



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2010/HCV04482

BETWEEN WINSOME JOHNS-GAYLE CLAIMANT

A N D BARRINGTON GAYLE DEFENDANT

Brian Barnes instructed by Wilson, Franklyn and Barnes for the Claimant.

Catherine Minto, instructed by Nunes, Scholefield, DeLeon & Co. for the Defendant.

Heard: December 5th & 6th, 2011

Coram: Anderson, K. (J)

[1] This matter has been brought before this Court by means of Fixed Date Claim Form which was filed on September 16th, 2010. The Fixed Date Claim Form as intituled makes it apparent that this matter pertains to an Application for division of property, pursuant to the Property (Rights of Spouses) Act, 2004. The correct name of the relevant statute though, is the Family Property Rights of Spouses Act. The properties sought to be divided include cash, stocks and securities and various parcels of real estate.

[2] The Claimant's Application is supported by two affidavits, both of which were deposed to by the Applicant and those affidavits were respectively filed on

September 16th, 2010 and April 7th, 2011. The latter of these two affidavits has been described as a, “Supplemental Affidavit.”

[3] The Claimant has, at all times in this matter, been represented by Messrs. Wilson, Franklyn & Barnes, Attorneys-at-law and Mr. Brian Barnes instructed by Wilson, Franklyn & Barnes, appeared before me on the 5th December 2011, when this matter came up for Trial. For the Defendant, Ms. Catherine Minto, instructed by Nunes, Scholefield, DeLeon and Co., appeared before me on December 5th, 2011, when this matter came up for Trial. Mr. George Belnavis is also noted on record as one of the counsel appearing for the Claimant, although Mr. Belnavis was not present, due to matters at the Norman Manley law School which he was unable to disengage himself from. I was told of this by Mr. Barnes. Insofar as the Defendant’s legal representation is concerned, it should be noted that prior to December 5, 2011 the Defendant was being represented by attorney - Mr. Leroy Equiano, of the Kingston Legal Aid Clinic. On December 5, 2011 it was shown to me that, clearly prior to the commencement of the Trial in Chambers, before me, of this matter, there was a Notice of Change of Attorney filed, which was copied to the Supreme Court Registrar, the Kingston Legal Aid Clinic and the Claimant’s attorneys. Counsel for the Claimant took no issue with the Defendant’s change in legal representation.

[4] Ms. Minto for the Defendant had indicated very shortly after the Court had begun to make enquiries of counsel as to certain ‘housekeeping matters’ pertaining to the expected Trial of the Claim, that her client would be making certain arguments as to the jurisdiction of this Court to try the Claim.

[5] Counsel for the Defendant, shortly thereafter, put forward her client’s contentions in that regard. Essentially, her contention was that the Fixed Date Claim Form was filed out of time, this taking into account the clear provisions of Section 13 of the Property (Rights of Spouses) Act. She referred the Court to the cases of **Allen v. Mesquita - Supreme Court Civil Appeal No. 8 of 2011** and

Annette Brown and Orphiel Brown – Supreme Court Civil Appeal No. 12 of 2009, in support of her contentions.

[6] It will be useful at this juncture to set out the relevant provisions of Section 13(1) and 12 (2) of the Property (Rights of Spouses) Act. **Section 13(1) provides that a spouse shall be entitled to apply to the Court for a division of property in the following four (4) 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 the 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 willful or reckless dissipation of property or earnings. (Emphasis mine).**

[7] **Section 13(2) provides that an application under Section 13(1)(a), (b), or (c) must be made within twelve (12) 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.**

[8] There is no dispute in the case at hand, that the parties are still married and that no decree of nullity of marriage has ever been made in relation to the parties' marriage. There is also no dispute that the parties are no longer engaging in marital/conjugal relations with one another, albeit that the Claimant contends that this is solely because of her fear that the Defendant's prior engagement in extra-marital relations, may put her health at risk if she were to at any time hereafter, resume conjugal relations with the Defendant. It is to be noted also, that the Defendant is currently in a wheelchair and came to Chambers for Trial of this matter, seated on same. The Defendant was,

according to that which has been deposed to in paragraph 18 of the Claimant's Affidavit which was filed on April 7th, 2011, "...one day stricken with an illness that left him paralyzed."

[9] It is to be noted though, that even though the parties are no longer cohabiting in the sense of engaging in conjugal relations with one another, the word "cohabiting" in the Property (Rights of Spouses) act, has a special and limited meaning. **In Section 2 (1) of the Act, the word "cohabit" is defined as meaning – "to live together in a conjugal relationship outside of marriage and "cohabitation" shall be construed accordingly.**" (Emphasis mine). Considered in the light of that definition, it is clear that since the parties are still married and have, at all marital times been married to one another, the wording used in Section 13(1) (a) of the Act, that being "termination of cohabitation", as being one of the trigger mechanisms, if you will, for the Act's provisions to come into force and effect, can have no applicability whatsoever, to the matter at hand. This is so because as defined in the Act, the term "cohabitation" relates only to unmarried partners who engaged in conjugal relations with one another. The termination of that cohabiting relationship therefore, relates only to the termination of cohabitation as between an unmarried couple, this as distinct from the case at hand, wherein it is a married couple that this matter concerns. Accordingly, neither Section 13(1) (a), nor Section 13(1) (b), could possibly be, in the particular circumstances of this particular case, "trigger mechanisms" being relied upon by Claimant, in order to bring the relevant Act's provisions into play.

[10] I must therefore go on to consider whether or not Section 13(1)(c) has any applicability to the matter at hand. In that regard, the Defendant's counsel has suggested that it does since, as he has submitted, it is clear that the Claimant is alleging in her Affidavit evidence as filed in support of her Claim, that the parties are separated from one another, as they sleep in separate beds, in separate

rooms of the house and also, no longer engage in conjugal relations with one another. Additionally, important decisions are not made by them in conjunction with one another – certainly at least, insofar as the purchasing of properties and disposition of properties and making of investments by the Defendant is concerned. The Defendant’s counsel also has contended that separation can and does arise in situations wherein, even though the marital partners may live in the same home together, for all intents and purposes, they do not act in union, such as, or at least to the extent to which a marital couple is expected to act. There is indeed case law both from England and the Caribbean, which supports this legal proposition, albeit in relation to the use of the words – “separate and apart from one another,” in the context of a basis for the divorce to be obtained under the provisions of the Matrimonial Causes Act (Eng.) which has been adopted and applied in various Caribbean countries.

[11] The response of the Claimant’s counsel, to the Defence counsel’s suggestion that the parties have separated, is that his instructions are that the parties have not separated as they live in the same house together and the Claimant still treats the Defendant as her husband and that this present Claim is expected to begin the process of the parties separating from one another.

In fact, the Claimant in her Supplemental Affidavit evidence as filed on April 7th, 2011 in reference to the properties purchased by her husband either in his sole name or in his name and that of another person, other than herself, has suggested, at the commencement of paragraph 35 of her Supplemental Affidavit, that – “to my surprise my husband wants all for himself and is also prepared to now put me out of my house.”

[12] It is to be noted on the point of whether or not the parties have separated, that the only evidence of separation, at least to the extent that the Defence counsel has contextualized it, is as contained in paragraph 12 of the Defendant’s sole Affidavit in this matter (as filed on February 25th, 2011, wherein the

Defendant deposed as follows:- “Paragraphs 23-31 are denied. The Claimant is fully aware that the relationship had broken down since 1994 although we lived in the same house but in separate rooms and lived separate lives. The relationship since 1994 was never a prosperous one, as it became worst and worst as time went on.”

[13] In this Court’s view, it is of vital importance for an Applicant seeking Orders in his or her favour under and pursuant to the provisions section 13 of the Property (Rights of Spouses) Act, to specify in his or her Application, perhaps best, firstly, as part and parcel of the heading of the Claim, “the trigger mechanism” being relied on by the Applicant, in terms of Section 13 (1) (a), (b), (c) or (d). Additionally though, Applicants must, it seems to me, in Affidavit evidence led in support of the claim, provide evidence to the Court, which will make it apparent to the Court, not only as to which, “trigger mechanism” is being relied upon, but as to the basis or bases for the Claimant’s reliance upon same. If a Claimant does not do this, than that Claimant cannot expect, in any event, to be entitled to any relief under the Family Property (Rights of Spouses) Act, since a person is not entitled to any such relief, if they cannot satisfy the Court with evidence that the Court can rely on, that they can properly make the Application, bearing in mind the provisions of Section 13(1) of that Act which I have referred to in detail above.

[14] This is of the utmost importance, especially since, if an Applicant for relief under the Family Property (Rights of Spouses) Act makes an Application under either of Section 13 (1) (a), (b) or (c) of that Act, there is a time limit of twelve (12) months following upon the occurrence of the, “trigger mechanism,” **“within which the Application to the Court, under and pursuant to the Act, must be made, unless the Court grants an extension of time to the Applicant, within which extension of time, the Application will be expected to file his or her Applicant. Section 13 (2) of the Act, as set out in detail above, expressly so provides.** (Emphasis mine).This being a provision of statute, with there being

no provision for waiver thereof, the same cannot be waived by a Defendant. Furthermore, the Court is precluded from extending time, subsequent to the twelve (12) month period following upon the occurrence of the “trigger mechanism”, having already elapsed. This is so because the Act does not allow for the Court to do this. Thus, the Application for extension of time within which to file the Claim, must not only be made and granted by the Court, before the Claim has been filed (this so as to thereby validate a Claim being filed outside of the twelve (12) month statutory limitation period), but also, that Application for an extension of time must be filed with the Court before the twelve (12) months’ limitation period has expired. See on these points, the Jamaican Court of Appeal’s Judgment in **Allen v. Mesquita – Supreme Court Civil Appeal No.8 of 2011.**

[15] I have gone through these last few points in some detail, in an effort to provide guidance to legal practitioners and future Applicants alike. Hopefully, careful note will be taken of same and they will all hereafter, if they have not already been doing so, be guided accordingly.

[16] The time factor is of importance in this case, since it is Defence counsel’s submission that since the parties “separated” from as long ago as 1994, and the Claimant’s fixed Date Claim Form was filed in 2010, the Claimant’s Application is thus, hopelessly out of time and that this can no longer be rectified. However, if this Court concludes that the Claimant’s Application has not been brought before this Court on the basis of the parties having separated, then the only other basis available to the Claimant upon which her Claim before this Court, under and pursuant to the provisions of the Family Property (Rights of Spouses) Act could be made, would be that as has been specified in **Section 13 (1) (d) of the Act, which is that – “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.”** (Emphasis mine). In respect of this particular, “trigger mechanism,” there is no time limitation period applicable, this

meaning that a Claim may be brought once this particular “trigger mechanism” period has occurred, provided that such Claim is instituted within the general statutory limitation period as would be applicable in respect of Claims of this nature, as per the provisions of the Limitation of Actions Act (Eng.) – as was received in Jamaican law upon Jamaica having achieved its independence.

[17] The Court is of the view that the Applicant must set out in very clear terms, in evidence before the Court, prior to the commencement of the First Hearing of a Fixed Date Claim Form, “the trigger mechanism”, being relied on and the basis for reliance on same. This must, it seems to me, be done prior to the First Hearing, because a Court can only properly exercise jurisdiction and powers afforded to the Court under the Civil Procedure Rules, if the Claim is properly before the Court in the first place and if the powers as sought to be exercised by this Court under the Civil Procedure Rules, are not inconsistent with the express provisions of the relevant statute, because if so, it is the statute that must prevail.

[18] With this in mind, I am not prepared to and do not conclude, that the Claimant is relying on separation of the parties, as the, “trigger mechanism”, allowing for the Claimant’s Application to be made. If she were to have been relying on that, then this would have had to have been made known to the Court evidentially, through evidence given on her behalf, in support of the Fixed Date Claim Form, which evidence, in the form of an Affidavit, would essentially take the place of Particulars of Claim. See 8: 1(1) (b) (ii) of the Civil Procedure Rules on this point. The Claimant has not at all, at any time either prior to, or subsequent to the First Hearing of the Fixed Date Claim Form made any assertion that she has separated from her husband (the Defendant). Furthermore, whilst it is true that the Defendant’s sole Affidavit in response to the Claim, suggests that there has been separation since 1994 albeit that this would only be separation in the broad typical legal definition of such term as applied in the past with respect to divorce cases) and there has been no dispute of that assertion from the Defendant, made by the Claimant in her Supplemental

Affidavit (which was filed subsequent to the Defendant's sole Affidavit having been filed). Nonetheless, I am of the view that this Court should not take cognizance of same, since the basis for the Claim, in terms of separation, if indeed that was the basis, has never been relied upon by the Claimant in any Affidavit of hers as filed in support of the Fixed Date Claim Form. Thus, that which has been set out in the Defendant's Defence, which in this case, takes the form of a sole Affidavit from the Defendant in response, is of no moment insofar as 'separation' is concerned, because the Claimant is clearly not relying upon such as being the, "trigger mechanism" enabling her to make the Claim. If she had been so relying, she would have needed to have set out the same in that which is equivalent to her Particulars of Claim, this being her Affidavit in support of Fixed Date Claim Form.

[19] Following on that conclusion, I must also, of necessity, conclude that the time limitation period as set out in Section 13 (2) of the Act, has no applicability to the matter at hand, since that time limitation period as specified in Section 13 (2) only applies wherein the, "trigger mechanism" being relied on, is one or the other of such as have been provided for in Section 13 (1) (a), (b) or (c) of the Act.

[20] This however, is clearly not the end of the matter, since it is the contention of the Claimant, as made through her counsel, that the Claimant is relying on Section 13 (1) (d) as the necessary trigger mechanism in this case. When questioned by the Court on this point, the Claimant's counsel contended that the property values insofar as both spouses were concerned, are being diminished, as the Claimant is not at all benefitting from these properties nor is being allowed to make any decisions as regards any of these properties. Thus, the value to her, of these properties, is being diminished. It is on that basis therefore, that Mr. Barnes contended that his client was entitled to and clearly is relying on Section 13 (1) (d) of the Act as the basis for instituting the Claim.

[21] **The word “property” is defined in the Act, as meaning – “any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other right or interest whether in possession or not to which the spouses or either of them is entitled.”** (Emphasis mine) From this definition, it is clear that all of the, “properties” which the Claimant seeks the Court’s determination as to her entitlement to a share of, are indeed “properties’ to which she may claim entitlement to a share of, provided that the requirements of Section 13 (1) (d) are met by her in terms of her Affidavit evidence as filed in support of Fixed Date Claim Form, since again, as aforementioned, it would be that Affidavit which would constitute her Particulars of Claim which was filed and served along with her Claim Form. Her subsequent Affidavit, being described as a ‘Supplemental Affidavit’, only was filed with the Court’s permission after the First Hearing of the Fixed Date Claim Form had been held. The exercise by this Court of its powers to permit a Supplemental Affidavit to have been filed could only properly have been exercised to my mind, if there was a valid Claim before the Court in the first place. The Claimant’s Affidavit in Support (the equivalent of her Particulars of Claim), had to disclose a valid legal basis for the institution of the Claim, insofar as either Section 13 (1) (a), (b), (c) or (d) is concerned and if it relied upon either Section 13 (1) (a), (b) or (c), then it also needed to make it clear that the applicable time limitation period in Section 13 (2) was not breached. Thus, to my mind, I am obliged to carefully consider whether there were any particulars alleged in the Claimant’s Affidavit in Support, which address the issues raised by the provisions of Section 13 (1) (d) of the Act.

[22] Based on my careful consideration of this matter, I am forced to conclude that the Claimant has not sought to rely on Section 13 (1) (d) of the Act in order to bring her claim before the court and cannot do so now, as the Claim is improperly before this Court and this Court is not able to exercise any jurisdiction in the Claimant’s favour in respect thereof.

[23] I have come to this conclusion, based on the fact that there is no evidence led in support of the Claim, to even remotely suggest to the Court, that the defendant is either endangering the property or seriously diminishing the property's value. In fact, if anything, the evidence clearly suggests the contrary. The Defendant clearly began without even a home in his name and was made redundant from his previous job at the Jamaica Telephone Company. Since then, he first acquired stocks and securities and thereafter moved to acquire properties, which clearly, by means of the buying and selling of same, has enabled him to have overall, a fairly large investment and real estate portfolio. This, to my mind, cannot amount to a diminution of value of either the real estate or the relevant stocks and securities. Clearly, over quite some period of time now, the Claimant has been obtaining no benefit from either the real estate or the investment portfolio held by the Defendant. In fact, if her evidence as contained in her Affidavit in Support of Fixed Date Claim Form were to be believed, she has never derived any benefit from such. No doubt, this is why she has instituted the present Claim against the Defendant seeking shares in the relevant "properties." If she had shares in them which were already clearly recognized in law, such as where the relevant properties were held either exclusively in her name, or perhaps in the names of the Claimant and the Defendant, or even in the names of the Claimant and other persons, then there would have been no need for the Claimant to have filed her Claim before this Court. Her Claim was filed, because that scenario is clearly fictional insofar as the matter at hand is concerned. Thus, the reference in Section 13 (1) (d) of the Act to the diminishing of the value of the property cannot, in my view, relate to a contention that there is a diminution in value whenever properties are acquired by a party to a marriage, without reference to the other marital partner and without the other marital partner having an **expressly** legally recognized share in that property. One or the other of these, or both together is/are a *sine que none* of the filing of a Claim pursuant to the provisions of Section 13 (1) (d) of the relevant Act. Therefore, a fortiori, there would have to be shown by the Claimant that the property itself is being endangered or diminished in value and also that such is being caused, as stated

in Section 13 (1) (d), either by “gross mismanagement or by willful or reckless dissipation of property or earnings.” The Claimant has not at all so alleged in her Fixed Claim Form or Affidavit in support as filed, nor even in her Supplemental Affidavit for that matter (if I were minded to take that latter Affidavit into account for present purposes, which I am not, for reasons given above).

[24] In the circumstances therefore this Court dismissed the Claim as it finds itself unable to exercise any jurisdiction in respect thereof. Costs are awarded to the Defendant, with such costs to be taxed, if not agreed upon between the parties. The Defendant’s attorneys shall prepare, file and serve the necessary Order in this regard.

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Hon. Anderson, K. (J)