BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

FAMILY DIVISION

NO. 64 of 2009

IN THE UNION OTHER THAN MARRIAGE OF:

ELVA SMITH **APPLICANT**

AND

TREVOR BUTCHER **RESPONDENT**

Before: The Honourable Mr. Justice William J Chandler, Judge of the High Court

Dates of Hearing: 2013: November 13
2016: December 15
2017: January 30, March 18,

Date of Decision: 2017: July 04

Appearances:

Ms. Alicia Archer for the Applicant

Mr. Chester Sue for the Respondent

DECISION

INTRODUCTION

[1] The Applicant and the Respondent were involved in an intimate relationship for a period of time. The Applicant alleges that she and the Respondent cohabited in a union other than marriage (a union) at Chapel Land No.2 in the parish of Saint Philip from the 24th December 2002 until the last week of October 2008. The Respondent admits that there was an intimate relationship between himself and the Applicant but denies that they lived together in the same household in a union. He alleges that the Applicant resided with her mother.

[2] At the heart of this matter is an application by the Applicant for a share in a dwelling house owned by the Respondent based upon the Applicant's alleged contributions to its maintenance and improvement as well as her contribution as a homemaker.

THE APPLICATION

[3] The application was filed on the 9th February 2009 claiming, inter alia:

a. A declaration pursuant to **Section 39 of the Family Law Act, Cap. 214 of the Laws of Barbados** that the relationship of the Applicant and the Respondent be recognised in law as a union other than marriage.

b. A declaration pursuant to **Section 56 of the Family Law Act, Cap 214 of the Laws of Barbados** that the Applicant

is entitled to a one-third share of a dwelling house situate at Chapel Land No. 2 in the parish of Saint Philip.

c. Such orders pursuant to **Section 57 of the Family Law Act, Cap. 214**, as this honourable court thinks fit for the alteration of the interests of the parties in the said property.

d. Any other order as this Court deems just.

THE ISSUE

[4] The sole preliminary issue currently to be determined by the court is whether the relationship between the Applicant and the Respondent falls to be considered as a union other than marriage within the terms of **Section 39 of the Family Law Act**. Determination of the other issues of division of property will have to await the outcome of this decision.

THE EVIDENCE

[5] The evidence was filed by way of the following affidavits:

On behalf of the Applicant:-

a. Affidavit of Elva Smith filed 9th February 2009;

b. Affidavit of Elva Smith filed 26th May 2011;

c. Affidavit of Elva Smith filed 26th September 2013;

d. Affidavit of Malicia Natasha Lewis filed 11th November 2013;

e. Affidavit of Kenneth Anderson Lewis filed 11th November 2013;

f. Affidavit of Ena Yvette Bayne filed 11th November 2013.

On behalf of the Respondent:-

a. Affidavit of Trevor Butcher filed 3rd July 2009;

b. Affidavit of Corrie Toppin filed 14th October 2013.

Viva Voce Evidence

[6] These deponents were cross-examined on the following dates:

a. Elva Smith on the 13th November 2013;

b. Kenneth Anderson Lewis on the 13th November 2013;

c. Malicia Natasha Lewis on the 13th November 2013;

d. Ena Yvette Bayne on the 18th March 2014;

e. Trevor Butcher on the 18th March 2014;

f. Corrie Toppin on the 18th March 2014.

THE APPLICANT'S CASE

THE APPLICANT'S EVIDENCE

THE AFFIDAVIT IN SUPPORT OF THE APPLICATION (THE AFFIDAVIT)

[7] The affidavit was filed 9th February 2009. The Applicant deposed as follows:

a. At paragraph 3 that she and the Respondent resided together as man and wife at Chapel Land No.2 in the parish of Saint Philip from the 24th day of December 2002 until the last week of October 2008. She no longer resided there because of threats made to her by the Respondent.

b. The land on which the dwelling house was constructed was owned by the Respondent before she took up residence.

c. Renovations were done to the house. She contributed by

changing the bedrooms from timber to masonry construction and adding another bathroom.

d. The money for the renovations came from her winnings of $25,000.00 from the lotto Double Draw Competition. She sent the Respondent to collect the winnings on her behalf. He deposited the money rather than give her as agreed. She eventually received $19,000.00, after her brother intervened whilst the Respondent retained $6,000.00.

e. The Respondent's adult son resided with them and did not contribute to the household.

f. The Respondent filed an application for a Protection Order against her which was dismissed by the learned Magistrate as being without merit and an inappropriate way of expelling her from the house.

g. She was in a better financial position than the Respondent because of her salary from "doing nursing".

THE AFFIDAVIT FILED 26TH SEPTEMBER 2013 (THE SEPTEMBER AFFIDAVIT)

[8] In the September affidavit the Applicant deposed, inter alia, that:

i. She had been advised that the DVPO, filed on the 25th day of February 2008, required that the parties to the proceedings be living in the same household. Copies of the summons and the application for a protection order were attached as Exhibits "ES 2" and "ES 3" respectively and copies of correspondence from the Respondent's then Attorney-at-Law were also exhibited.

ii. Her clothes and other personal effects were still in a locked bedroom in the house. She retained keys to the house.

iii. She would usually go to the house accompanied by the police.

[9] The Applicant was tendered for cross-examination on 09 October 2013. She stated that she and the Respondent became lovers in October 2001. She was then living at Brighton, St. George with her children, the youngest of whom was then 14 years old. She stopped living there on 24 December 2002 and went to live with the Respondent at Chapel Land. She was not married then. She was married on 30 June 1999.

[10] She stated that she did not go back to Brighton at any time. When asked if she went back to look for her children, she said that they were big (grown). She gave evidence that the Respondent's house had three bedrooms. She slept with the Respondent in the middle bedroom. The Respondent kept his things (belongings) locked in the front bedroom.

[11] She gave further evidence that she did not sleep with him every night because he worked at night. She and the Respondent fell out (had a disagreement) towards the end of September 2008. When the Respondent made the complaint at District C magistrate's court they were still together. When the Respondent's lawyer wrote her on 2nd June 2008 (the letter) they were still talking and she was still cooking and washing (doing the laundry). She ceased living at Chapel in the last week of October 2008, however she continued to visit the house. She retained a key to the home and did not break into it.

[12] She denied counsel's suggestion that she and the Respondent had fallen out

long before September 2008 or before the Respondent's lawyer had written her the letter.

THE EVIDENCE OF KENNETH ANDERSON LEWIS

[13] This witness filed an affidavit on 11 November 2013 in which he deposed that:

a. He lived at No 19 Halton Terrace, St. Philip and knew that the Applicant (his aunt) was living at Chapel with the Respondent prior to the 3rd February 2003 because that was the date on which his grandmother passed away.

b. He deposed that he took the Applicant from the Respondent's house to the airport when she travelled overseas, collected her on her return and took her to the house at Chapel.

c. His father Kenneth Lewis senior lived less than one kilometer away from where the Applicant and Respondent resided and the Applicant would ask him to collect her from and return her to, the Respondent's house to facilitate these visits.

d. He visited the Applicant often at Chapel Land and had been inside the house but most of the time he talked with the Applicant in the doorway because he and the Respondent's spirits did not meet. He "picked up a bad vibe."

[14] Under cross-examination by Counsel for the Respondent Mr. Lewis stated:

a. That he knew the Respondent for over 10 years, he first met the Respondent when the Applicant brought him home. It was roughly 2002 but he knew that it was before 2003 when his grandmother passed away.

b. When he took the Applicant to the airport, the Respondent was also in the vehicle.

c. He along with about five or six cousins lived at Brighton

with his grandmother who was now deceased. The Applicant did not live there. The Applicant lived at Brighton for the most of her life but she also lived at Chapel No.2.

d. The Applicant started living at Chapel in 2002. She had children living at Brighton when she started living at Chapel. When asked if she came to Brighton to look after these children? The witness said that she used to come to Brighton periodically. He disagreed with the suggestion that she would come to Brighton for a week.

[15] There is a contradiction in the evidence of this witness and the Applicant in relation to whether or not the Applicant returned to Brighton at any time. I did not get the impression, however, that the witness was deliberately lying.

THE EVIDENCE OF MALICIA NATASHA LEWIS

[16] Malicia Natasha Lewis is the daughter of the Applicant and filed her affidavit on the 11 November 2013. She deposed that:

a. She knew the Respondent, who she called "Butcher", as her mother's boyfriend who would come to their house and "cool out."

b. Her mother lived with the Respondent for a number of years from around the time when her 11 year old daughter was born.

c. She knew that the Applicant was living at Butcher because she called her there every day, morning and night and also visited her there.

d. During her visits she would see the Applicant cleaning her television, other items in the back bedroom and the house generally. The Respondent slept with her mother in the back bedroom but stored his things in the front bedroom

which he kept locked even when things were good between her mother and the Respondent.

e. Her mother cared for Butcher's dog, cooked for it and cleaned up its mess.

f. Butcher's son came to live with his father and the Applicant after the son's house was burnt.

[17] Under cross-examination she gave evidence that:

a. She visited her mother at the Respondent's home about three or four times but could not recall exactly how many times.

b. On her first visit the Respondent prepared pickled breadfruit with fish and cucumber on the side, which she did not like but her mother forced her to eat it.

c. She moved from Brighton when she was 14 years old to live with her father at Hoyte's Terrace, St. James. At that time her mother was still at Brighton.

d. During her visits she did not see her mother and the Respondent sleeping in the back bedroom nor did she observe her cooking, however, she saw her cleaning.

e. She got on well with the Respondent but things got bad due to a remark he made about her. Things got bad between the Respondent and her mother when he kept her Lotto winnings for himself.

f. When asked if, on her visits, she saw her mother do anything for the dog, she replied "No."

g. When it was suggested to her that Butcher's son's house was not burnt but was dismantled by Marshals of the Court, she responded that she discovered that afterwards and that it was a mistake that she did not put that in her affidavit.

[18] There was one inconsistency in this witness' testimony in relation to her response to the question whether she saw her mother do anything for the dog on her visits. I saw and heard this witness and am of the opinion that she was not lying when she gave her response. I attributed any perceived inconsistency to the generality of the question.

THE EVIDENCE OF ENA YVETTE BAYNE

[19] This witness filed an affidavit on 11 November 2013 and deposed that:

a. She resided at #2 Chapel Land, Saint Philip for more than 40 years.

b. She knew the Respondent as Edwin Butcher or "Ela".

c. She knew the Applicant from the time she lived at Chapel Land with the Respondent. She lived there for more than five but less than ten years.

d. She knew that the Applicant was living at the house and not just visiting because the Applicant used to go to work from there and come home straight from work to the house.

e. She would see her cleaning around the house on the mornings of her day off work.

f. She knew that she cooked and washed for the Respondent. She could see the Butcher's residence from her home and she would see the Applicant hanging out the Respondent's clothes on the clothesline.

g. She also passed alongside the Butcher residence to get to where she is travelling but preferred to go through a gully.

h. The Respondent had a girlfriend called "Fattie" who died but she doubted that Fattie contributed to the house because it was

converted from wood to wall after Fattie died and after the Applicant went to live there.

i. She had warned the Applicant about the Respondent. Women could be strange and she did not know if she could trust the Applicant.

[20] In cross-examination, the witness said:

a. She knew the Respondent from the time she was 20 years old. She was now 61. She knew the Applicant from the time she moved into the Respondent's house. She could not remember when the Applicant move in but it was after Lyra Toppin died. She could not recall when she left.

b. She knew she cooked because she would smell the pot when she passed. She saw her hanging out clothes. The Applicant's son did not live at the house so the clothes had to be the Respondent's.

c. When it was suggested to her that she spent her time minding people's business, she replied that that was untrue, however, if she saw anything going on at anybody's house such as a fire, she would call the fire brigade.

d. She went on to speak about the conversion of a portion of the house from wood to wall and the work done by the Respondent and his brother on the house.

e. She knew that the Applicant was at the house when the above wall was built because the Applicant helped mix the cement.

[21] I was impressed with this witness who was forthright in responding to questions. She appeared honest in her analysis of her relationship with both parties and did not hide the fact that she did not always have a good

relationship with the Respondent. I found her to a witness of truth upon whose evidence I could rely.

THE CASE FOR THE RESPONDENT

[22] The Respondent's affidavit evidence file 3rd July 2009 is that:

a. He denied that the Applicant and he lived together in the same household as husband and wife.

b. At all material time the relationship was a visiting relationship.

c. He admitted that he and the Respondent were intimately involved but the Respondent never lived with him consistently or at all.

d. The dwelling house and the renovations to it were effected through the joint efforts of himself and his now deceased girlfriend long before he met or became involved with the Respondent.

e. The Applicant did not win the Lotto, he did and in an effort to pacify her he gave her $13,000.00.

f. During the currency of his involvement with the Applicant he bore the sole responsibility for the purchase of food. When she purchased food it was for her sole purposes and use.

[23] Under cross examination, he said that:

a. He admitted that he filed the application before the magistrate. He swore to the magistrate that its contents were true and correct.

b. He had asked the magistrate to put the Applicant out of the house but this was not done because the case was never finished. He had his lawyer send the Applicant a notice to

quit but she did not leave, she was still visiting the house and had "a little belongings there."

c. In June 2008, he filed an eviction against her because she was stealing things, breaking the locks and stealing things unknown to him.

d. When asked if he gave her $13,000.00 to pacify her, he responded "I don't know about pacify but I gave her the $13,000.00".

e. The Applicant had objected to and quarreled about his placing his Lotto winnings on his bank account.

f. He denied that he and the Applicant started talking around 2002. It was between August/September 2003.

g. The Applicant never moved into his house, she would stay for a day or overnight, sometimes he would not see her for 2 weeks. They would talk on the phone.

h. He was the cook at his home. The Applicant never washed or ironed his clothes. He did all his household things himself.

i. His brother helped him with the below part of the house (changing it from wood to wall). When it was suggested to him that Lyra Toppin died before the renovations were completed, he replied that she died in the same house, her own house.

j. Counsel asked if the house was completely wall before Lyra died, he responded that the house was board first. Whilst she (Lyra) was living she changed the house from board to wall.

k. He denied that the Applicant helped mixed concrete but stated that his son Corrie helped mix concrete.

l. He said that when Lyra died Corrie was still a child.

m. He, the Respondent did most of the masonry work.

n. He worked at night and was home during the day.

THE EVIDENCE OF CORRIE TOPPIN

[24] In his affidavit filed 14th October 2014, he deposed that:

a. He was the son of Lyra Toppin and the Respondent, Lyra died when he was 17 years old.

b. He was raised and lived at the house and, at the date of the affidavit, he was 34 years old.

[25] In cross examination he said:

a. That at the time the renovations on the house were completed he was a child.

b. He had stopped living at the house for about 15 years.

c. He agreed with counsel's suggestion that only half of the house was changed from wood to wall before his mother died. Only one half of the house was converted from wood to wall before his mother died.

THE APPLICANT'S SUBMISSIONS

[26] Ms. Archer submitted that the court as the fact finder in this instance must determine whether any particular witness was honestly mistaken, had an "imperfect recollection" or was deliberately attempting to deceive the Court. The court ought to objectively assess the remainder of the evidence and the relevant surrounding circumstances to determine the honesty or otherwise of that witness.

[27] Counsel relied upon an application under the **Domestic Violence Protection Orders Act** Documentary evidence in the form of Exhibit "ES 2", as indicative that on 28th February 2008 the Respondent considered the Applicant to be either his spouse or a member of the household contrary to his subsequent claim that the Applicant was a licensee.

[28] Counsel also submitted that this was contrary to his affidavit evidence filed 3rd July 2009 categorically that he and the Applicant never lived in the same household and that she resided with her mother.

[29] It is submitted that if the Applicant was residing in St. George there would be no need for the Respondent to instruct counsel to take ejectment proceedings.

THE RESPONDENT'S SUBMISSIONS

[30] Mr. Sue submitted that, if it was accepted that the Respondent lived at the Respondent's house, her evidence left doubt the nature and duration of the living arrangement. The letter of counsel to the Applicant, the notice to quit and complaint before the magistrate showed that the Respondent treated the Applicant as a licensee. She never denied in cross-examination or in affidavit form that the Respondent treated her as a licensee.

[31] Counsel submitted that the application under the **DVPO Act** did not specify the capacity in which the Respondent made the application, that is, whether as spouse or member of the household.

[32] The fact that the application was followed by a complaint for ejectment i8ndicated that the Respondent's then Attorney-at-Law may have been "trying a thing" which was not unknown in practice.

[33] The hand delivery of the complaint and letter indicated that the relationship had broken down before the date the Applicant alleged that the relationship had ended.

[34] Counsel also submitted that a union required Applicant to show that the parties manifested a common intention to cohabit in a union other than marriage. The Applicant did not depose to the various incidents of association, which made up a union, e.g., sexual intercourse, society and protection, support, and recognition in private and public. He further submitted that the evidence revealed that separation occurred before October 2008. There was no mental state to the alleged cohabitation.

THE LAW

[35] **Section 39** of the **Family Law Act** provides as follows:

> "union other than marriage" or "union" means the relationship that is established when a man and a woman, who, not being married to each other, have cohabited continuously for a period of 5 years or more and have so cohabited within the year immediately preceding the institution of the proceedings."

[36] In **Shepherd v Taylor, No. 346 of 1986 Williams C.J**, considered the factors, which a court must take into account in determining whether or not a union

other than marriage exists. These factors are largely based upon the incidents of marriage, which were considered as applicable to a union, which only lacked the circumstance of being blessed by the Church as in a religious marriage or sanctioned by the state as in civil marriages.

"Consortium vitae is the matrimonial relationship, consisting of the various incidents that go to make up such a relationship; such matters as marital intercourse, the dwelling under the same roof, society and protection, support, recognition in public and private, correspondence during separation" **Tulk v. Tulk [1907] V.L.R. 64** per Cussen, J.)

[37] The listed components are among those incidents, but they are neither exhaustive nor exclusive. For example, the importance in a given relationship of sexual intercourse will vary with such circumstances as the age and health of the parties. To argue that absence of one of the usual incidents of a marital relationship in a given marriage supports an inference that that relationship has broken down will lack cogency if that incident did not play any important role in the particular marriage in question, even at a time when that marriage was a success.

[38] In **Thomas v. Thomas [1948] 2 K.B. 98** Lord Goddard, C.J. said at p. 99:

> "Cohabitation does not necessarily depend on whether there is sexual intercourse between husband and wife. Cohabitation means living together as husband and wife. As I endeavoured to point out in *Evans v. Evans [1947] 2 All E.R. 656* cohabitation

> consists in the husband acting as a husband towards the wife and the wife acting as a wife towards the husband, the wife rendering housewifely duties to the husband and the husband cherishing and supporting his wife as a husband should. Sexual intercourse usually takes place between parties of moderate age if they are cohabiting and if there is sexual intercourse, it is very strong evidence (it may be conclusive evidence) that they are cohabiting, but it does not follow that because they do not have sexual intercourse they are not cohabiting."

[39] I consider the above observations to be relevant to determining whether or not a union exists. These incidents of marriage are no different from those articulated in English law. One can easily substitute male spouse for husband and female spouse for wife in order to bring the observations in line with the concept under discussion.

THE BURDEN OF PROOF

[40] The burden of proof is on the Applicant to establish that there existed a union other than marriage within the provisions of the **FLA**.

THE STANDARD OF PROOF

[41] The standard of proof is the normal civil standard of a balance of probabilities.

DISCUSSION

[42] In the instant case both parties have admitted to having had an intimate relationship so that the court may reasonably draw the conclusion from the vernacular of intimacy that there was sexual intercourse between the parties. What is in dispute is whether they lived together as husband and wife as

alleged by the Applicant or whether there was a visiting relationship or license as alleged by the Respondent?

[43] It is true that there are some contradictions in the evidence of some of the witnesses, however, I do not consider those contradictions to be so manifest that the witnesses are not to be believed on the central issue of cohabitation. Put another way, I do not consider those witnesses to have lied under oath. I am therefore free to place what weight I consider appropriate upon their testimonies.

[44] I am of the opinion, and hold, that the Applicant's evidence in cross-examination did not differ materially from her affidavit evidence. Her evidence that she cohabited with the Respondent is supported by his application (the **DVA**) for a protection order against her "Exhibit ES1". This application is made under **section 4** of the **Domestic Violence (Protection Orders) Act 1992-4 (the DVPOA).** That section provides that:

> "4.(1) An application for a protection order in accordance with **Form 1** in the ***Schedule*** may be made by way of complaint by (a) the spouse or former spouse of the person against whom the order is sought where the offence was committed or the harassment conducted against that spouse or a child of the household; (b) any other member of the household, not being a spouse or child."

[45] **Section 5** provides that the evidence on an application for a protection order may be given on affidavit. **Section 2** defines a "spouse" as including a party

to a relationship where the parties are living with each other in the same household as husband and wife.

[46] The **DVA** was made under oath and, in it, the Applicant therein (being the Respondent therein) swore that he was the spouse of the respondent and that he was applying for a protection order against her. The respondent referred to is the present Applicant whose address is also given as Chapel Land, St. Philip in the **DVA**. The grounds of the application were:

> "She takes up my belongings (drapes, sheets) and carry then away. She also cuts up the tablecloth. She also pull a knife on me. On arriving home from work (morning-works at night) she wants to pick a fight. She locks me out of my own house".

[47] Counsel also submitted that there was no evidence as to the capacity in which the Respondent brought the application in the magistrate's court. This submission is without foundation. On any view of the evidence there were only two people living at the home, the Applicant and the Respondent. The Respondent's son Corrie Toppin gave evidence that he had stopped living at the house for about 15 years. The Applicant's daughter was an infrequent visitor.

[48] The court must apply a purposive approach to interpreting the **DVA**. It is clear from the evidence that the Respondent claimed ownership of the house at Chapel Land. The household was his. The only logical and natural interpretation of the **DVA** is that the Respondent was alleging, in the court

below, that the Applicant was his spouse and I so hold. Further, **Section 4. 1(a)** of the **DVPOA** provides that a spouse or former spouse may bring the application. **Section 4. 1(b)** provides that any other member of the household, not being a spouse or child may also apply. Given the fact that **Section 4. 1(a)** provides for a former spouse to apply, it is my view that those sections need not be read conjunctively. I, therefore reject Mr. Sue's submission in this regard.

[49] I heard and saw the Respondent and observed his demeanour under cross examination. I was unimpressed with the manner in which he gave his evidence. I, therefore accept the Applicant's evidence over his where their evidence is at variance.

[50] A letter from Mr. Steve A. H. Gollop, the Respondent's then attorney-at-Law (the letter), addressed to the Applicant is attached to the Applicant's affidavit in support filed 11 November 2013. Counsel states that he was instructed that the Applicant and Respondent "…were once involved in an intimate relationship but have been separated for over one year, although you continue to periodically reside at his premises. Indeed he instructs that the said relationship has broken down irretrievably, but you still keep much of your personal property and effects there." In the said latter, counsel advised the Applicant that she "shared" his client's residence as a mere licensee. The

formal notice to quit and complaint before the magistrate refers to the Applicant as a licensee.

[51] The language used in the letter is ambivalent. The letter refers to the Applicant as a licensee and also as a person sharing the Respondent's home who continued to keep much of her personal property there. This is more consistent with the Applicant's evidence and the **DVA** application and supports her claim. It is also inconsistent with the Respondent's allegation that his relationship with the Applicant was a visiting relationship. No mention is made as to the nature of the relationship prior to the alleged irretrievable breakdown of it. It must also be noted that, at paragraph 3 of his affidavit filed 03 July 2009, the Respondent denied that the Applicant lived with him at all. The Respondent, under cross-examination, was asked:

> "Did Ms. Smith ever stay at you for any length of time?" He responded: "Sometimes she would spend a day or overnight. Sometimes I would not see her for two weeks."

[52] His sworn testimony is inconsistent with his affidavit evidence and the clear inferences from the **DVA** and the letter that the Applicant lived at his house.

[53] The Respondent's counsel posited that the fact that the **DVA** was followed by a complaint for ejectment was an indication that his client's former lawyer may have been "trying a thing" presumably to get the Applicant out of the house. This submission was not fully articulated by counsel as to the manner

in which former counsel was trying “a thing”.

[54] Having regard to the possible imputations on Mr. Gollop’s previous representation of the Respondent, I deem it necessary to deal with this submission. The **DVA** was sworn to by the Respondent. The grounds of the **DVA** are in manuscript and the Respondent gave evidence that he filled out the form himself and signed it. There is nothing in the evidence to indicate that Mr. Gollop had a hand in its preparation. The lack of adherence to the rules of grammar in the application very much indicate that Mr. Gollop had no hand in its preparation. His role, on the evidence, was confined to writing the letter referred to earlier in this decision and bringing the ejectment proceedings.

[55] In the opinion of this court, it is presumed that lawyers act on their client’s instructions. To do otherwise would be a violation of their retainer. There is no evidence here to displace that presumption and find that Mr. Gollop did otherwise than as he was instructed.

[56] Mr. Sue’s submission asks this court to subscribe to the view that persons can take an oath willy-nilly and not be conscious that they face a penalty of perjury for lying under oath. That would shake the very foundations upon which our law of evidence is founded. I will not subscribe to such a view.

[57] Mr. Sue alluded to the time of filing of the application for an interest in the

property. No serious submission was made with respect to this matter. No evidence was led by his client in relation to the date of separation. Indeed his case was that no union existed. There is no evidence therefore to contradict the Applicant's evidence with respect to the date of separation. I agree with Ms. Archer's submission that even in the face of the **DVA** (filed 25 February 2008), the letter dated 02 June 2008, the notice to quit of 06 June 2008 and ejectment proceedings filed subsequently, this matter was filed within the twelve-month limitation. I must reiterate that no issue of limitation was raised by the Respondent by way of an answer. In any event the burden of proof would have fallen on him and he has failed to discharge it.

[58] In the circumstances, I am of the view and hold that the Applicant was a spouse of the Respondent and that their relationship constituted a union other than marriage within the meaning of **Section 39 of the FLA**.

[59] The court therefore declares pursuant to **Section 39 of the Family Law Act, Cap. 214 of the Laws of Barbados** that:

i. The relationship of the Applicant and the Respondent constituted, in law, a union other than marriage.

ii. The Respondent will pay the Applicant's costs of this application to be taxed if not agreed.

William J. Chandler
High Court Judge