[2010] JMCA Civ 12

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 12/2009

BEFORE: **THE HON. MR JUSTICE COOKE, J.A.**
THE HON. MR JUSTICE MORRISON, J.A.
THE HON. MISS JUSTICE PHILLIPS, J.A.

BETWEEN	**ANNETTE BROWN**	**APPELLANT**
AND	**ORPHIEL BROWN**	**RESPONDENT**

Gordon Steer and Ms. Deborah Dowding, instructed by Chambers, Bunny & Steer for the appellant.

Miss Sherry Ann McGregor, instructed by Nunes, Scholefield, Deleon & Co. for the respondent.

17, 18 November 2009, 5 February and 26 March 2010

COOKE, J.A.

[1] The Property (Rights of Spouses) Act ('the Act') came into operation on the 1st April 2006. The appellant's marriage to the respondent was dissolved on the 13th May 2005. The important question raised in this appeal is as to whether or not the provisions of the Act are applicable to her claim for a 50% share of property located at Barnett Place, Mandeville in the parish of Manchester. The

property, she asserts, was the family home within the context of section 6 of the Act (see paragraph 14 of the affidavit of the appellant dated the 21st May, 2007).

[2] The appellant's claim form was filed in January 2007. In that same month and subsequent to it, she, in a notice of application for court orders, sought:

> "An order for leave to present the Application for division of the matrimonial (sic) home out of time."

The ground on which the order was sought was:

> "That under section 13(2) of the Property Rights of Spouses Act 2004 (sic) makes allowance for applications brought after the requisite time for filing applications (sic) have passed."

This application was necessary as her claim being brought on the grant of the dissolution of a marriage (section 13 (1) (a) of the Act), was subject to section 13(2) which states that such an application "shall be made within twelve months of the dissolution of a marriage ... or such longer period as the court may allow after hearing the applicant".

The respondent's affidavit in opposition to the application consisted of two sentences which were:

> "1. There has been substantial delay and or neglect by the claimant.
>
> 2. That were leave granted as prayed the same would lead to the prejudice of the defendant."

On the 28th June 2007, leave was granted to the appellant to present her application out of time.

[3] The appellant's claim then proceeded to trial. At the start of the proceedings, Mr. Keith Smith, counsel for the respondent raised the issue of "whether or not in these proceedings the court had jurisdiction to hear the matter". The learned trial judge (Marsh J.) answered in the negative. He pronounced that:

> "It is my view that the Act began on the 1st day of April 2006 and provides courts with the powers as of the 1st day of April, 2006."

Accordingly, since the divorce predated the coming into operation of the Act, the court had no jurisdiction to hear the claim. The learned trial judge's reasoning was founded on his stated premise that:

> "There is a fundamental legal principle that the law does not accommodate retroactivity and efforts to impose liabilities."

Marsh J. agreed with and cited the judgment of Sykes J. in **Stewart v Stewart** (Claim No. 2007 HCV 0327) where the latter in paragraphs 19 and 20 said the following:

> "19. The wording of section 13 (2) also puts the matter beyond doubt. It permits an application under the Act when the specified events of section 13 (1) have occurred. If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it came into force. Courts do not lightly conclude that a statute has

retrospective effect. I conclude that Mr. Wilkins's submission that I have no jurisdiction to hear the matter, for the reasons given, is well founded.

20. I do not think I have the power to enlarge time to accommodate a claim under a statute to give the court jurisdiction over a state of affairs that would have given rise to a claim under the Act had the Act been in force at the time of the occurrence of the specified acts but which, unfortunately for Mrs. Shirley-Stewart, was not in force at the material time. However, if I am wrong I will consider whether 22 West Strathmore Drive was the family home."

[4] In resolving this issue it is imperative to undertake a comprehensive approach to the various significant sections which comprise the Act. In this regard I endorse the approach recommended by Brandon J. in **Powys v Powys** [1971] 3 All ER. 116 at 124 (e) where he said:

> "The true principles to apply are, in my view, these: that the first and most important consideration in construing an Act in 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."

[5] The commencement to the Act is heralded as follows:

> "An Act to Make provision for the division of Property Belonging to Spouses and to provide for matters incidental thereto or connected therewith."

In section 2 (1) of the Act it is stated that "spouse" includes—

> "(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;

(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,

immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be."

Further section 2(2) states:

"2 (2) The terms "single woman" and "single man" used with reference to the definition of "spouse" include widow or widower, as the case may be, or a divorcee."

The legislature by its definition of "spouse" has recognized and given effect to the prevalence of so called common-law relationships in our country. This recognition will have fundamental and salutary consequences as between "spouses" hereafter, following the termination of "man and wife relationships" not evidenced by traditional legal criteria.

[6] It cannot be said that the commencement to the Act speaks to whether or not its provisions should only be applicable if the divorce or termination of the relationship was effected after the Act came into operation. It is to be noted that the Act was signed by the Governor General on the 10th March, 2004, but only came into operation on the 1st April 2006. It does seem somewhat curious that persons who were divorced or terminated their relationship in this 2 year period should be denied any benefit as provided by the Act.

[7] In respect of the application of the Act, it is only section 3 which specifically addresses this aspect. This section is set out below:

"3 (1) Except as otherwise provided in this Act and subject to subsections (2) and (3) of this section and section 6, the provisions of this Act shall not apply after the death of either spouse and every enactment and rule of law or of equity shall continue to operate and apply in such case as if this Act had not been enacted.

(2) The death of either spouse shall not affect the validity or effect of anything done or suffered in pursuance of the provisions of this Act.

(3) If, while any proceedings under this Act are pending one of the spouses dies, the proceedings may be continued and be completed; and any appeal may be heard and determined and the Court may make such order as it thinks fit in the circumstances of the case as if the spouse had not died."

[8] I would think that in a section which deals with the non-applicability of the Act, then, if it were so, I would expect the legislature to say in unambiguous language that the Act does not apply to divorces or the termination of relationships which took place before the date on which the Act came into operation. Section 3 of the Act has to be read in conjunction with section 24 of the Act which states:-

"24. The commencement of this Act shall not affect —

(a) any legal proceeding in respect of property which has been instituted under any enactment before such commencement; or

(b) any remedy in respect of any such legal proceeding to enforce or establish a right, privilege, obligation or liability acquired, accrued or incurred before such commencement,

> and any such legal proceeding or remedy may be continued or enforced as if this Act had not been brought into operation."

This savings section does not preclude a claimant who has not instituted proceedings under the old regime to pursue a cause under the Act.

[9] I now advert to section 4 of the Act which states:-

> "4. 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 is made by this Act, between spouses and each of them, and third parties."

Complementary to this section, sections 16 and 17 of the Married Women's Property Act were repealed.

[10] By section 4 of the Act, the legislature directed that there was to be an entirely new and different approach in deciding issues of property rights as between spouses. Section 4 is a directive to the courts as to what the approach should be. In **Carson v Carson and Stoyek** [1964] 1 WLR 511 at 518, Scarman J. (as he then was) had to examine sections 1, 2, and 3 of the English Matrimonial Causes Act 1963. These sections are now reproduced:-

> "1. Any presumption of condonation which arises from the continuance or resumption of marital intercourse may be rebutted on the part of a husband, as well as on the part of a wife, by evidence sufficient to negative the necessary intent.
>
> 2. (1) For the purposes of the Matrimonial Causes Act 1950 and of the Matrimonial Proceedings (Magistrates' Courts) Act 1960, adultery or cruelty shall not be

deemed to have been condoned by reason only of a continuation or resumption of cohabitation between the parties for one period not exceeding three months, or of anything done during such cohabitation, if it is proved that cohabitation was continued or resumed, as the case may be, with a view to effecting a reconciliation.

(2) In calculating for purposes of section 1(1)(b) of the Matrimonial Causes Act 1950 the period for which the respondent has deserted the petitioner without cause, and in considering whether such desertion has been continuous, no account shall be taken of any one period (not exceeding three months) during which the parties resumed cohabitation with a view to a reconciliation.

3. Adultery which has been condoned shall not be capable of being revived."

After his review of these sections, Scarman J. said this (at page 518):

> "If one looks to the Act itself, as Mr. Merrylees invited the court to do, it is plain in my opinion, as Mr. Merrylees rightly conceded, that sections 1 and 2 would have, albeit indirectly, retrospective effect. The reason is that both those sections are directions to the court as to the way in which to approach the problems dealt with by the sections, as and when those problems arise in court after the passing of the Act. Neither section is concerned with the date of the events proved but each is directed to the way in which the court will, after the commencement of the Act, deal with those events irrespective of their date, once they are proved. It was submitted, however, that section 3 was quite differently phrased, and, as I have indicated, effected an alteration in the substantive law."

I likewise regard section 4 as directions to the court as to the approach irrespective of when the divorce or termination of the relationship took place provided that the claim is within the ambit of the Act.

[11] In resolving this issue it would be unwise to ignore pragmatic considerations. A "spouse" now includes single persons who have cohabited with a partner for not less than five years. What would be the position of such a person who terminated the relationship say on the 27th March, 2006 at which time the requisite five year period would have been then satisfied. Does it mean that such a person should be denied the benefit of the Act because the five year period occurred four days before the date of the coming into operation of the Act? This, to my mind, would not be in harmony with the purpose of the Act as stated in the commencement of it. Plainly, that would not be fair and such a denial would result in stripping the Act of its efficacy.

[12] The respondent submitted that the ruling of Marsh J. in the court below was correct in that the Act should not be construed -

> "to affect circumstances that existed before the statute came into effect unless such a construction appears very clearly on the terms of the Act or arises by necessary and distinct implication".

In respect of this submission reliance was placed on **Yew Bon Tew v Kenderaan Bas Mara** [1982] 3 All ER 833. As a general proposition, I would not say it is not in harmony with the law. However, as I have previously endeavoured to demonstrate, the issue of retroactivity does not go to the heart of the matter. This is so because the Act sets out the new approach which must inform the courts in dealing with property rights issues as between spouses. As such, retroactivity in a limited sense is an indirect consequence of this new

approach. Perhaps I should say that even if I should put retroactivity in the forefront of the debate (which I do not), my earlier analysis of what I regard as significant sections of the Act vis-à-vis this issue, would lead me to conclude that that Act, has retrospective effect. The language, and consequentially the import of these sections (as well as the commencement to the Act), as I have construed them, reflect the intention of the legislature that persons who were divorced, or who had terminated their relationships before the coming into operation of the Act were to have its benefits.

[13] The new approach can be illustrated by the provisions which deal with entitlement to the family home.

> " '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."

Sections 6 and 7 are in the following terms:

> "6 (1) Subject to subsection (2) of this section and share of the family home —
>
> sections 7 and 10, each spouse shall be entitled to one-half
>
> (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
>
> (b) on the grant of a decree of nullity of marriage;

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

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

7 (1) Where in the circumstances of any particular case the Court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to one-half the family home, the Court may, upon application by an interested party, make such order as it thinks reasonable taking into consideration such factors as the Court thinks relevant including the following —

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

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

(c) that the marriage is of short duration

(2) In subsection (1) "interested party" means —

(a) a spouse;
(b) a relevant child; or

(c) any other person within whom the Court is satisfied has sufficient interest in the matter."

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

[14] As a subsidiary issue before us was the question of whether the learned trial judge was entitled to entertain the jurisdictional point at the trial, the appellant having obtained leave to present her application out of time pursuant to 13(2) of the Act. It would seem to me that at the application for the extension of time, no issue as to the jurisdiction of the court was raised. Accordingly although the judge extended time, it cannot be said that she made any ruling in respect of jurisdiction. The affidavit opposing the application was at best perfunctory (see paragraph 2 above). It is therefore my view that Marsh J. was properly entitled to give audience to submissions pertaining to his jurisdiction.

[15] Finally, I would allow the appeal. The matter should be remitted to the Supreme Court for trial. The appellant should have her costs in the appeal to be agreed or taxed.

MORRISON, J.A.

Introduction

[16] I have had the advantage of reading in draft the judgment prepared by Cooke JA in this matter and I am happy to find myself in full agreement with his reasoning and conclusion. I have however decided to add my own contribution, not only because we are differing from the judge below, but also because we were told by counsel that the decision of this court in this case will resolve a

difference in opinion that has emerged on the question posed by this appeal. That question, stated broadly, is whether the Property (Rights of Spouses) Act, 2004 ("the 2004 Act"), which was assented to by the Governor-General on 10 March 2004 and came into effect on 1 April 2006, was intended by Parliament to have retrospective operation.

[17] The actual facts of the case and the history of the proceedings in the court below have already been accurately summarised by Cooke JA and I do not propose to repeat them in this judgment. It is sufficient to say that the issue of particular concern to the appellant and the respondent is, if I may adopt Cooke JA's characteristically direct formulation, "whether or not the provisions of the Act are applicable to [the appellant's] claim for a 50% share of property located at Barnett Place, Mandeville in the parish of Manchester", pursuant to section 6 of the 2004 Act (see para. [1] above). The issue is primarily one of construction of the 2004 Act and, as Lord Hoffman observed in a recent decision of the House of Lords concerned with the question of whether a particular set of regulations was intended to have retrospective effect, "Like any other question of construction, this depends upon the language of the [Act], construed against the relevant background" (***Odelola v Secretary of State for the Home Department*** [2009] 3 All ER 1061, at [4]).

The background to the 2004 Act

[18] It may therefore be of some value to consider briefly the background to the 2004 Act and the presumed mischief which it sought to address. Authority, if it is needed, for this approach may be found in the judgment of the Full Court of the Supreme Court in ***R v Industrial Disputes Tribunal, ex parte Seprod Group of Companies*** (1981) 18 JLR 456, in which it was held that, when the court is called upon to construe an enactment, it is permissible not only to consider the state of the law at the time of the enactment, but also to review the history of the legislation on the subject in order to detect what mischief Parliament wished to correct. Parnell J in his judgment referred with approval (at page 462) to the well known statement of Lord Halsbury (in ***Eastman Photographic Co. v Comptroller-General of Patents*** [1898] AC 571, 576) that in construing a statute "it is not only legitimate but highly convenient to refer both to the former Act and to the ascertained evils to which the former Act had given rise, and to the latter Act which provided the remedy".

[19] The only legislative predecessor to the 2004 Act in this jurisdiction is the Married Women's Property Act ("the MWPA"), which came into force on 1 January 1887 (a mere five years after its English counterpart was enacted in 1882). The MWPA removed the proprietary disabilities imposed on married women by the common law (by which husband and wife were treated as one person, that person being the husband) by providing, among other things, for

the capacity of a married woman to acquire, hold and dispose of any property and to sue and be sued, either in tort or in contract, "in all respects as if she were a *feme sole*". Section 16 of the MWPA provided for the resolution of disputes between husband and wife as to the ownership or possession of property by means of an application "by summons or otherwise in a summary way" to a Judge of the Supreme Court or a Resident Magistrate. Section 17 extended the right given to a wife under section 16 to disputes in relation to money or other property in the possession or control of her husband to which, or to a share in which, she claimed to be beneficially entitled. The judge was given power by section 16 to make such orders with respect to the property in dispute "as he thinks fit".

[20] Despite the fact that, as Lord Reid observed in his judgment in ***Pettit v Pettit*** [1969] 2 All ER 385, 388, the words "as he thinks fit" in relation to the judge's powers under the equivalent section of the English statute (section 17) "are words normally used to confer a discretion on the court", a unanimous House of Lords in that case held that the section was procedural only and gave no discretion to the court to override or adjust existing property rights to accord with the court's view of what was fair or reasonable. The House of Lords also rejected (almost unanimously) the existence of any general doctrine of 'family assets' (thus settling a difference in judicial opinion of long standing, for a recent summary of which, see generally the magisterial judgments of Baroness Hale and Lord Walker in ***Stack v Dowden*** [2007] 2 All ER 929, at [14] and [42]).

[21] ***Pettit v Pettit*** was followed just over a year later by what came to be regarded as the companion decision, also of the House of Lords, in ***Gissing v Gissing*** [1970] 2 All ER 780. This case decided that the mechanism for the resolution of disputes between husband and wife as to the beneficial ownership of property vested in the name of one or the other of them was to be found in the law of trust, in particular in the principles governing resulting, implied or constructive trusts (see especially per Lord Diplock at page 790; and see also Lord Walker's trenchant comment in ***Stack v Dowden*** on what he described as "Lord Diplock's insouciant approach to legal taxonomy" – at [23]).

[22] In ***Goodison v Goodison*** (Supreme Court Civil Appeal No. 95/94, judgment delivered 7 April 2005), Downer JA observed that ***Pettit v Pettit*** and ***Gissing v Gissing*** "have been followed on numerous occasions by this court". Perhaps the best known example is ***Azan v Azan*** (1988) 25 JLR 301, in which both Forte JA (as he then was) and Downer JA delivered notable judgments applying both cases.

[23] In England, both cases and in particular the hugely influential speech of Lord Diplock in ***Gissing v Gissing***, dominated this area of the law until 1970, when, after a considerable period of study, review and discussion, the Matrimonial Proceedings and Property Act 1970 was enacted. This Act came into force on 1 January 1971 and gave "[n]ew and far-reaching powers to the court to make property adjustment orders of a kind which had not previously been

contemplated" (per Ormrod LJ in ***Chaterjee v Chaterjee*** [1976] 1 All ER 719, 722). The relevant provisions are now to be found in the Matrimonial Causes Act 1973, which gives to the court what Baroness Hale has described as "comprehensive redistributive powers" in the resolution of matrimonial property disputes (***Stack v Dowden***, supra, at [43]). Despite the fact that there has not been any similar legislation in England with regard to property jointly owned by unmarried couples, the law applicable to them, as settled by ***Pettit v Pettit*** and ***Gissing v Gissing***, must now be read subject to ***Stack v Dowden***, a decision which has considerably simplified the court's approach to the problem in that particular context (and see now ***Abbot v Abbot*** (2007) 70 WIR 183, a decision of the Privy Council on appeal from Antigua, where the common law still applies, in which ***Stack v Dowden*** was applied to the case of a married couple).

[24] The impetus towards reform in this area in Jamaica has a long history. In October 1975 a Family Law Committee ("the committee") was appointed by the Minister of Justice, under the distinguished chairmanship of the late Mr Justice Ira Rowe, and specifically charged "to examine the existing Law relating to Divorce and other areas of Matrimonial and Family Law, and to make recommendations for changes where this is deemed necessary" (introduction to the committee's interim report, published in the form of a Green Paper in 1977 and referred to hereafter as "the Green Paper"). The establishment of the Family Court in December 1975 (by section 3 of the Judicature (Family Court) Act) was projected by the administration to be a first step towards a new

approach to the whole subject of Family Law, which would involve a restructuring "not only [of] the system of administration of laws which affect the family relationship, but also the laws themselves" (Green Paper, para. 1).

[25] In the Green Paper, the committee made preliminary recommendations with regard to divorce law reform as well as the division of matrimonial property. In respect of the former, its primary recommendation was that the then existing grounds for the dissolution of marriage should be abolished and replaced by a single ground of irretrievable breakdown of the marriage. As regards the latter, after referring to the MWPA and its limitations, the committee's introductory comment was as follows:

> "The present law relating to ownership of matrimonial property is unsatisfactory, creates injustice between the parties and is out of touch with social realities. It recognizes only money contribution to the acquisition of property and ignores the contribution made by a wife in the performance of her role as a mother and a homemaker."

[26] The committee's general proposals to remedy this state of affairs were these (para. 52):

> "1. That legislation should be enacted to give to the Court a wide discretion upon application by either spouse to order the division of matrimonial property, however held, between the spouses, and that this power should apply to all marriages, whenever solemnized.
>
> 2. That the proposed legislation should contain guidelines for the exercise of judicial discretion in this respect; and

3. That the proposed legislation should contain specific provisions governing the matrimonial home."

[27] Because it was thought that the matrimonial home called for special consideration, as it was in most cases the principal asset of the parties, as well as the family home, the committee recommended that the legislation should provide for equal ownership of the matrimonial home between the spouses, subject to provisions to be made for exceptional cases (paras. 54-59).

[28] The committee in due course completed its deliberations on the law relating to divorce and other matrimonial remedies and submitted its final recommendations, which were ultimately accepted and embodied in the Matrimonial Causes Act which came into force on 1 February 1989. But with regard to matrimonial property, the committee in 1984 published a Working Paper on Matrimonial Property Reform ("the working paper"), in the introduction to which it reported on the responses which had been received in the interim as follows:

> "Generally speaking, the responses to our proposals have been favourable, but particularly and more importantly it is clear from the comments received that it is the general view that the present law relating to matrimonial property is unsatisfactory, and that the law should be changed to provide for more equitable division between spouses when a marriage ends."

[29] The working paper was accordingly designed to provide more information on the existing law, to discuss alternative matrimonial property systems, their advantages and disadvantages, and to bring to public attention, in the committee's words, "certain vital issues on which we would like specific comments" (page 2). The working paper referred to and compared reforming legislation from other jurisdictions throughout the Commonwealth (the United Kingdom, Australia, New Zealand, Canada, Barbados and Trinidad and Tobago) and also referred briefly to the system applied in certain civil law countries (Belgium and France). The committee identified the options for reform suggested by the legislation enacted in the various countries as being based on three approaches, that is, the discretionary approach, the fixed approach and the composite approach, discussed the pros and cons of each in full and admirable detail (pages 6-15), and invited public comment.

[30] And finally, after a further extended period of discussion and consideration of written submissions, the committee published the Family Law Committee Report on Matrimonial Property Law Reform (the final report) in March 1990. Although the committee in the Green Paper had initially favoured the composite approach (that is, giving the court a discretion to divide the matrimonial assets based on stated criteria, save only in respect of the matrimonial home, which should in general be shared equally), it had by the time of its final report altered its position in favour of the discretionary approach (that

is, to give the court a wide discretion to divide matrimonial property as it sees fit, subject to stipulated statutory guidelines). This change was primarily influenced by the view that the discretionary approach would be easier and simpler to implement (see the final report, page 13, para. 6.3).

[31] The work of the committee had therefore spanned a period of 15 years, during which there had been some (but a surprising few) changes in its composition, though continuity had been assured by the constant factor of the chairmanship of Mr Justice Rowe. Over the same period, there had also been two changes of government (in 1980 and 1989), though by a coincidence of history the final report, as had been the interim report, was presented by the committee to the Honourable Mr R. Carl Rattray, Q.C., the Attorney-General, who had, as Minister of Justice, originally appointed it in 1975.

[32] But it was to be another 14 years before a Bill was introduced in Parliament on the subject of matrimonial property. In the Memorandum of Objects and Reasons appended to the Bill, the Honourable Mr K.D. Knight Q.C., the then Minister of National Security and Justice, provided the administration's rationale for seeking to have the Bill enacted into law as follows:

> "The present law does not provide for the equitable division of property between spouses upon the breakdown of marriage as the basic principle governing the property rights is "you own what you buy". Where there is a dispute as to the ownership of property, proof of purchase or contribution to the purchase of the property in question is required. The emphasis on financial contribution places a wife who

has never worked outside the home at an obvious disadvantage. There have also been practical difficulties regarding proof of contribution since records of expenditure are not usually kept and contribution is often indirect.

The present law is based on the separate property law concept which is embodied in the Married Women's Property Act of 1887. This concept has been abolished in many countries and new statutory rules have been introduced to determine the property rights of spouses on the breakdown of marriage.

The Government, aware of the need to reform the law relating to family property now seeks to enact provisions to provide new rules for the division of property between spouses upon a breakdown of their union.

In enacting these new provisions the Government is also aware of the social reality of men and women living together in common law unions. They build families together, they work together and they accumulate possessions together. When the union breaks down, the parties experience the same kinds of financial dislocation as if they were married. In our society legal solutions for the problems of family breakdown must address not only married couples, but also common law spouses, if they are to be effective. In enacting these new provisions cognizance is taken of the question of the division of property upon the breakdown of a common law union.

Consequently this Bill seeks-

(a) to bring common law unions within the ambit of the provisions with respect to the division of property where there is a breakdown of the union; however, under the law, common law spouses must be single and have cohabited for a period of not less than five years;

(b) to give the Supreme Court, the Family Court and the Resident Magistrates Court jurisdiction to hear all matters relating to property owned by either or both spouses;

(c) to make provision for the family home to be equally divided except where such division would not be equitable;

(d) to make provision for the Court to have the power to divide property owned by either or both spouses except the family home as mentioned in paragraph (c);

(e) to provide for-
(i) ante and post nuptial agreements;
(ii) declaration of property rights;
(iii) determination of value and share of property;
(iv) the manner in which the property is to be divided;
(v) property and creditors;
(vi) cases where the disposition of property is made to defeat the claim of a spouse or other party;
(vii) proceedings of and orders that the Court may make in relation to property:

(f) to make consequential amendments to_
(i) The Judicature (Family Court) Act;
(ii) The Married Women's Property Act; and
(iii) The Matrimonial Causes Act."

[33] Although the Property (Rights of Spouses) Act ("the 2004 Act") was finally enacted in 2004, it was to be yet another two years before it came into force on 1 April 2006. In its final form, the 2004 Act therefore represented almost 20 years of discussion, ventilation (and, perhaps, compromise).

The 2004 Act

[34] It may be a matter of no more than passing interest to note that the approach finally chosen by Parliament in the 2004 Act more closely resembled that originally favoured by the committee in the Green Paper (the composite approach) than that recommended in its final report (the discretionary approach). For while the Act does give extensive discretionary powers to a judge to make orders redistributing matrimonial property (section 14), it introduces for the first time the concept of the 'family home', in respect of which the general rule is that, upon the breakup of marriage, each spouse is entitled to an equal share (section 6). The other significant feature of the 2004 Act which did not form part of the committee's recommendations in its final report was the extension of the applicability of the new property rules to unmarried couples in common law relationships of greater than five years duration.

[35] I regret that I cannot avoid to some extent retracing ground already covered by Cooke JA in his judgment, but in order to decide the question posed by this appeal it is necessary to examine the relevant sections of the 2004 Act, and some in detail. I start with section 2, which is the definition section. In section 2(1) the definitions of "family home", "property", and "spouse" are important:

> "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; ...
>
> ...'property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled;...
> ...'spouse' includes—
>
> (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;
>
> (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,
>
> immediately preceding the institution of proceedings under this Act or the termination of cohabitation, as the case may be, or a divorcee."

[36] The concept of the family home and the definition of spouse are entirely new to this area of the law, although an almost identical definition of spouse may also be found in a number of pieces of modern legislation (see, for example, section 2 of the Maintenance Act). It is clear that, as Cooke JA has observed, the recognition of common law relationships "will have fundamental and salutary consequences" in this regard (see para. 5 above). Section 2(2) provides that the terms "single woman and "single man" used with reference to the definition of

spouse include a widow, widower or divorcee. The only significance of this in my view is to make it clear that, for the purposes of the definition of spouse in section 2(1), a widow, widower or divorcee as the case may be, who has cohabited with a single man or woman, or indeed with another widow, widower or divorcee as the case may be, for the requisite period, will also qualify as a spouse.

[37] Section 3 provides for the application of the Act, save in cases of the death of either spouse and as otherwise provided, while section 4 makes clear the intention of the framers of the Act that its provisions "shall have effect in place of the presumptions of the common law and of equity to the extent that they apply to transactions between spouses…".

[38] The special provisions with regard to the family home are to be found in Part II of the Act. Section 6, as I have already noted, makes provision for equal sharing of the family home between spouses, while section 7 provides for the exceptional situations in respect of which the court is given power to vary the equal share rule. Section 8 deals with the situation where the title to the family home is held in the name of one spouse only, permitting the other spouse in these circumstances to take steps to protect his or her interest by lodging a caveat or otherwise, and also requiring that in such a case any transaction concerning the family home must have the consent of both parties. Finally in

this part, section 9 provides an exemption from transfer tax in respect of transfers of property pursuant to the Act between spouses.

[39] The actual division of matrimonial property is dealt with in Part III of the 2004 Act. Section 10 provides for the making of agreements between spouses, before or after their marriage (or their cohabitation, as the case may be) in respect of the ownership and division of their property. Section 11 empowers the court to make orders resolving disputes between spouses as to the title or possession of any property, while section 12 provides for the method of determining the value of any property which is the subject of proceedings under the Act.

[40] In addition to section 6 (the family home), sections 13 and 14, which deal with the subject of division of property, are arguably the most important sections of the Act, which was after all primarily enacted to make provision for the rights of the parties on a breakdown of marriage. Section 13(1) provides that a spouse shall be entitled to apply to the court for a division of property in the following four situations:

(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 mismanagement or by wilful or reckless dissipation of property or earnings.

[41] Section 13(2) provides that an application under section 13(1)(a), (b) or (c) must 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, while section 13(3) provides that, for the purposes of section 13(1)(a) and (b), and section 14 the definition of "spouse" shall include a former spouse.

[42] Section 14(1) lists the orders which the court is empowered to make on an application by a spouse made pursuant to section 13, which are (a) an order for division of the family home in accordance with sections 6 or 7, as the case may require; or (b) subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in section 14(2); or, where the circumstances so warrant, make orders under both (a) and (b).

[43] The all important factors which the court is mandated to take into account on an application by a spouse under section 13(1) are set out in section 14(2), as follows:

"(a) the contribution, financial or otherwise, directly or indirectly made by or on behalf of a spouse

to the acquisition, conservation or improvement of any property, whether or not such property has, since the making of the financial contribution, ceased to be property of the spouses or either of them;

(b) that there is no family home;

(c) the duration of the marriage or the period of cohabitation;

(d) that there is an agreement with respect to the ownership and division of property;

(e) such other fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account."

[44] Section 14(3) defines "contribution" as -

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

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

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

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

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

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

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

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

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

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

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

[45] Section 14(4) then provides that, "for the avoidance of doubt, there shall be no presumption that a monetary contribution is of greater value than a non-monetary contribution."

[46] Section 15 allows for the alteration of property interests in respect of property owned by the spouses jointly or by either spouse in cases where the court considers it just and equitable to do so, while section 16 permits the court to set aside orders made under section 15 in cases of fraud or duress, subject to the rights of a bona fide purchaser without notice. Sections 17, 18 and 19 give protection to creditors and mortgagees of spouses, while sections 20 to 22 deal with attempts by either spouse to sell or otherwise dispose of property, which is the subject of court proceedings, without the consent of the other spouse. Section 23 sets out the various orders which may be made with regard to matrimonial property in any proceedings before the court.

[47] Importantly, section 24 provides for savings in the following terms:

"24. The commencement of this Act shall not affect—

(a) any legal proceeding in respect of property which has been instituted under any enactment before such commencement; or

(b) any remedy in respect of any such legal proceeding to enforce or establish a right, privilege, obligation or liability acquired, accrued or incurred before such commencement, and any such legal proceeding or remedy may be continued or enforced as if this Act had not been brought into operation."

[48] And finally, there is section 25, which provides for amendments to the existing enactments listed in the Appendix, including the MWPA, sections 16 and 17 of which were repealed.

The decisions in the court below

[49] The decisions at first instance to which we were referred are ***Stewart v Stewart*** (Claim No. 2007 HCV 0327, judgment delivered 6 November 2007) and ***Boswell v Boswell*** (Claim No. 2006/HCV 02453, judgment delivered 31 July 2008). In ***Stewart v Stewart***, Sykes J found that the parties had separated at least a year before the 2004 Act came into force and, after considering the relevant sections of the Act, concluded as follows:

"19. The wording of section 13 (2) also puts the matter beyond doubt. It permits an application under the Act when the specified events of section 13 (1) have occurred. If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it came into force.

> Courts do not lightly conclude that a statute has retrospective effect. I conclude that Mr. Wilkin's submission that I have no jurisdiction to hear the matter, for the reasons given, is well founded."

[50] Despite this conclusion, Sykes J nevertheless went on to consider, in the event that he was wrong in his finding that the 2004 Act had no retrospective effect, the question whether the property in respect of which the wife's claim was brought came within the definition of the "family home" in the Act. His conclusion on this question was that it did not, as a result of which the wife's claim accordingly failed in its entirety.

[51] In ***Boswell v Boswell***, the parties' marriage was dissolved on 3 June 2005, that is, 10 months before the 2004 Act came into force. The wife claimed an interest in a number of properties (including one claimed as the family home) and motor vehicles, among other things. Norma McIntosh J excluded from her consideration the claim to a 50% share in the family home, on the ground that since "there is no retroactive provision [in the 2004 Act], the Claimant's claim for a share of property under the Act can therefore relate only to property other than the family home" (page 4 of the judgment). However, the learned judge then went on to consider whether the wife's claim to a 50 % share in all the assets, including the property said to have been the family home, had been made out, taking into account the factors stated in section 14, and concluded that she was entitled to a 50% share in that property and another.

[52] I must confess that I did not initially find Norma McIntosh J's reasoning in this case easy to follow, since it appeared to me that it was not possible to, in effect, sub-divide the provisions of the Act for the purposes of retrospectivity, in the absence of any clear sanction in the language used by Parliament justifying such a course (for an example of this, see section 9, dealing with the exemption from transfer tax on a transfer by one spouse to another pursuant to the Act, in respect of which it would be difficult to argue for anything other than prospective effect). However, on further consideration, it now appears to me that the learned judge's reasoning was in fact based on a literal reading of the wording of section 6. That is to say that, since the section refers to each spouse being entitled to a 50% share in the family home "on the grant of a decree of dissolution of a marriage...", and the claimant's marriage having been dissolved before the Act came into force, it was no longer possible to give effect to a provision which only applied "on the grant of a decree...", etc., and the section could therefore no longer be applied to effect a division of property in respect of the family home.

[53] But be that as it may, Marsh J in the instant case applied Sykes J's judgment in ***Stewart v Stewart*** (which was not mentioned by Norma McIntosh J in her judgment in ***Boswell v Boswell***) and concluded that since the 2004 Act did not have retroactive effect, the court's powers under it could only relate to matters arising after 1 April 2006.

Some relevant English authorities

[54] I have already made reference to the fact that, more than 30 years before the enactment of the 2004 Act, the Matrimonial Proceedings and Property Act 1970, and subsequently the Matrimonial Causes Act 1973, were enacted in England to give the court power to adjust property rights as it found to be just and necessary (see para. [23] above). That legislation brought into being a new dispensation which was also beset in its early stages by the identical problem to that posed by the instant case and several of the authorities very helpfully cited to us by counsel describe the English judicial response to the problem. It may therefore be helpful to consider some of those authorities and some other authorities of more general application on the subject of retrospectivity of legislation.

[55] The earliest of them was ***Williams v Williams*** [1971] 2 All ER 764, a case in which the parties were of Jamaican origin, in which the question of whether and to what extent the provisions of the (then) new Matrimonial Proceedings and Property Act 1970 ("the 1970 Act") operated retrospectively was squarely raised. The matter was heard by Lord Simon P, then the President of the Probate, Divorce and Admiralty division, who confessed at the very outset that he had found the point "extremely difficult of determination" (page 765).

[56] In that case, the parties' marriage had been dissolved by a decree made absolute on 10 July 1970, that is, a little less than six months before the 1970

Act came into force on 1 January 1971. The learned judge stated the traditional rule against the retrospective construction of statutes, pointing out that the rule "is a presumption only; and it may be overcome either by express words in the statute showing that the provision is intended to be retrospective, or 'by necessary and distinct implication' demonstrating such an intention" (pages 770-71). Lord Simon found that there were no words expressly making the relevant sections of the Act retrospective, but that, on a reading of the Act as a whole, there were what he described as "a number of small indicia" which led him to the conclusion that it was intended to be retrospective (page 772). The court was particularly impressed by the consideration that, no application for ancillary relief having been made under the old legislation, none was now possible after the coming into force of the 1970 Act, which had repealed the old legislation. In these circumstances, unless it was intended to operate retrospectively, neither could such an application be made under the 1970 Act, thus creating a lacuna which the court felt unable to believe could have been intended by the draftsman. In the result, it was held that the implication of retrospection, while not 'distinct', was nevertheless necessary "to give reasonable efficacy to the [1970] Act" (page 772).

[57] The judgment in ***Powys v Powys*** [1971] 3 All ER 116 was delivered just three weeks later. In that case the parties' marriage had ended in divorce as long ago as 1961. However, throughout the 1960s, there were various proceedings in court between them, having to do with applications by the wife

for maintenance by way of periodical payments and/or by the payment of a lump sum and/or the making of a secured provision order. The 1970 Act empowered the court for the first time, on the grant of a decree, or at any time thereafter to order either party to transfer property to the other party and one of the questions which arose for decision in the case was whether the court had power to apply the 1970 Act to a fresh application made by the wife in 1971 for a transfer of property to her. In other words, was the relevant section of the 1970 Act retrospective in the sense of giving power to the court to make a transfer of property order in a case, such as this one was, in which the decree was granted before 1 January 1971.

[58] Brandon J (as he then was) stated the applicable principle of statutory construction to be as follows (at page 124):

> "Despite this, Sir Jocelyn Simon P in H v H[6] felt obliged to construe s 5 (1) as not applying to the latter class of case, on the ground that the subsection contained no express words making it plain that it was intended to be retrospective and that the presumption against retrospective effect ought, therefore, to prevail. With great respect to Sir Jocelyn Simon P, I would adopt a different approach. 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. Applying those principles to s 5 (1) of the 1963 Act, I am of opinion that the words used, in their ordinary and natural meaning, cover cases where a decree was pronounced before, as well as

> after, the coming into force of the Act; and, being of that opinion, I would give effect to that meaning even if it makes the Act retrospective."

[59] Applying that principle to the case before him, that learned judge was clearly of the view that, on the natural and ordinary meaning of the words of the particular section of the 1970 Act ("On granting of a decree of divorce...or at any time thereafter...the court may... make...(a) an order that a party to the marriage shall transfer to the other party...such property as may be so specified...") they applied not only to cases in which the decree was granted after the date of coming into force of the 1970 Act, but also to cases in which the decree was made before that date. In so doing, Brandon J expressed himself to be in complete agreement with the decision of Lord Simon P in ***Williams v Williams*** and said this (at page 126):

> "Having read the judgment of Lord Simon P in that case, I should like to express respectfully my complete agreement with his conclusion. The 1970 Act was a reforming Act of wide scope. It gave the court new and enlarged powers in relation to both financial provision and property adjustment after judicial separation, divorce and annulment, and also financial provision in cases of willful neglect to maintain during a subsisting marriage. Many of these new and enlarged powers were given for the benefit of children of the family (the definition of which was itself enlarged), either directly, or indirectly by enabling better provision to be ordered for parents having the custody or the care and control of them. In my view, it would frustrate the reforming purpose of Parliament to hold that these new and enlarged powers in respect of financial provision and property adjustment after judicial separation, divorce and annulment could only be exercised in cases where a

> decree is granted on or after 1st January1971. I am, however, satisfied both on the ordinary and natural meaning of the relevant provisions of the Act (in which I include particularly ss 1, 2, 3, 4,6, 24, 28 and Sch 1), and from the detailed analysis of those provisions made by Lord Simon P in the judgment to which I have referred, that it would be wrong, as a matter of construction, to restrict the effect of the Act in that way".

[60] In ***Chaterjee v Chaterjee*** (supra), the issue before the court was again whether the 1970 Act should be given retroactive effect. The Court of Appeal was unanimously of the view that the 1970 Act was intended by Parliament to have that effect and ***Williams v Williams*** and ***Powys v Powys*** were both expressly approved. Ormrod LJ pointed out that the Act was "an integral part of the fundamental revision of our divorce law which was begun by the Divorce Reform Act 1969 and completed by the 1970 Act" (page 722). He was impressed, as Lord Simon had been in ***Williams v Williams***, by the consideration that if the 1970 Act was not retroactive in its effect the court would be unable to deal with many cases arising under the old law, the provisions of which had been repealed (page 723). Sir John Pennycuick agreed, observing that "when one reads the provision [of the 1970 Act] in the context of its statutory and judicial background I find the conclusion inescapable that it is retroactive" (pages 725-26). Stamp LJ also agreed, albeit with somewhat greater diffidence (page 726).

[61] ***Carson v Carson & Stoyek*** [1964] 1 WLR 511, was also cited to us. It was also a matrimonial case, though not having to do with property, but with whether certain sections of the Matrimonial Causes Act 1963 relating to the plea of condonation as a bar to divorce were intended to have retrospective effect. The actual sections, as well as the relevant extract from the judgment of Scarman J (as he then was), are set out at para. [10] of Cooke JA's judgment. I shall return to Scarman J's judgment in due course.

[62] In ***Chebaro v Chebaro*** [1987] 1 All ER 999, which was a case concerned with whether the Matrimonial and Family Proceedings Act 1984 should be given retroactive effect, the court was referred to ***Yew Bon Tew v Kenderaan Bas Mara*** [1982] 3 All ER 833, a decision of the Privy Council. That was a case in which Lord Brightman had stated that "there is at common law a prima facie rule of construction that a statute should not be interpreted retrospectively so as to impair an existing right or obligation unless that result is unavoidable on the language used" (page 836). In his judgment in ***Chebaro v Chebaro,*** Neill LJ, after referring to the general rule of the common law against the retrospectivity of statutes without the sanction of express words, observed that a comparison of the dictum of Brandon J in ***Powys v Powys*** with the later statement of Lord Brightman in ***Yew Bon Tew*** suggested "that the way in which this general rule is to be applied can be approached from different standpoints" (page 1003). However, he did not think it either necessary or desirable "to try to determine in this case the precise stage at which the presumption against retrospection is to

be introduced into the process of interpretation" (page 1004) and in the result ***Williams v Williams***, ***Powys v Powys*** and ***Chaterjee v Chaterjee*** were all followed.

[63] However, it should be noted that we were also referred by counsel to ***Lewis v Lewis*** [1984] 3 WLR 45, which was a case in which all three cases were later distinguished by the Court of Appeal. In that case, Anthony Lincoln J expressed the view that the common feature in those cases "was the need to make the statutes workable and the reforms effective at this period of their introduction" (page 89). But in the case actually before the court, Anthony Lincoln J, with whom Sir John Arnold P agreed, considered that that was no longer a decisive factor and applied what he described as "the principle enunciated in ***Yew Bon Tew***..." without qualification (page 91).

[64] I should also refer to three more recent cases of more general application, which may also have a bearing on the problem at hand in the instant case. The first is the decision of the House of Lords in ***L'Office Cherifien des Phosphates v Yamashita Shinnihon Steamship Co Ltd, The Boucraa*** [1994] 1 All ER 20. In that case, Lord Mustill, who delivered the leading speech, said this (at page 29):

> "My Lords, it would be impossible now to doubt that the court is required to approach questions of statutory interpretation with a disposition, and in some cases a very strong disposition, to assume that a statute is not intended to have retrospective effect. Nor indeed would I wish to cast any doubt on the

> validity of this approach for it ensures that the courts are constantly on the alert for the kind of unfairness which is found in, for example, the characterisation as criminal of past conduct which was lawful when it took place, or in alterations to the antecedent natural, civil or familial status of individuals. Nevertheless, I must own to reservations about the reliability of generalised presumptions and maxims when engaged in the task of finding out what Parliament intended by a particular form of words, for they too readily confine the court to a perspective which treats all statutes, and all situations to which they apply, as if they were the same. This is misleading, for the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule. True it is that to change the legal character of a person's acts or omissions after an event will very often be unfair; and since it is rightly taken for granted that Parliament will rarely wish to act in a way which seems unfair it is sensible to look very hard at a statute which appears to have this effect, to make sure that this is what Parliament really intended. This is, however, no more than common sense, the application of which may be impeded rather than helped by recourse to formulae which do not adapt themselves to individual circumstances, and which tend themselves to become the subject of minute analysis, whereas what ought to be analysed is the statute itself."

[65] Lord Mustill then went on to refer with approval to the following dictum of Staughton LJ in ***Secretary of State for Social Security v Tunnicliffe*** [1991] 2 All ER 712, 724 (a decision of the Court of Appeal in which Lord Mustill himself, then Mustill LJ, had presided):

> "In my judgment 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."

[66] Basing himself on this dictum, Lord Mustill then suggested that, in the quest to ascertain what Parliament intended to achieve by a particular statute or provision, "a single indivisible question, to be answered largely as a matter of impression" of fairness should be applied to all provisions (page 30):

> "Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute affects, or the extent to which that value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, and the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity is so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."

[67] In the subsequent case of ***Wilson v First County Trust Ltd*** [2003] 4 All ER 97 at [201], Lord Rodger expressed the view that, on Lord Mustill's approach, an appropriate test might be formulated along the following lines: "Would the consequences of applying the statutory provision retroactively, or so

as to affect vested rights or pending proceedings, be 'so unfair' that Parliament could not have intended it to be applied in these ways?" (See also Lord Hope's judgment at [98], in which he observed that the presumption that legislation is not intended to operate retrospectively "is based on concepts of fairness and legal certainty".)

[68] And, most recently, in ***Odelola v Secretary of State***, the House of Lords also applied ***The Boucraa.*** Lord Brown, who delivered the leading judgment, after posing Lord Mustill's single indivisible question, concluded that changes in the immigration rules, with the applicability of which the case was concerned, were intended to take effect as of their date with regard to all applications for leave to remain in the United Kingdom, "those pending no less than those yet to be made" (at [39]).

[69] Based on this brief survey of the authorities, it appears to me that the proper approach to the question posed by this appeal is to be found in the following principles:

(i) The determination of the question of whether an Act of Parliament was intended by the legislature to have retrospective effect is primarily one of construction of the language of the particular statute, having regard to the relevant background (which includes the particular mischief which it was sought by Parliament to correct).

(ii) In construing an Act, the first and most important consideration is the natural and ordinary meaning of the words used by the legislature. If there is an indication in the Act in clear and unmistakable terms that it was intended to have retrospective effect or operation, then it is the duty of the court to give effect to the plain meaning of the Act accordingly.

(iii) Even where the language of the Act does not reveal in clear and express terms what Parliament intended, an implication of retrospection may nevertheless be derived from a reading of the Act as a whole (such as, for example, where it is necessary to give reasonable efficacy to the Act).

(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) This 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

How is the 2004 Act to be interpreted?

[70] And so I come, at last, to the question raised by this appeal. In ***Williams v Williams***, Lord Simon P, after concluding that there were "a number of small indicia" that had led him to the conclusion that the statute in question in that case had been intended by Parliament to have retrospective effect, had suggested that "it is desirable that wherever possible a statute should indicate in express and unmistakable terms whether (and, if so, how far) or not it is intended to be retrospective" (page 772). While no one could possibly gainsay the good sense of this suggestion, coming from one of the pre-eminent judges of his generation, it certainly does not appear to have commended itself to the drafters of the 2004 Act. There is therefore, so far as I have been able to discern, no express statement in the Act that it was intended to have retrospective operation. So the question is whether such an intention can be derived by way of implication from the actual language used by the legislature.

[71] I approach this question against the extended background to the 2004 Act which I have attempted to describe in paras. [18] – [33] above. That exercise demonstrates that as long ago as 1975, it was thought by the committee set up by government to study the subject that the law as it then existed was "unsatisfactory, creates injustice between the parties and is out of

touch with social realities" (see Green Paper, para. 50 and para. [25] above). The committee was clearly of the view that the separate property system of ownership of matrimonial property as between husband and wife introduced by the MWPA, even as modified by the intervention of equity and judicial resort to the concept of the trust, had failed to provide "an adequate and fair solution to the property disputes of spouses" in the modern context (working paper, page 5).

[72] In introducing the concept of the family home and the wide discretionary powers given to the court by section 14 of the Act, the two principal new features of the Act, it seems to me that the legislature in enacting it set out to remedy some of the perceived ills of the past and to usher in an entirely new dispensation in the adjudication of disputes between spouses in respect of matrimonial property. The 2004 Act was, therefore, just as Brandon J had observed of the 1970 English Act in ***Powys v Powys*** (at page 126), "a reforming Act of wide scope…giving new and enlarged powers" to the court.

[73] Taking all of this into account, and reading the 2004 Act as a whole, I am clearly of the view that there are a number of indicia, some larger than others, that compel the conclusion that it was intended to have retrospective effect.

[74] To begin with, there is section 2(1) and the expanded definition of a spouse to include persons in common law relationships of the specified duration. While, as I have already observed, the definition in the 2004 Act is also to be

found in other legislation, it is without a doubt a significant advance and a break from the past in this area, which will no doubt result in, as Cooke JA has observed (at para. [5] above), "fundamental and salutary consequences" for persons in such relationships. It seems to me that this provision must have been intended to operate retrospectively, in the sense that as of the date when the Act came into force all persons who satisfied the new statutory criteria would become immediately entitled to take the benefit of the new provisions, notwithstanding the fact that the requisite five year period had already elapsed from before the Act came into force. It would also follow from this that persons who had not yet completed the five year period as of that date would be able to count the time already elapsed in calculating the end of the period. To read this provision prospectively, it seems to me, would mean that persons in a common law relationship would be obliged to wait out the five year qualification period, reckoned as of the date the Act came into force, before being able to bring proceedings under the new provisions. This is a result that I consider to be as startling as it would be unjust.

[75] Section 3 of the Act, again as Cooke JA has pointed out (at paras. [7] and [8] above), is in fact one of the only two sections of the Act that makes an explicit statement as regards its scope. Even then, it does so only in a negative sense by stating that its provisions do not apply after the death of either spouse and that in that circumstance it is the old rules of "law or of equity" that will apply. The other section is section 24 (see para. [47] above), which provides

that the 2004 Act does not affect legal proceedings instituted before it came into force and that such proceedings and any remedy sought would continue or be enforced under the old regime. These explicit exclusions from the scope of the 2004 Act, it seems to me, give rise to the clear implication that, save in those respects, it was the intention of the legislature that it should apply to every other situation from its effective date.

[76] The statement in section 4 that the provisions of the Act "shall have effect in place of the rules and presumptions of the common law and of equity" is further evidence in my view of the intention of the legislature that the 2004 Act should, as of the date it came into force, have effect in respect of all disputes as to matrimonial property, irrespective of the date of separation or divorce of the parties, as the case may be. That provision is in fact, as Scarman J put it in a not dissimilar context in ***Carson v Carson & Stoyek*** (at page 518), a direction to the court as to the proper approach to problems of matrimonial property "as and when these problems arise after the passing of the Act". I have been unable to discover anything in the language of the 2004 Act that can be construed as restrictive of the applicability of the concept of the family home, for instance, which is arguably the cornerstone of the ameliorative architecture of the new regime, to cases in which the parties' divorce or separation occurred after the effective date of the Act. Indeed it seems to me that to so limit the operation of the Act is in fact contrary to the plain language of section 4, which mandates the

substitution of its provisions in place of the old rules and presumptions which were equally central to the old regime.

[77] Much time was consumed during the hearing of the appeal with the effect of sections 13 and 14 of the 2004 Act. The first question (although I agree with Cooke JA's characterisation of it as "a subsidiary issue" – see para. [14] above) is whether the fact that the permission of a judge had been sought and obtained for the appellant to present her application under the Act out of time, as provided for by section 13(2), precluded any further consideration of the jurisdictional issue with which this appeal is concerned. I am fully in agreement with Cooke JA's conclusion that, based on the material that was before her, the judge who heard and granted that application (Cole-Smith J) was not invited to make and made no ruling on the issue of jurisdiction. On an application under section 13(2), it seems to me, all that the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as the merits of the case (on a purely prima facie basis), delay and prejudice, and also taking into account the overriding objective of the Civil Procedure Rules of "enabling the court to deal with matters justly" (rule 1.1(1)).

[78] Much time was also devoted in argument to the true meaning and effect of section 13(3). That subsection provides that for the purposes of section

13(1)(a) and (b) (that is, the subsection entitling a spouse to apply for a division of property on the grant of a decree of dissolution of a marriage or termination of cohabitation or on the grant of a decree of nullity of marriage) and section 14, "the definition of 'spouse' shall include a former spouse".

[79] This subsection makes it clear, it seems to me, that a former spouse, that is, someone who was, but is no longer, a spouse (by virtue of the dissolution of the marriage in any manner, or cessation of cohabitation after the expiry of the period specified in section 2(1)), has the same entitlement as a spouse to make an application for division of property pursuant to the said provisions. This provision is yet another manifestation of the breadth of the reform agenda of the legislature, it having been decided as long ago as 1979, in ***Mowatt v Mowatt*** (1979) 16 JLR 362, that the court had no jurisdiction under the MWPA to entertain an application brought by a former spouse after the marriage had been dissolved by the grant of a decree absolute. In the course of a typically erudite judgment, Carberry JA pointed out that the summary procedure under the MWPA, which was purely procedural, was "only available to determine questions arising between persons who [were] husband and wife *at the time that the application is made*" (page 363, emphasis in the original). Carberry JA also went on to point out further that in England the 1970 Act, to which reference has already been made (see para. [49] above), had rectified this situation by providing (in section 39) that such proceedings could be brought by either party, notwithstanding that their marriage had been dissolved or annulled, so long as

the application was brought within three years of the dissolution or annulment. Section 13(3) is therefore, in my view, our legislative response (albeit 35 years later) to the mischief identified by this court in ***Mowatt v Mowatt.***

[80] As I have already suggested, after sections 6 and 7, section 14 is the other most far-reaching provision of the 2004 Act. Section 14(1) empowers the court on an application by a spouse to make an order for the division of the family home in accordance with sections 6 or 7, or (subject only to the provisions made in section 17 for the protection of creditors) to divide other matrimonial property in accordance with the factors specified in section 14(2), or, if the circumstances so warrant, order both the division of the family home under sections 6 or 7 and the division of other matrimonial property in accordance with those factors.

[81] Some of the specified factors are fairly readily identifiable to persons familiar with the rules of the common law and equity which previously prevailed in this area (such as the making by a spouse of direct or indirect contributions to the acquisition or improvement of the property – section 14(2)(a)), but some are entirely new (such as the definition of 'contribution' to include, for instance, "the effect of any proposed order upon the earning capacity of either spouse" – section 14(3)(i)). Also completely new, and emphasising the essentially discretionary nature of the extensive powers of redistribution of property other than the family home given by section 14(1), is section 14(2)(e), which enables

the court to take into account, in addition to the specified factors, "such other fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account".

[82] As with the earlier sections of the 2004 Act which I have already discussed, it appears to me that what the legislature was seeking to do in sections 13 and 14 was to give directions to the court as to how disputes as to matrimonial property are to be resolved as of the effective date of the Act, under what is in significant respects an entirely new dispensation. Hence the opening words of section 13, for instance, are completely unrestricted in scope ("A spouse shall be entitled to apply to the Court for a division of property..."), as are the opening words of section 14 ("Where under section 13 a spouse applies to the Court for a division of property the Court may...").

[83] In the instant case, it appears to me that the appellant, whose marriage was dissolved on 13 May 2005 and whose claim form was filed on 17 January 2007, was plainly entitled by virtue of section 13(3), as a former spouse, to make an application under the 2004 Act. But if Marsh J's ruling that the 2004 Act cannot operate retrospectively is correct, section 13(3) will have given the appellant a purely theoretical entitlement, entirely void of content or meaning. Not only would she be without recourse under the MWPA (which, as ***Mowatt v Mowatt*** confirmed, would have been the position even before the repeal of sections 16 and 17, her marriage already having been dissolved), but she would

also be without a remedy under the 2004 Act. Her only remedy would then (presumably) lie by way of ordinary action (assuming in her favour no limitation problems), applying the very rules which the committee had condemned some 35 years ago as unsatisfactory, unjust and "out of touch with social realities" (see para. [68] above]). Again, I would regard such a result as not only anomalous and unfair, but also completely at variance with the emphatically articulated objectives of the 2004 Act in the Memorandum of Objects and Reasons appended to the Bill, already referred to at para. [32] above . In addition, such a result would reveal a distinctly unhappy lacuna quite similar, if not identical, to that which Lord Simon considered to be decisive in ***Williams v Williams*** (see para. [55] above).

[84] It follows from these additional considerations that although I have been considering the matter primarily on the basis of the various indicia in the 2004 Act itself which, in my view, compel the conclusion that it was indeed intended to have retrospective effect, it also appears to me that an approach to the matter on the more modern basis of Lord Mustill's 'single indivisible question, to be answered largely as a matter of impression' (see paras. [65-79] above), must inevitably produce the identical result. In other words, the question whether the consequences of applying the relevant provisions of the 2004 Act retrospectively would be so unfair, that Parliament could not have intended it to be applied in that manner, must in my view attract a negative answer. Indeed, for all the reasons that I have attempted to articulate and for those also identified by

Cooke JA in his judgment, it seems to me that all the unfairness is entirely the other way.

Conclusion

[85] It follows from all of the foregoing that I consider ***Stewart v Stewart*** (see paras. [49-50] above) to have been wrongly decided, in so far as Sykes J concluded that the 2004 Act could not be given retrospective effect. However, the learned judge did go on to consider the matter on its merits on the alternative footing, that is, that the 2004 Act did apply, and found in the result that on the evidence presented by the claimant the property in respect of which the claim was brought was not the family home.

[86] As to ***Boswell v Boswell*** (see paras. [51-56] above), I think that, in her conclusion that the equal share rule in section 6 of the 2004 Act could not apply because of the fact that the parties' marriage had already been dissolved by the time it came into force, Norma McIntosh J also fell into error (section 13(3) in so many words permits a former spouse to apply for a division of property and section 14 makes it equally clear that on all such applications the equal share rule in section 6 is to be applied). However, the learned judge also went on to consider the claimant's claim to a share in all the relevant properties, including that alleged to have been the family home, and concluded that, on the evidence, equality of division was indicated in respect of that property. So in the result,

the same conclusion was reached, albeit by a different route from that laid down in section 6.

[87] So at the end of the day, substantial justice was done to all concerned in both ***Stewart v Stewart*** and ***Boswell v Boswell.*** However, it appears to me that the position is entirely different in the instant case, Marsh J having decided on a preliminary point that the court had no jurisdiction to hear the matter at all. I think that he was wrong in this conclusion and that the appeal must accordingly be allowed, with the consequences stated in the order which was announced on 5 February 2010.

[88] Finally, I must indicate that, although I have not made specific reference in this judgment to the very able submissions made by both Mr Steer and Miss McGregor, it must nevertheless be clear to them that I have derived much assistance from their extremely thoughtful and responsible submissions. I am accordingly happy to acknowledge a considerable debt of gratitude to both counsel.

PHILLIPS, J.A.

[89] I have had the advantage of reading in draft the judgments of Cooke and Morrison JJA and find myself in agreement with their conclusions. However, as the Property (Rights of Spouses) Act, 2004, (the Act) has such wide application and far-reaching consequences and has brought about such a significant change

to the old regime in the division of property shared by the parties, and as we are differing from two judgments given by experienced and knowledgeable judges in the court below, I decided to add a few words of my own.

[90] I must say that I am compelled to commend my learned brother Morrison, JA for his thorough and detailed tracing of the tortuous history and route to the promulgation of this particular piece of legislation, set out so painstakingly with his usual cogent and clear analysis. I need therefore say nothing more on that. I also accept the history of this particular matter through the courts as chronicled by my learned brother Cooke, JA and adopt the same herein.

[91] This matter comes before this court on appeal from a preliminary objection upheld by Marsh, J. The objection was taken by the respondent at the first hearing of the fixed date claim form filed by the appellant who was attempting to obtain a 50% share in the family home situated at Barrett Piece, Mandeville, under the provisions of the Act. The application was being made in circumstances where the parties were divorced on 13 May 2005, fourteen months after the promulgation of the Act on 10 March 2004, but eleven months before the Act came into operation on 1 April, 2006.

[92] As the initial fixed date claim form (2007 HCV 00297) was originally filed on 17January 2007, in order to obtain any benefit under the Act, an application had to be filed for the court to extend the time for the hearing of the same, pursuant to section 13(2) of the Act which states:

> "(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."

[93] This was done on 25 January 2007, and the order made by M. McIntosh, J on 28 June 2007 was relied on by the appellant on appeal, initially to say that the order having been made, the learned trial judge was bound to hear the substantive matter and could not interfere with an order made by a judge of coordinate jurisdiction (in keeping with the principle laid down in **Leyman Strachan v The Gleaner Co. Ltd & Others,** Motion 12/99 delivered 6 December 1999). It was challenged by the respondent who submitted that pursuant to section 6 of the Judicature (Supreme Court) Act, all judges of the Supreme Court have equal power, respect and authority, and as a consequence, no single judge of the court had the power to bind another. The decision of one judge could perhaps be only highly persuasive precedent for other judges at the same level. In any event, the respondent further submitted, Marsh, J was always competent to decide whether he had the jurisdiction to hear the application.

[94] This issue was dealt with in grounds of appeal (a) and (b) and I find that when the application was made for extension of time, the only information before the court, as can be seen by the affidavits, was, on behalf of the claimant, the fact that the decree absolute had been granted in May 2005, and that the time had passed to apply for any remedies under the Act. On behalf of the

respondent, in reply, the only information was that there had been substantial delay and or neglect by the claimant, and if leave were granted the defendant would suffer prejudice. Neither party had addressed the applicability of the Act, and as a consequence, the order made by McIntosh, J did not address that issue at all. It therefore remained a matter which could be dealt with by the trial judge, and of course, the issue of whether a judge has jurisdiction to hear a matter is one of law, and can be raised at any time. Marsh, J was correct to hear submissions and to rule on the preliminary point.

[95] The remaining grounds of appeal challenged the judgment of Marsh, J that he did not have jurisdiction to hear the matter, as the power to extend time granted in the Act in section 13(2) related to situations after 1 April 2006, when the statute came into operation. Marsh, J indicated in his oral judgment that he agreed with the statements made by Sykes, J in **Stewart v Stewart** (2007 HCV 0327 judgment delivered on 6 November 2007) in paragraph 20 of the judgment, when he stated:

> "20. I do not think I have the power to enlarge time to accommodate a claim under a statute to give the court jurisdiction over a state of affairs that would have given rise to a claim under the Act had the Act been in force at the time of the occurrence of the specified acts but which, unfortunately for Mrs. Shirley Stewart, was not in force at the material time. However, if I am wrong I will consider whether 22 West Strathmore Drive was the family home."

[96] In paragraph 19 of the same judgment, this is what the learned judge said which led him to that conclusion:

> "19. The wording of section 13 (2) also puts the matter beyond doubt. It permits an application under the Act when the specified events of section 13 (1) have occurred. If the events occurred before the Act became law then logically it cannot apply to events that occurred before the Act became law. Before the Act came into force it was not the law. Thus the law can only speak from the time it came into force. Courts do not lightly conclude that a statute has retrospective effect. I conclude that Mr. Wilkin's submission that I have no jurisdiction to hear the matter, for the reasons given, is well founded.

[97] In **Boswell v Boswell**, (2006 HCV 2453 – judgment delivered on 31 July 2009) the learned trial judge found that the claimant, whose decree absolute had been granted on 3 June 2005, and whose application under section13 (2) of the Act had been filed on 11 July 2006, which therefore fell outside the twelve month period provided for in the statute, could apply as a former spouse, by virtue of section 13(3) of the Act, as set out below. Section 13(3) of the Act reads as follows:

> "(3) For the purposes of subsection (1) (a) and (b) of this section and section 14 the definition of "spouse" shall include a former spouse."

The learned judge however found that the claimant could not obtain any share in the family home, as by virtue of section 6 of the Act, the entitlement to that share was "on the grant of a decree of dissolution of marriage," and since the

decree had been granted before the Act came into operation, and there was no retroactive provision, then the claimant's claim could only relate to property other than the family home.

[98] The learned judge found that section 6 of the Act and section 7, (which relates to the power of the court to vary the 'equal share rule' for division of the family home") were therefore inapplicable.

I respectfully disagree with both of the conclusions arrived at in these judgments and will set out briefly below why, in my view, the learned judges erred.

[99] The focus by both counsel on appeal was on the issue as to whether the provisions of the Act have retrospective effect. I am guided by the speech of Sir Thomas Bingham MR in the Court of Appeal who referred to an excerpt from Maxwell on Interpretation of Statutes, 12th edition, (1969) page 215, which was quoted by Lord Mustill in the oft- cited judgment of the House of Lords in **L'Office Cherifien des Phosphates v Yamashita -Shinnihon Steamship Limited** [1994] 2 WLR 39, the locus classicus on this area of the law, which reads as follows:

> "Upon the presumption that the legislature does not intend what is unjust rests the leaning against giving certain statutes a retrospective operation. They are construed as operating only in cases or on facts which come into existence after the statutes were passed unless a retrospective effect is clearly intended. It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of

> the Act, or arises by necessary and distinct implication."

In my view, on a true and proper construction of the Act, as well as by necessary and distinct implication, as I shall show, the Act, does and must have retrospective operation.

[100] The learned author has also stated that the rule against retrospective operation is a presumption only, and as such, it "may be overcome, not only by express words in the Act, but also by circumstances sufficiently strong to displace it". In fact, in the words of Lord Mustill in the **L'Office** case:

> "the basis of the rule is no more than simple fairness, which ought to be the basis of every legal rule...."

and I find, that "simple fairness", and matters hereinafter set out, would dictate retrospective application of the subject provisions of the Act.

[101] I accept that in interpreting this statute it is a question of construction and one must look at the relevant background, and the mischief that the statute was promulgated to address which, as indicated previously, has been set out by Morrison, J.A with such clarity in his judgment. It is against that background that I deal with the true and proper construction to be given to the provisions of the Act, viewed as a whole.

[102] In the appeal there were many authorities cited to us and I intend to refer to only a few and briefly, to the extent I think necessary to dispose of the issue

in this appeal. Firstly, in the case of **Chaterjee v Charterjee** [1976]1All ER 719, the question of whether certain provisions were retrospective in effect arose, with particular reference to sections 2 and 4 of the Matrimonial Causes Act 1970, in England. Was the court empowered to make orders for the payment of a lump sum or the transfer of property, "on granting a decree of divorce..... or at any time thereafter?" If permitted, this would empower the court to make an order in cases where the decree had been granted before the commencement of the 1970 Act and at a time before the court had power to make such orders. The Court of Appeal found that the court did have such power and that the provisions were retrospective in effect.

[103] What was interesting in the discussion in that case, was the phrase, "on any decree...." which phrase was stated in the speech of Omrod, LJ , to have been the source of a considerable body of case law, and which he stated, could not be construed in its narrow sense of "at the time of making the decree", but had to be construed as meaning a reasonable time thereafter. This, he said, was due to the practical reason that ancillary matters were dealt with after the decree was pronounced, What was "a reasonable time" had been interpreted as a period of up to ten years. In England the words "or any time thereafter," were later added to the statute.

[104] However, in the Act, although the phrase, "on the grant of a decree" is to be found in section 6 of the Act, since there is a later provision in the Act,

(section 13) which permits applications for extension of time, (if the application is not made within 12 months of the date of the decree), in order to obtain remedies under the Act, (inclusive of declarations in relation to the family home, (section 6)) then even without the added words, "or any time thereafter," to the phrase, "on the grant of a decree", in my view, it would not be possible to construe the Act in such a way that the remedies would only relate to decrees pronounced after the coming into effect of the Act. The provisions would clearly embrace decrees which had been granted to spouses before the Act, and thus, as in the **Charterjee** case, similarly empower the court to make orders relating to matters before the Act, when at that time, it would not have had those powers.

[105] Additionally, since section 13 of the Act also refers to the same words, "on the grant of a decree," but in respect of relief refers to any spouse, (including a former spouse), I agree with the statement of Omrod, L.J. that, "It is difficult to think of wider language, or of a situation which calls more clearly for the use of limiting words, if limitation was intended". For example, a more specific and clear intention would have been the use of the words, "after commencement of the Act," which words are noticeably absent from the provisions relative to this appeal. I also further agree with the dictum of Omrod, LJ , relative to the Act, that even if it involves the risk that some people may be exposed to retrospective interference with their rights and obligations, it is difficult to come

to "any other conclusion than that the provisions are fully retrospective in their effect".

[106] In the case of **Chebaro v Chebaro** [1987] 1 All ER 999 the Court of Appeal reiterated the law on this area, that:

> "There is a long – established principle of statutory construction that a statute shall not be interpreted retrospectively so as to impair an existing right or obligation. A statute is retrospective if, inter alia it attaches a new disability in regard to events already past."

Balcombe, LJ in that case endorsed the statement made in **Lewis v Lewis** [1984] 2 All ER, 497, that, "the principle is of general application, and there are no special rules applicable to the construction of matrimonial statutes." The learned judge also referred to the Privy Council case of **Yew Bon Tew v Kenderaan Bas Mara** [1982] 3 All ER 833, where, their Lordships' Board had stated, "that the principle applies unless the result is unavoidable on the language used." Nevertheless, Balcombe, LJ indicated that he preferred the approach adopted by Brandon, J in **Powys v Powys** [1971] 3 All ER 116 at 124:

> "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."

So, in keeping with this approach of Balcombe, LJ, the real question in this appeal with respect to the interpretation of the provisions of the Act is, "Are the words plain and unequivocal?"

[107] As I understand the arguments of the respondent on appeal, if the Act were to be interpreted to permit persons who had obtained decrees absolute before the coming into operation of the Act to apply for remedies thereunder, that would be "reaching back," with the effect of adversely affecting parties' vested rights. It was submitted that persons who had been divorced and were the sole registered legal owners of property, (as is the respondent in the instant case) and against whom no application had been taken out claiming a beneficial interest in the said property, prior to 1 April 2006, would now be faced with a presumption of beneficial ownership in the said property by the former wife or husband, which would have to be rebutted. The burden would have been shifted to the respondent, and based on the criteria in the Act, the nature of the evidence required to establish an interest in the property was much less demanding than existed before.

[108] I am of the opinion, however that based on the principles derived from **Chebaro** endorsing the dicta in the Privy Council case of **Yew Bon Tew** the plain, simple and ordinary language of the Act dictates, as stated previously, that the intention of the legislature was that a "former spouse" is entitled to make an application under sections13 and 14 of the Act, which would, on a reading of the

said provisions also include obtaining relief in respect of the "family home". The submission of the respondent, that the words "former spouse" should be interpreted to mean, "someone who became a former spouse after the coming into operation of the Act, on 1 April 2006" flies in the face of the dicta in the cases referred to above, as the words "spouse, shall include a former spouse," are plain and unequivocal and one would have had to have had determinative words to give the Act the meaning for which counsel for the respondent contended. Such an approach as proffered by the respondent would not be in keeping with the basic tenets of statutory construction.

[109] Further, one would have to ask the question whether Parliament intended to exclude persons who had separated before the promulgation of the Act, but who would now have no remedy, as sections 16 and 17 of the Married Women's Property Act, (which were hitherto the provisions under which spouses would obtain division of matrimonial property) have been repealed by the Act. The answer to that question would be that Parliament could not have intended such a result, as that would clearly be unfair.

[110] Additionally in **Williams v Williams** [1971] 2 All ER 764 Lord Simon was pellucid in his judgment when he stated that although in the absence of any express provision making a section retrospective, there was a presumption against its retrospective operation, particularly if the section did not merely affect procedural rights and practice in the courts, but affected substantive law by

creating new rights and obligations, nevertheless, on a reading of the Matrimonial Proceedings and Property Act,1970, as a whole, there were many indicia that showed that certain provisions should have retrospective effect. The learned judge was of the view that if without that application, there would be a lacuna in the law, Parliament could not have intended for that to obtain, and if the repealing of other statutes result in parties no longer having a remedy, then the, "implication of retrospection would seem necessary to give reasonable efficacy to the Act". In my view that conclusion also obtains here in respect of the Act.

[111] In **Yew Bon Tew,** Lord Brightman in delivering the speech of the Board also gave some insight into the difficult questions affecting the interpretation of provisions in statutes which could have retrospective effect. Having reiterated the prima facie common law rule that a statute should not be interpreted retrospectively so as to impair existing rights and obligations as set out in paragraph 17 herein, he stated that there are exceptions in the case of a statute which is purely procedural, "because no person has a vested right in any particular course of procedure but only a right to prosecute and defend a suit according to the rules for the conduct of an action for the time being prescribed". He went on to state that in any event so categorizing the provisions can be misleading. Additionally, he said:

> "A statute which is retrospective in relation to one aspect of the case, (for example, because it applies to a pre-statute cause of action) may at the same time

> be prospective in relation to another aspect of the same case,(for example, because it applies only to the post- statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances, do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."

The Act, the subject of this appeal, has provisions, some of which have already been referred to herein, which affect substantive rights and obligations, and also other provisions which are purely procedural.

[112] Additionally, in my view, it often happens that certain aspects of the same piece of legislation includes provisions which affect rights retrospectively and other provisions which are clearly meant to be prospective in application. This is also the situation in the Act being considered in this appeal to which I will refer below.

[113] It only remains for me to look closely at some of the relevant provisions of the Act, in the light of the abovementioned principles distilled from the authorities, to show why I am of the view that the Act in some respects has retrospective application.

[114] For the purposes of this matter, the words "family home" and "spouse" in the interpretation of the Act **(section 2)** are relevant. "Family home" is a new concept in our law and this Act embraces an entirely new approach to the entitlement of the parties to share in the ownership of the same. If the decree of

divorce has been granted many years ago, one would be entitled to make an application for division of property including the family home. However, one may not be able to convince a court that a particular property can fall under the rubric of 'family home' but that remains a matter for the tribunal of fact at the appropriate time. The definition of "spouse" is clearly not exhaustive as it reads "spouse includes" (emphasis mine) and specifically refers to the particular circumstances of 'the single man' and the 'single woman', which has been a development in our legislative reform over the last two decades. It does not speak to the union of a man and his wife, currently, nor in the past, which are obviously presumed to be included.

[115] **Section 3** of the Act is important as it indicates when the Act shall not have effect, which, (subject to section 6 of the Act), is after the death of either spouse save and except to the validity of anything done pursuant to the Act, and if one of the spouses dies while proceedings under the Act are pending, they may continue until completed, and be subject to an appeal, if necessary.

[116] **Section 24** of the Act, similarly, makes it clear that the commencement of the Act shall not affect any legal proceedings in respect of property in train under any enactment before the Act, nor any remedy to enforce or establish a right, privilege, obligation or liability acquired or incurred before the commencement of the Act, and the legal proceeding shall continue as if the Act had not been brought into operation. To the contrary, **section 4** of the Act,

states quite clearly that the Act shall have effect in place of the rules and presumptions of the common law and equity, to the extent that they apply to transactions in respect of property.

[117] These three sections of the Act indicate when and how the Act will operate and apply. There are no indications that in respect of property owned by spouses, the Act will only be applicable to situations that obtain subsequent to the date of the Act. This, in my view, must mean that rights and obligations relative thereto existing prior to its enactment, will be governed by it. Indeed **section 24** seems to suggest that it is only proceedings which had commenced before the Act came into operation which will not be governed by the Act. This would appear to have been the clear intent of the legislature.

[118] **Section 6** of the Act falls under the section entitled Part II, "Family Home", and I find that once the spouse can apply under the Act, (section 13), then, (subject to sections 7 and 10 of the Act), each spouse, on the occurrence of the triggering events set out in sub-paragraphs (a)-(c) thereof, shall be entitled to one-half share in the "family home". In section 6 (1) (a) and (b), of the Act, on a proper interpretation, the triggering event would be, "on the grant of the decree" or "a reasonable time thereafter", which would therefore signify retrospective application.

[119] **Section 11** of the Act speaks to orders that can be made by the court in respect of questions between spouses as to title to and or possession of property

and includes applications to the court which relate to any title, interest or rights to property which had been in the possession of or under the control of the other spouse but is no longer in their possession or control. This provision clearly addresses rights which existed in the past.

[120] **Section 12** of the Act, relates to the determination of values of property but fixes a date for the assessment of the value on the date of the order, (unless the court otherwise decides). However the date of determination of the share in the property is the date at which the spouses ceased to live together, as man and wife, or to cohabit, or if they have not so ceased, then it is the date of the application to the court. This recognizes a state of rights and obligations in the past, not subsequent to the statute becoming effective, yet it also embraces orders which will of necessity have prospective application. **Section 9** of the Act which grants relief from the payment of transfer tax on transfer of property between spouses, pursuant to the provisions of the Act, must, also, of necessity be prospective in its application.

[121] **Sections 13 and 14** of the Act are very instructive in the interpretation of the statute, and are of particular relevance to this matter as they address the division of property and the factors to be considered in that determination, which are part of the new regime, and as a consequence of which sections 16 and 17 of the Married Women's Property Act, which represent the old regime, have been repealed in section 25 of the Act. Section 13 refers to the triggering events

before the spouse shall be entitled to apply for benefits pursuant to the provisions under the Act. Section 14 (1) empowers the court to make certain orders once the triggering events in Section 13 have occurred on the basis of factors set out in section 14 (2). Section 13 (3) states that in respect of subsection 1 (a) and (b) of sections 13 and 14 of the Act "spouse" shall include "former spouse". There can be no clearer intention that the Act recognizes rights existing for sometime immediately preceding the operation of the Act and contemplates persons who were once spouses applying to the court for division of property even if the parties were divorced by the grant of a decree of nullity or dissolution of marriage sometime before the commencement of the operation of the Act. The grant of the enlargement of time under section 13(2) to permit a spouse "including a former spouse" to bring the application for the division of property under the provisions of the Act, presumes and recognizes this.

[122] In the instant case Mrs. Brown is a 'former spouse'. That perhaps may be all that was required to be said to dispose of this appeal, for in the ordinary plain and simple language of the statute, she would be entitled to apply for division of property under sections 13 and 14 of the Act and endeavor to satisfy the tribunal of fact that the property, the subject of the fixed date claim form in this matter, is the "family home" or falls to be considered as "such property" under section 14 of the Act.

[123] As a consequence, on 5 February 2010, we allowed the appeal and sent the matter back to the court below to be tried on the merits.

ORDER

COOKE, J.A.

It is for the above reasons that on 5 February 2010 we made the following order:

Appeal allowed. The matter is remitted to the Supreme Court for trial. The appellant should have her costs in the appeal to be agreed or taxed.