



[2014]JMSC Civ. 216

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO 2013HCV 03968

BETWEEN PAULETTE DIANNA MCINTOSH CLAIMANT
AND ERIC GEORGE CAMPBELL DEFENDANT

Ms Dianne Edwards and Ms. K Lewis for the claimant / applicant

Dr Diana Harrison for the defendant

Claimant and defendant present

Heard : October 31, 2014, November 28, 2014 and December 9, 2014

**Property (Rights of Spouses) Act, Section 13(2) - Fixed Date Claim Form (FDCF)
filed outside of limitation period - Application for extension of time to bring Claim**

Application to strike out FDCF

LINDO J. (Ag.)

[1] Before me are two applications, one by the claimant, filed on July 31, 2014, seeking the court's permission to file an application under Section 13(2) of the Property (Rights of Spouses) Act (PROSA) and for an extension of time within which to make the application and the other by the defendant, filed on October 31, 2014, for an order that the FDCF filed on July 5, 2013 be struck out.

[2] For obvious reasons, the application by the claimant was heard first. It is also noted that it was the first in time.

[3] The claimant's application is supported by her the affidavit filed on July 31, 2014. The basis of the application are that she cohabited with the defendant for a period of sixteen years and that such cohabitation terminated in 2009; that more than twelve months have elapsed since the termination of cohabitation; she is unemployed and was

not in a position to retain the services of an attorney-at-law and that in all the circumstances it would be fair and just to grant the extension of time taking into account the objective of the Civil Procedure Rules enabling the court to deal with matters justly.

[4] Under Section 13(2) of the PROSA, the claim by the applicant was to be brought within 12 months of the termination of cohabitation 'or such longer period as the court may allow after hearing the applicant'. The court therefore has a discretion to extend the time within which such a claim can be made.

[5] In this case, the Fixed Date Claim Form with supporting affidavit was filed on July 5, 2013, approximately five years after the time allotted by the statute.

[6] The decision of the Court of Appeal in **Saddler v Saddler [2013] JMCA Civ 11** shows that this FDCF could not "be struck out as an abuse of process simpliciter". The matter cannot proceed however, without the court allowing the time period to be extended. The court has a wide discretion to allow persons to access the benefits provided by the PROSA, particularly since the statute is dealing with the protection of the rights of persons within families.

[7] The principles set out in the case of **Brown v Brown [2010] JMCA Civ 12**, I believe are applicable to this matter. The applicant in that case sought an order for leave to make an application for division of matrimonial property. A Fixed Date Claim Form seeking the remedies was filed before the application was made, as in the instant case.

[8] Morrison JA at paragraph 77 of the judgment stated: *'on an application under section 13(2), it seems to me, that 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 CPR of "enabling the court to deal with matters justly"'*.

[9] The length of the delay and reasons for the delay must therefore be evaluated by the court to justify the right to file the claim and therefore have to be viewed together. I am of the view that the starting point in dealing with the issue of delay is when the time for carrying out the act expired and the applicant had to seek the courts intervention in doing that act.

[10] The parties ceased cohabitation in 2009. Under the PROSA the application should have been made within twelve months of that date, “or such longer period as the court may allow after hearing the applicant”. The affidavit evidence of the applicant is that she was unemployed and not in a position to retain Counsel. She further indicated that she sought the assistance of the Legal Aid Clinic but was unable to find the legal fee after coming up with the “money for the consultation”.

[11] I accept that the claimant’s lack of finances during the period of delay is a factor to be taken into consideration in addition to the fact that she made efforts to seek legal assistance during the period. The reasons proffered for the delay in making the application are therefore plausible

[12] The affidavit of the defendant (in support of his application to strike out the FDCF which was in fact an affidavit in response to the claimant’s application for extension of time) did not provide any evidence to negate the reasons put forward by the applicant and there is no evidence to contradict the reasons put forward by the applicant except for certain assertions submitted by counsel for the defendant.

[13] The substance of the claim which the applicant is seeking permission of the court to bring is one which is to the knowledge of the defendant. She is not seeking to raise anything new or anything which he never expected to have to face at some stage. There is nothing placed before me to show that the conduct of the claimant was such as to cause the respondent to believe that she would not pursue a claim for division of the property.

[14] On the issue of prejudice to either party, the delay has not prejudiced the defendant and he has not stated that there is any likelihood of prejudice because of the applicant’s delay. The defendant continues to reside in the home while the claimant and

the child of the family have been displaced. The claimant has asserted through the submissions of her counsel that she would suffer hardship if she were unable to pursue her claim under PROSA to obtain her interest in the family home. I accept that the claimant would be the one who would be prejudiced if she is not given the opportunity to present her claim for an interest in the property.

[15] I have also considered whether (on a purely prima facie level) the applicant has a claim with a real prospect of success. The evidence is that the parties started cohabiting in 1988, their relationship was suspended, they reconciled and recommenced living as man and wife from 1994 to 2009. The respondent has not sought to contradict the applicant in relation to her evidence in the affidavit dated July 31, 2014 as it relates to her contribution to the family, neither has there been any contradiction of the evidence that the respondent is still in control of items in the household which would form part of the subject of the claim the applicant is seeking the court's permission to file.

[16] The respondent has affirmed that the claimant was engaged in activities of sale to earn an income as well as that she brought furniture and appliances into the home which was used for the benefit of the family.

[17] This delay is inordinate but I am of the view that it has been satisfactorily accounted for. Even if there was lack of a good reason, however, that in my view would not be sufficient to prevent the applicant from pursuing a claim where it is found that there is a reasonable prospect of success on the claim she is seeking to put forward. To deny the application would mean that the issues that need to be addressed would be left undetermined.

[18] The exercise of the power to extend time is discretionary. Having carefully considered the circumstances under which permission may be granted to extend the time, I am satisfied that the reasons stated are plausible. The delay has been inordinate but I accept the reasons given especially in view of the fact that it is a family matter. This court cannot at this stage consider the issue of the likely apportionment of the property as there are questions of fact and of law to be determined and the nature and purpose of the application before me is not such that I should consider what would be

the substantive claim, but to consider whether the applicant has a prima facie case which she should be allowed to put forward for the court's determination.

[19] I believe it is only fair and just for a potential claimant who has a claim with a real prospect of success not to be shut out from the courts to which she has turned for redress. Equally, however, it is fair and just for a potential defendant at some point to be able to rest with full knowledge that he will not be asked to answer to a claim which due to the passage of time he may not be able to adequately respond to. The circumstances of this case are not such that the defendant would think that he would not be required to answer due to the passage of time.

[20] I have had regard to the submissions of both Counsel, the authorities cited by them and to factors such as the length of the delay, the reason(s) for the delay and the issue of prejudice to either party if the application is granted or refused. In balancing justice, I have also had regard to the overriding objective of the Civil Procedure Rules while applying the provisions of the enabling statute and I am satisfied that this is a fit case to exercise my discretion and allow the claimant to file a claim under Section 13(2) of PROSA.

[21] The claimant's application is therefore granted. The time within which the applicant is to file the Fixed Date Claim Form under Section 13(2) of PROSA is extended to July 5, 2013. The FDCF filed on July 5, 2013 and all documents filed in support thereof are to stand.

[22] The defendant is entitled to the costs of the application, same to be agreed or taxed.