his expenditure, however, because he had left all his documents at Farringdon when he moved out and he was not able to retrieve them.

[28] It was understood that, that dwelling house would have been owned by both of them as it was their 'matrimonial home' after they were married. They lived together in it prior to and after they were married. It was always their declared intention to have it as the 'matrimonial home'. He produced documentary evidence, including the marriage certificate, in support of this assertion that they were living at Farringdon before and during the marriage.

[29] He did not insist that his name be placed on the certificate of title because he was going through a divorce and his wife at the time was claiming half of everything. It was an implied term (seemingly, of the relationship) that his name, eventually, would have been placed on the certificate of title.

[30] It was after he was served with the divorce petition of Mrs Lambie on 30 March 2007 that he became aware that the transfer of an interest in the property to Mr Harris by way of gift was effected on 7 April 1997. At that time, he and Mrs Lambie were living together in the house. He did not consent to that transfer. He believed that Mrs Lambie effected the transfer in order to deprive him of an interest in the property.

[31] Both witnesses on his behalf, Mr Levy and Mrs Hoo, attested to Mr Lambie's assertion that Farringdon was used as the main or principal place of residence by the parties before and during the marriage. Mr Levy stated that he knew the parties to have lived in Farringdon since 1988 when the house was under construction. He would visit them there before and after they were married and that at no time did Mr Lambie establish a matrimonial home in Ocho Rios. Mr Levy also deposed that Mr Lambie had provided money to Mrs Lambie to purchase a BMW motorcar.

[32] Mrs Hoo, for her part, deposed that she would attend social gatherings at the house, such as birthday and anniversary parties, between 1990 and 2005; that would have been before and during the marriage and after the parties separated in 2003.

Mrs Lambie's case

[33] The salient parts of Mrs Lambie's response will now be summarised. The assertion of Mr Lambie that they met in 1985 is false; they met in 1987. It was in that year that the house was completed but before she met Mr Lambie. Mr Lambie gave no assistance and made no contribution towards the construction of the house. It was built from her own personal funds together with a mortgage loan that she serviced solely and a loan from her son, Mr Harris.

[34] By 1988, she was living at Farringdon with Mr Harris and his family. It was always her intention to make a gift of the property to Mr Harris who is her only child. It was always intended by her to be a home for herself and Mr Harris.

[35] It was never understood by her that Farringdon would have been jointly owned by Mr Lambie and her and it was never used as the matrimonial home. The matrimonial home was at Country Manor in Ocho Rios where Mr Lambie had his business operations and where he resided principally during the course of the union. They never cohabited at Farringdon on any regular basis and Mr Lambie only came to Farringdon for a short time in 2000 after he lost Country Manor.

[36] She did not transfer the property to Mr Harris to defeat any interest of Mr Lambie as he had none in the property. Mr Lambie was aware from 1999 that her son's name was placed on the certificate of title because he admitted to her in 1999 that he had seen the certificate of title.

[37] She had no business involvement with Mr Lambie, save and except for assisting him with his typing, whenever it was convenient, and running a few errands for him. She was a businesswoman in her own right with financial means of her own. She was in no need of any income or money from Mr Lambie or from any of his companies. Mr Lambie has no interest in Farringdon by virtue of PROSA, in equity, or at all, and so his applications should be rejected.

Discussion

The failure to cross-examine

[38] It is quite evident that there was a serious dispute as to fact between the parties that could only have been resolved on their credibility and that of their witnesses. This notwithstanding, there was, surprisingly, no cross-examination. There

is nothing on the record of appeal to indicate whether or not this was the choice of the parties that was expressed to the learned trial judge. The absence of cross-examination was, however, observed by the learned trial judge when he indicated in his judgment the difficulty that confronted him in treating with the evidence of the Lambies (see paragraph [52] below). In the circumstances that obtained, cross-examination seemed to have been desirable. It might have assisted in better testing the case presented by each of the parties by providing material that could have been useful in assessing their respective credibility.

[39] Litigants and trial judges, alike, should always give serious consideration to the utility of cross-examination in cases of such nature where there is marked and substantial divergence on the facts. It would be useful to note in this regard the observations of Rattray P in **Whittaker v Whittaker** (1994) 31 JLR 503, 505 and of their Lordships of the Privy Council in **Lascelles Chin v Audrey Chin** [2001] UKPC 7.

[40] The learned trial judge was, therefore, deprived of valuable assistance in this case by not hearing the affiants even though he saw them. He, nevertheless, in those circumstances, proceeded to decide the case entirely on paper and managed to arrive at his findings of fact and law. It means that this court is in the same position as the learned trial judge with only the paper evidence for consideration.

Ground one

Whether the learned trial judge erred in law in declaring the property to be the family home within the meaning of PROSA

[41] The learned trial judge, after a review of the affidavit evidence of the parties, arrived at a finding that Farringdon was the family home. His finding, in this regard, has been challenged by Mrs Lambie on the following grounds:

(i) The evidence suggests that the parties were living together both at Farringdon and in Ocho Rios.

(ii) There is no cogent evidence that Farringdon was used as the principal place of residence.

(iii) The learned judge was wrong to base his finding that Farringdon was the family home on the business partnership between the parties.

(iv) He relied on residence as the only test.

(v) The certificate of title shows clearly that from 7 April 1997, Farringdon was not owned wholly by either or both of the spouses as required by PROSA. Therefore, it could not have been the family home and so a finding that it was the family home is contrary to the definition in PROSA.

[42] Mr Dabdoub, in responding to these arguments on behalf of Mr Lambie's estate, submitted that the learned trial judge was correct in his interpretation of the law as to what constitutes the family home. He supported this contention on the following bases:

(i) The learned judge determined that on a balance of probabilities, he preferred the evidence of Mr Lambie that Farringdon was the family home.

(ii) The learned judge found as a fact that the parties lived at Farringdon before and during the marriage and that the transfer to Mr Harris was during the time that the parties lived at the property.

(iii) The learned judge demonstrated that he had given due consideration to the fact that the land was owned by Mrs Lambie but that both parties lived there before and during the marriage.

(iv) The property was, therefore, already a family home when the transfer was made to Mr Harris.

(v) The learned trial judge did not overlook the fact that Farringdon was not wholly owned by either or both of the spouses. This is so because in his judgment, the learned trial judge mentioned the fact that Mrs Lambie had transferred an interest in the property to her son and he furthered considered and found that the son was not a *bona fide* purchaser for value and, therefore, not in need of protection. The judge came to the

view that by virtue of section 8(3) of PROSA, he should set aside the transaction and did so.

The relevant legislative framework

[43] In an attempt to place the challenged findings of the learned trial judge and the submissions made by counsel for the parties within their proper legal perspective, it is considered necessary to highlight some relevant provisions of PROSA that pertain to this concept of 'the family home' which would have informed Mr Lambie's application as well as the course adopted by the learned trial judge in dealing with the application.

[44] In section 2(1) of PROSA, the definition of the family home is set out in these terms:

> "2. – (1) In this Act -
>
> ..." 'family home' means the dwelling-house that **is wholly owned by either or both of the spouses and used habitually or from time to time by the spouses as the only or principal family residence** together with any land, buildings or improvements appurtenant to such dwelling-house and used wholly or mainly for the purposes of the household, but shall not include such a dwelling-house which is a gift to one spouse by a donor who intended that spouse alone to benefit;" (Emphasis added)

[45] It should now be noted that the family home assumes primary importance upon the breakdown or dissolution of a marital union or the termination of cohabitation, as the case may be. Section 6 (1) of PROSA should be noted in this regard. It 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--
>
> (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.

Subsection 2 continues:

> "(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."

[46] Another relevant provision connected to the family home is section 7 that follows. Section 7(1) provides:

> "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."

[47] A spouse or former spouse is entitled to make an application to the court to ask for division of the family home upon the occurrence of any one of the trigger events set out in section 6(1). The relevant provision granting *locus standi* to persons involved in a union in which there has been an occurrence of one of the specified trigger events, which would include separation with no likelihood of reconciliation, is section 13.

Section 13(1) reads:

> "13.-(1) A spouse shall be entitled to apply to the Court for a division of property-
>
> (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
>
> (b) on the grant of a decree of nullity of marriage; or
>
> (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation;
> or
>
> (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanage-ment or by wilful or reckless dissipation of property or earnings."

[48] Section 13(3), then, explains that for the purposes of subsection (1)(a) and (b) (above) and section 14 (discussed below) the definition of "spouse" includes a "former spouse".

[49] It should be noted, however, that although a spouse (or former spouse) may apply to the court under this subsection, there is a limitation period within which the application should be brought. In this regard, section 13(2) should be noted. It reads:

> "(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant."

[50] In relation to the court's power, with respect to applications made pursuant to section 13, section 14 then provides, in so far as the family home is concerned:

> "14.--(1) Where under section 13 a spouse applies to the Court for a division of property the Court may-
>
> (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require;"
>
> (b) …
>
> or, where the circumstances so warrant, take action under both paragraph (a) or (b)."

The learned trial judge's findings

[51] It is now considered necessary to focus attention on the main portions of the learned trial judge's reasoning in coming to his finding that Farringdon was the family home and that it should be divided equally between the parties against the background of those highlighted provisions of PROSA.

[52] The learned trial judge, after examining the evidence of Mr and Mrs Lambie, noted:

> "Even though the parties were both present at the hearing for cross examination it is always difficult to determine the truth when the evidence is so divergent. I found great assistance in the evidence of the supporting witnesses and the documents that were exhibited."

He then proceeded to examine the evidence of Mr Lambie's witnesses, who themselves, were not cross-examined, and reasoned as follows:

> "The question of when Mr. Lambie lived at Farringdon was addressed by Mr. Hugh Levy Attorney-at-Law (in his Affidavit filed [sic] November 26, 2007, where he spoke of visiting the Lambies at Farringdon before and after their wedding. Ms. Verona Hoo spoke of attending social gatherings including birthday parties and anniversary celebrations between 1990 and 2005 at Farringdon. Documents such as the Marriage Certificate and letters from the lawyer were addressed to both parties at Farringdon. In fact even Mrs. Lambie's own document, the agreement of October 1995 between the Lambies and Irma Tully which was exhibited in her affidavit of 22nd April 2008 states the joint address of the parties as Farringdon.
>
> In fact, the documents exhibited both in relation to Ms. Tully and a loan obtained from Workers Savings and Loan Bank in 1998 for use in their business, indicate that there was a level of partnership between the parties. As a result on a balance of probabilities I prefer Mr. Lambie's evidence that Farringdon was the family home.
>
> Consequently I find that Farringdon was the family home. I accept that the parties lived in that house before and after the marriage. I accept that Mr. Lambie contributed financially and otherwise to the building of the house and it was the principal family residence for the duration of the marriage. I do not accept that the construction and maintenance of the house was Mrs. Lambie's private project and that she had no input from Mr. Lambie.
>
> Having found that Farringdon is the family home the provisions of the Property (Family [sic] Rights of Spouses) Act have to be applied to this case. The fact that Farringdon was owned by Mrs. Lambie before the parties [sic] means

> that the Court should consider whether this is a proper case for a variation of the equal share rule."

[53] It is seen clearly from this reasoning that the learned judge concluded that Mr Lambie was entitled to a half share in Farringdon on the basis that it was the family home as he found it to be. In effect, he gave due regard to section 6 of PROSA (albeit without directly saying so) and that explained his action in examining whether the equal share rule should have been departed from as is provided for under section 7. He stated it thus:

> "The equal share rule should only be departed from for good reason This view is set out in **White v White [2000] 2 F.L.R. 981** and more recently, elegantly set out by McDonald-Bishop J (Ag) in **Graham v Graham**.
>
> No good reason has been presented to vary the equal share rule and therefore Farringdon ought to be equally divided between the parties."

[54] In turning to consider the complaints of Mrs Lambie concerning the learned judge's findings of fact and law as stated in paragraph [41] above, it must be stated at this juncture that it is accepted that this court ought not to disturb the learned judge's findings of fact unless they are inconsistent with the evidence and/or plainly unsound (see **Thomas v Thomas** [1947] AC 484). So issues of pure fact that rested on the credibility of the parties would have fallen within the exclusive purview of the learned judge and so would not, without more, provide a basis for this court to interfere with his findings.

[55] Different considerations, however, apply to the ultimate finding that Farringdon was the family home. That finding involves a mixed question of both fact and law as to whether the statutory definition has been satisfied. Therefore, it is open to this court to interfere with his findings of law on this issue if the circumstances so warrant.

[56] What is palpably missing from the learned judge's analysis, and which has given Mrs Lambie a meritorious basis for her complaint, is his treatment of the 'ownership element' in the statutory definition of the family home. It does appear, as advanced on behalf of Mrs Lambie, that the learned judge only applied the 'residence test' in determining whether the property was the family home and had failed to take into account the 'ownership' component of the definition up to the point he declared it to be so. For Farringdon to qualify as the family home, it must satisfy all the elements of the statutory definition and one of those elements is that it must be "*wholly owned by either or both of the spouses".* The fulfillment of the 'residence test' is, therefore, not the only criterion for a dwelling house to qualify as a family home within the meaning of PROSA.

[57] There is undisputed evidence in this case, which was the evidence before the learned trial judge, that long before the separation of the parties, the filing of the divorce petition and the filing and hearing of the applications for division of property, the registered owners of the property had been Mrs Lambie and Mr Harris. They hold (and have done so since 1997) both the legal and, presumptively, the beneficial interest in the property as joint tenants. This means that up to the time of the

consideration of the application by the learned trial judge, Farringdon was not, prima facie, wholly owned by both or either of the spouses within the statutory prescription. The interest of Mr Harris, as a registered co-owner, therefore, loomed large on the evidence to be considered by the learned trial judge before he could have properly arrived at the ultimate finding of fact and law that the property was the family home within the meaning of PROSA.

[58] Having failed to deal directly, or demonstrably so, with the question of ownership, the learned trial judge seems to have fallen into error in simply concluding, as he did, that he "preferred Mr. Lambie's evidence that Farringdon was the family home". This is so because nothing that Mr Lambie and/or his witnesses might have said would have relieved the learned trial judge of his duty to independently and objectively examine the evidence, as judge of the law, to see whether the property fits within the legal definition of family home. It was not simply a matter of who resided there, the nature and quality of the residence and/or who had contributed to its construction and maintenance; residence and contribution, without more, do not convey ownership in property. He had to demonstrate on his reasoning the basis on which he accepted Mr Lambie's case that Farringdon was the family home within the full legal meaning of the term.

[59] Mr Harris' title, as a registered proprietor, was not displaced, without more, by those assertions of Mr Lambie in his affidavit that Farringdon was the 'matrimonial home'. When those affidavits were filed along with the application, and by the time of

the hearing, Farringdon was not, on the face of it, the family home within the statutory meaning of the term.

[60] Indeed, contrary to what Mr Dabdoub argued, up to the point at which the learned trial judge decided that Farringdon ought to be divided equally between the Lambies, he had not yet factored into the equation the interest of Mr Harris. Also, when he examined the question whether any good reason existed to vary the equal share rule, he, apparently, gave no consideration to the registered interest of Mr Harris as a third party in the scheme of things. It was after declaring that the Lambies were entitled to equal share in the family home that he then said:

> "The interest of Mr. Neil Harris has to be determined. Section 8 (3) of the Property Rights of Spouses Act gives the Court the power to set aside any transaction for the **family home** entered into without the permission of the other spouse. The Act allows for a bona fide purchaser for value without notice to be protected. There is no evidence that Mr Harris is a bona fide purchaser. In fact his relationship to the parties would exclude him from such a description.
>
> Therefore, I am of the view that the transaction should be set aside and the Order sought by Mr Lambie should be granted."

[61] It is patently clear that Mr Harris' interest was not dealt with as part of the analysis concerning whether the property was the family home, or more particularly, in relation to the question of its ownership. Nowhere did the learned judge declare, as Mr Dabdoub contended, that in 1997 at the time of the transfer, Farringdon was the family home and give his reasons in law for saying so. It is Mr Dabdoub who has advanced this as an argument in favour of the finding but, regrettably, the learned trial judge did not indicate that to have been part of his contemplation or his

conclusion. Mr Harris' interest seemed to have been contemplated merely in relation to the application for an order that the transfer to him be set aside. There was no express finding by the trial judge of any dealing with the property by Mrs Lambie to defeat Mr Lambie's interest when the transfer was effected as Mr Lambie had alleged. He merely found that Mr Harris was not a *bona fide* purchaser for value.

[62] The issue concerning ownership was a relevant fact in issue, as a matter of law, and so judicial determination of the question was required before the property could have been declared to be the family home within the meaning of PROSA. It does appear that the approach taken by the learned trial judge might not have been appropriate because up to the point he decided that the property should have been divided in equal shares between Mr and Mrs Lambie on the basis that it was the family home, it was, prima facie, not wholly owned by any of the Lambies or jointly by them.

[63] I am propelled to the conclusion that the learned trial judge fell into error in finding that Farringdon was the family home within the meaning of PROSA and for the purposes of the application of PROSA when the issue of ownership was not resolved. There is thus merit in Mrs Lambie's complaint that the learned trial judge erred when he found that Farringdon was the family home within the definition of section 2(1) of PROSA.

[64] Ground one of the appeal, therefore, succeeds.

Ground two

Whether the learned trial judge erred in setting aside the registered transfer to Mr Harris

Submissions

[65] Mrs Lambie's contention on ground two is that the learned trial judge erred in law in setting aside the transfer to Mr Harris. Part of the submissions advanced on Mrs Lambie's behalf (this time by Dr Williams) was that when the Act came into operation on 1 April 2006, the property in question was not the family home and that at the time of the hearing of the application, that remained so. So, the learned trial judge in declaring Farringdon to be the family home and setting aside the transfer executed by her in 1997 because the consent of Mr Lambie had not been obtained had given retrospective effect to section 8(3).

[66] Dr Williams argued further that at the time of the transfer in 1997, the requirement for consent by virtue of PROSA did not exist because the Act was not yet passed. According to him, Mrs Lambie had a right to dispose of her property as a *feme sole* under the Married Women's Property Act (section 3(1)(b) which was the applicable statute at the time). Under that statute, he argued, Mrs Lambie did not need the consent of Mr Lambie to dispose of her property and so she would have acted lawfully within the terms of the applicable law. Therefore, the learned trial judge, in applying PROSA retrospectively, had rendered Mrs Lambie's lawful act done under the Married Women's Property Act unlawful.

[67] Learned counsel further maintained that to give PROSA retrospective effect, by declaring Farringdon to be the family home and depriving Mr Harris of a vested proprietary right that had existed for almost a decade before the passing of the Act, was unfair and unjust and could never have been the intention of Parliament. In support of his arguments, he relied heavily on the case of **Wilson v First County Trust Ltd** [2003] 4 All ER 97, a case cited by this court in **Brown v Brown** [2010] JMCA Civ 12.

[68] Based on these submissions, Mrs Lambie has challenged the order of the learned trial judge on the basis that, in applying PROSA retrospectively to defeat Mr Harris' interest, the learned trial judge failed to apply the presumption against interference with vested rights.

[69] Mr Dabdoub, in his response, relied on the authority of **Brown v Brown** to argue that PROSA does have retrospective effect and that even though the transfer was effected before the passing of the Act, the Act would still operate to affect it. His argument is that the property was wholly owned by Mrs Lambie before the transfer to Mr Harris and herself. Furthermore, from the moment the parties got married and lived in the house, it had become the family home because the Act has retrospective effect.

[70] Mr Dabdoub maintained further that the fact that PROSA has retrospective effect means that Mrs Lambie could not have transferred the property without Mr Lambie's consent and so when she did so, that transfer was liable to be set aside

under section 8(3). According to him, it would be unfair to deprive Mr Lambie of an interest in the property. Fairness, he said, would dictate that this court does not depart from **Brown v Brown.** Therefore, the learned trial judge was correct to find that the transfer was null and void.

[71] Dr Williams, in countering that argument, responded that in **Brown v Brown** the Court of Appeal did not say that all provisions of PROSA are retrospective. He noted, in particular, the dicta of Morrison and Phillips JJA in which it was indicated that some sections of the statute do have only prospective effect.

Analysis and findings

[72] The arguments presented by both sides have been closely considered and it is found that there is merit in the arguments of Dr Williams made on behalf of Mrs Lambie on more than one basis. Firstly, he is correct in saying that the learned trial judge fell into error when he set aside the transfer to Mr Harris on the basis of section 8(3) of PROSA. The entire section 8 is set out for clarity. It reads:

> "8.- (1) Where the title to a family home is in the name of one spouse only then, subject to the provisions of this Act-
>
> (a) the other spouse may take such steps as may be necessary to protect his or her interest including the lodging of a caveat pursuant to section 139 of the Registration of Titles Act; and
>
> (b) any transaction concerning the family home shall require the consent of both spouses.

> (2) The Court may dispense with the consent of a spouse required by subsection (1) (b) if it is satisfied that consent cannot be obtained because the spouse is mentally incapacitated or the whereabouts of the spouse are unknown or consent is unreasonably withheld or for any other reason consent should be dispensed with.
>
> (3) Where one spouse enters into a transaction concerning the family home without the consent of the other spouse then-
>
> (a) subject *to* paragraph (b), that transaction may be set aside by the Court on an application by the other spouse if such consent had not been previously dispensed with by the Court;
>
> (b) paragraph (a) shall not apply in any case where an interest in the family home is acquired by a person as *bona fide* purchaser for value without notice of the other spouse's interest in the family home.
>
> (4) Where by virtue of subsection (3) (b) a transaction cannot be set aside by the Court, the spouse whose interest is defeated shall be entitled to claim, out of the proceeds of the transaction, the value of that spouse's share in the family home."

[73] The whole scheme of section 8 applies to property that is the family home within the meaning of the Act and which is in the name of one spouse only. Section 8 and, particularly subsection 8(3), therefore, would have had no relevance to the application in the absence of a prior correct finding made in law that Farringdon was the family home and that it was wholly owned by Mrs Lambie for the purposes of the operation of section 8(1) of PROSA.

[74] The order setting aside the transfer is also viewed within the context of the arguments concerning retrospectivity advanced by counsel on both sides. It is clear

that for the learned trial judge to have applied section 8(3) to set aside the transaction, he would have had to apply the Act retrospectively because the transaction was done in 1997 before the statute was passed. At that time, the property rights of Mrs Lambie and Mr Lambie would have been governed by the Married Women's Property Act and the rules and presumptions of common law and equity. Under that regime, the concept of the family home was unknown to the law and there was no statutory regime corresponding to section 8.

[75] The learned trial judge, in arriving at his decision to set aside the transaction done under the pre-existing law, did not indicate, as Dr Williams correctly noted, that he had applied his mind to the principles applicable to giving retrospective effect to an Act of Parliament when there is no express provision for retrospective application. Mr Dabdoub made the interesting point that if the Act is not given retrospective effect, then any action could be taken by a spouse to defeat the interest of the other spouse in the family home and that is a situation that Parliament intended to correct. According to Mr Dabdoub, Parliament has given the court the power to reverse such an action. Mr Dabdoub's point is well appreciated; however, the learned trial judge has not indicated any specific finding relating to the parties' interest in the property in 1997 and/ or concerning Mrs Lambie's motive for making the transfer to Mr Harris. So, his reason for applying section 8(3) retrospectively in the circumstances of the case is not expressed for our benefit.

[76] This argument concerning the omission of the learned trial judge to consider the principles relating to the retrospective application of PROSA is connected to

another argument advanced on behalf of Mrs Lambie and that concerns the question of fairness. The argument advanced on behalf of Mrs Lambie was that it was unfair for the learned trial judge to apply PROSA retrospectively and to make a decision so that it adversely affected Mr Harris' vested rights that existed before the passing of the Act, without giving him an opportunity to be heard.

[77] The issue of fairness is a profound one in treating with the question whether an enactment should be given retrospective application. The authorities have, indeed, shown that whilst the presumption against the retrospective operation of legislation is not unqualified, there is an underlying rationale for the presumption. The rationale is fairness. This was stated by Staughton LJ in **Secretary of State for Social Security and Another v Tunnicliffe** [1991] 2 All ER 712. His Lordship opined at page 724:

> "…the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree — the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended."

[78] The law on this point was diligently distilled and helpfully summarised by Morrison JA in **Brown v Brown** in paragraphs [64] – [69] of the judgment. After providing an overview of the dicta from several authorities, including **L'Office Cherifien des Phosphates v Yamashita Shinnihon Steamship Co Ltd** [1994] 1 All ER; **Wilson v First County Trust Ltd** [2003] 4 All ER 97 and **Secretary of State for Social Security v Tunnicliffe**, Morrison JA set out in paragraph [69] of his

judgment what he saw as the proper approach and the principles that are applicable in determining whether a statute should be given retrospective effect. The relevant portions of that paragraph state:

> "(iv) Unless it appears plainly or unavoidably from the language of the Act, or by necessary implication, that it was intended to have retrospective effect, there is at common law a prima facie rule of construction against retrospectivity, that is to say that the court is required to approach questions of statutory interpretation with a disposition, in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect.
>
> (v) The prima facie rule of construction is based on simple fairness, thus giving rise, whenever questions of retrospectivity arise, to a single, indivisible question, which is would the consequences of applying the Act retrospectively be so unfair that Parliament could not have intended it to be applied in this way."

[79] The learned trial judge's failure to expressly consider these principles when he proceeded to set aside the transfer to Mr Harris on the basis of section 8(3), regrettably, leads one to conclude that he might have failed to first adequately instruct himself in law in applying that provision of PROSA. In my view, the learned trial judge, before proceeding to apply section 8(3), retrospectively, and setting aside the transfer on the basis of that provision, ought to have demonstrably resolved the issue as to the interests of the relevant parties in the property at the time of the transaction in 1997, and up to the date of their separation, against the background of the relevant principles of law.

Unfairness to the third party co-owner

[80] It was also contended on behalf of Mrs Lambie, in advancing her arguments in relation to ground two, that not only was the retrospective application of PROSA unfair but that the order was unfairly made in the absence and without the knowledge of Mr Harris. Mr Dabdoub, however, argued among other things, that it would have made no difference to the findings of the learned trial judge because Mr Harris was not a *bona fide* purchaser for value.

[81] The argument of Mr Dabdoub is, however, rejected for the reasons that will now be outlined. Mr Harris has a vested interest and rights as registered proprietor of the property. As such, he has all the rights and privileges bestowed on him by virtue of the Registration of Titles Act, one such privilege being the inviolability or indefeasibility of his title in the absence of fraud. So, as a registered owner, he is the legal and presumptive beneficial co-owner with Mrs Lambie until and unless good ground is shown in law to deprive him of his interest in the property. The fact that he was a registered proprietor of Farringdon before the passing of PROSA, and was so during the course of the marital union, rendered it even more reasonable and fair that he be given an opportunity to be heard or, at least, to be notified that a decision could have been made that would be adverse to him. The principles of natural justice require it.

[82] The need for Mr Harris to have had notice of the proceedings would have arisen also from the remedies sought by Mr Lambie not only in relation to PROSA but from

those he was seeking in equity. It is seen that on the second application, Mr Lambie was claiming the existence of a trust in his favour. He maintained that Mrs Lambie held the property on trust for him. The certificate of title shows that Mrs Lambie and Mr Harris are the registered joint tenants. However, in the case of a joint tenancy there is no separate and distinct share in the property to be held wholly by one joint tenant. Based on the fundamental principle applicable to joint tenancy, Mrs Lambie holds everything with Mr Harris and she holds nothing by herself because of the four unities of interest, title, time and possession and there having been no severance of the joint tenancy.

[83] It follows from this that there can be no notion of Farringdon being held in trust solely by Mrs Lambie for the benefit of Mr Lambie in the face of the joint tenancy. Both Mrs Lambie and Mr Harris would be holding the legal estate on trust for the benefit of Mr Lambie (even in part) if he is successful on his claim to a beneficial interest. The issue whether and how the court would treat with Mr Lambie's claim in relation to the property jointly held by Mrs Lambie and Mr Harris remains an issue to be resolved in the court below. So, even on that premise alone, Mr Harris would not merely be an interested third party but a necessary party to the proceedings.

[84] For all the foregoing reasons, it is believed that it was desirable that Mr Harris be joined as a party so that all the matters in the dispute between the Lambies, which also affected him personally, would have been fairly and fully resolved. In the absence of any notes of the proceedings provided to this court, it is not clear whether the question of joining Mr Harris or of notifying him of the proceedings was ever

raised. Regrettably, counsel appearing for the parties before us could not assist on this because they did not appear below. The issue of fairness in the proceedings below is, indeed, a live one for consideration. This has added some merit to the arguments advanced by Mrs Lambie on ground two of the appeal that the approach of the learned trial judge, in treating with the application and granting the orders he did, was wrong.

[85] Ground two of this appeal, therefore, succeeds.

Ground three

Whether the application was irregular having been made outside the limitation period without permission of the court

[86] It was contended on behalf of Mrs Lambie in ground three of her grounds of appeal that the learned trial judge erred in law when he failed to consider that section 13(2) of PROSA prohibited Mr Lambie from making an application for division of property under the statute without the permission of the court.

[87] The submission in support of this is that the parties, having been separated without reconciliation, the application for division of the property should have been made within the 12 month period after separation, as prescribed in section 13(2), unless a separate application for an extension of that time had been successfully made.

[88] Section 13 has already been highlighted in paragraphs [47], [48] and [49] and so its provisions will not be detailed at this juncture. It should be noted, however,

that apart from section 13, section 11 also empowers spouses to approach the court to settle property disputes between them. Section 11, however, applies specifically to spouses in a subsisting marriage at the time of the application. It does not expressly make provision for spouses who have separated without likelihood of reconciliation to apply to the court for division of their property as set out under section 13.

[89] The Act provides that on applications made pursuant to section 11(1), the court may make such orders as it sees fit including an order for sale of the property. Pursuant to section 11(3), the court is further empowered to deal with questions that arise between the spouses in relation to property no longer in the possession or under the control of one of them. The court is empowered to make such orders on an application under that subsection as contained in section 11(4) and (5). Section 11 reflects, to an appreciable extent, the former provisions of sections 16 and 17 of the Married Women's Property Act. Section 11 is, however, not expressly made subject to sections 6, 7 and 14 that treat specifically with the division of the family home in applications brought pursuant to section 13(1).

[90] Mr Lambie did not set out, as a ground, the statutory basis on which he was bringing the application. Therefore, no mention was made in the application of sections 11 or 13 and this is unsatisfactory. It would have been far more helpful if he had done so since different considerations apply depending on the section being invoked. The Civil Procedure Rules 2002 (the 'CPR'), provide in rule 11.7(1)(b) that an applicant in seeking an order must state briefly the grounds on which the order is being sought. The word 'grounds' must be taken to mean legal as well as factual

grounds. So, if the application for the order is based on a statutory provision or a rule, then the relevant provision or rule being relied on should be stated (similarly, see rule 8.8(b) and (c) as it pertains to a claim by way of fixed date claim form).

[91] It is, evident, that in seeking a declaration that Farringdon was the family home, Mr Lambie was of the view that he was entitled to half share in keeping with section 6(1). His ground for bringing the application was that they were separated. All this would suggest, on an objective evaluation, is that he was proceeding on the basis of his entitlement to apply under section 13(1). That section, specifically, makes provision for a spouse in the position that Mr Lambie was in to apply for division of property.

[92] The learned trial judge has not disclosed in his judgment the specific statutory provisions he had applied in treating with the application under PROSA in the absence of any being disclosed on the application. It is evident, however, that like Mr Lambie, he treated with the application as one made pursuant to section 13 because he clearly divided the property in accordance with sections 6 and 14 on the basis that it was the family home.

[93] The significant thing to note, however, in relation to all this, is that Mr Lambie had made his application four years after the separation. That fact, in and of itself, would have given rise to a preliminary issue for resolution as to the jurisdiction of the learned trial judge to treat with the application under section 13. This would have been so because of the time restriction imposed on the bringing of applications

pursuant to section 13(1). So, unless the permission of the court was granted, extending time beyond the 12 month period (section 13(2)), then the application would have been statute-barred under section 13.

[94] The flaw in the learned trial judge's approach was that he did not first determine whether he had the jurisdiction to treat with the application within section 13 and the other related provisions. The learned trial judge identified the issues he had to determine in this way:

> "[t]he important questions are whether or not the property was the family home and what, if any contribution did Mr Lambie make to the construction of the house."

[95] Once it is accepted that the parties were separated without the likelihood of reconciliation at the time of the application, which was, in my view, the situation from all indications, and that the separation was in 2003 (or even as late as 2005), the application would have been statute–barred on that basis. Mr Lambie having made no application for extension of time and no extension of time having been granted, it means, then, that the application did not fall to be considered by the learned trial judge under section 13. The learned trial judge, therefore, fell in error in treating with the application and proceeding to apply the equal share rule before first determining his jurisdiction to do so.

[96] I find that there is merit in Mrs Lambie's complaint that without an extension of time having been granted for the application to be brought outside the 12 month limitation period, the application was out of time under section 13 when it was

considered by the learned trial judge. As such, the application was irregular then and it remains irregular in the absence of permission granted for extension of time. Such an application for extension of time, if it were to be made at this point in the history of the proceedings, would, no doubt, be subjected to its own particular challenges.

[97] Ground three of the appeal, also, succeeds.

[98] Counsel before us have also not explored, in any meaningful way, the issue whether section 11 of PROSA could have been applied although it was raised in passing by counsel for Mrs Lambie. There is nothing to indicate whether or not that point was canvassed before the learned trial judge. Given that the application, as it stands, is out of time as it relates to section 13, then the question whether it could be dealt with under section 11 remains to be explored given that the parties had not yet obtained their divorce at the time the application was made. This is a matter that should have been raised and ventilated in the court below, and is yet to be the subject of determination by that court, as it relates to the fundamental question of jurisdiction to treat with the application under PROSA. There being no substantial argument before us on this issue, and given the course I intend to ultimately propose in disposing of the appeal, I would refrain from stating any view in relation to that question.

Conclusion

[99] It is recognised that many critical and fundamental issues that have arisen for determination in the matter, concerning the applicability of PROSA to Mr Lambie's first

application and the jurisdiction of the learned judge to treat with the application within its provisions, were not fully ventilated and determined in the court below. These issues of law relate primarily to the following matters:

(a) the jurisdiction of the learned trial judge to deal with the application within the provisions of PROSA;

(b) whether Farringdon was the family home in the full legal sense of the concept;

(c) whether the transfer to Mr Harris should be set aside and the basis for doing so or not doing so, as the case may be; and

(d) the principles governing the retrospective application of section 8(3) of PROSA.

[100] It is also noted that because the learned trial judge rested his decision on PROSA and because he viewed the applications as being in the alternative, he would not have seen it fit to consider the application of Mr Lambie that was brought under equity. That is understandable. However, if a conclusion were arrived at that Mr Lambie did not succeed on the first application on the basis of PROSA, he would have had a right to have his claim of the existence of a trust in his favour determined by the learned trial judge. It follows, therefore, that it would be unjust not to allow his estate the opportunity to have his claim to a share in Farringdon, be it on the basis of PROSA or in equity, finally and fairly determined.

[101] Also, and more importantly, it is my humble view that given the issues raised for determination before the learned trial judge, and given the orders sought by Mr

Lambie on both applications, it was necessary and just that Mr Harris be joined as a party to the proceedings.

[102] This court would not be in a position to fairly determine all the matters in dispute between the parties in the absence of Mr Harris and in light of the failure of the judge to resolve some material issues of fact and law. It is my view that in the interests of fairness and justice, a re-hearing before another judge of the Supreme Court, with Mr Harris added to both applications as a respondent, is warranted. It is for that reason, that I have seen it prudent to refrain from expressing any view on any question of law and/or fact that remains unresolved and which should have been determined in the court below.

[103] The instructive dicta of their Lordships in **Chin v Chin,** as expressed by Lord Scott of Foscote, have informed the view that a re-hearing seems appropriate given all the unresolved issues that have emerged in the proceedings. Their Lordships opined at paragraphs [14] and [15]:

> "14. …The normal and proper function of an appellate court is that of review. An appellate court can, within well- recognised parameters, correct factual findings made below. But where the necessary factual findings have not been made below and the material on which to make those findings is absent, an appellate court ought not, except perhaps with the consent of the parties, itself embark on the fact finding exercise. It should remit the case for a re-hearing below.
>
> 15. In their Lordships' opinion, that is what the Court of Appeal should have done in the present case. It is unfortunately true that none of the counsel in the case asked for that to be done. Nonetheless, their silence cannot, their Lordships think, be taken to signify consent to the Court of Appeal embarking on an irregular course."

Disposal

[104] The learned trial judge, having omitted to resolve some material facts and to apply the relevant principles of law in treating with those facts on the application before him, fell into error in coming to his findings of law that Farringdon was the family home; that the provisions of PROSA have empowered him to divide Farringdon equally between Mr and Mrs Lambie; and that the 1997 registered transfer of an interest in the property to Mr Harris should be set aside pursuant to section 8(3) of PROSA.

[105] Accordingly, I would allow the appeal and set aside the orders made on Mr Lambie's notice of application for court orders dated 11 May 2007.

[106] In my view, the matter should be remitted for a re-hearing before another judge of the Supreme Court. Mr Harris, as a registered proprietor of Farringdon, should be joined as a respondent to both applications and should be served with the notices of application, all affidavits and all other relevant supporting documents, including the judgment of this court, so that all matters in dispute between the parties can be finally determined.

[107] Mr Harris should be given an opportunity to file his response (be it by way of affidavit evidence, submissions or both) and the original parties, that is Mrs Lambie and Mr Lambie's personal representatives, should be at liberty to respond to any evidence adduced by him. Consideration should be given to cross-examination of the

affiants although it is recognised that Mr Lambie is no longer available for cross-examination. This issue could be addressed at a case management conference in the court below following the service of processes on Mr Harris, if the parties consider it necessary to do so. This would better facilitate the making of the necessary orders for a fair disposal of the matter at the re-hearing.

[108] The parties should also be at liberty to make any and such applications as they see fit or consider necessary for the disposal of the applications for consideration by the judge at the case management conference.

[109] I would propose that all the matters discussed above be reflected in the terms of the orders to be made by this court.

PHILLIPS JA

ORDER

(1) The appeal against the orders of the Supreme Court made on 12 August 2008 is allowed and the orders are set aside.

(2) The matter is remitted for a re-hearing before a different judge of the Supreme Court.

(3) Mr (Norson Othneil) Harris is hereby joined as 2nd respondent to the applications filed by Mr Lambie.

(4) The amended notices of application for court orders reflecting the joinder of Mr Harris are to be filed by the attorneys-at- law for Mr Lambie's estate and those amended notices of application, all supporting affidavits and other relevant documents relative to the applications, including this judgment, are to be served by them on Mr Harris on or before 20 December 2014.

(5) Mr Harris is to file and serve an acknowledgment of service within 14 days and affidavit(s) in response, if he considers it necessary to give evidence, within 30 days of service of all the documents referred to in sub-paragraph (4).

(6) Mrs Lambie and Mr Lambie's personal representatives are at liberty to file affidavits in response to Mr Harris' affidavit(s), in so far as may be considered reasonably necessary, with Mr Harris being at liberty to respond to any new matters raised in those affidavits in response.

(7) A date for a case management conference, to facilitate preparation for the re-hearing, and a date for the re-hearing, are to be fixed by the registrar of the Supreme Court after consultation with the parties. Such case management conference and the re-hearing should be conducted as soon as is reasonably practicable.

(8) At the case management conference, consideration is to be given by the parties to the need for cross-examination of the deponents, or any of them, at the re-hearing.

(9) Costs of the appeal, to be taxed if not agreed, to Mrs Lambie.