



[2022] JMSC Civ 42

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN THE CIVIL DIVISION**

**CLAIM NO. SU2020CV03752**

<b>BETWEEN</b>	<b>ROY DASSADO</b>	<b>APPLICANT/CLAIMANT</b>
<b>AND</b>	<b>JENNIFER BROWN</b>	<b>RESPONDENT/DEFENDANT</b>

**IN CHAMBERS**

**Mr. Nicholas Jarrett attorney-at-law instructed by McKenzie Howell & Company, for the claimant.**

**Mr. Jermaine Campbell instructed by Williams and Campbell for the defendant.**

**January 17<sup>th</sup> 2022 and delivered March 8<sup>th</sup> 2022**

**Property Rights of Spouses Act (PROSA) – Common law property - Application to make claim for division of family home - Delay – Prejudice – Whether the overriding objective can be preserved in the granting or non-granting of the extension of time – Limitation of Actions Act – Adverse possession.**

**CARNEGIE, MASTER (AG.)**

**INTRODUCTION**

**[1]** The parties to the claim began a common law union in 1989, which irretrievably broke down and ended in 2002. In 1997, during the common law union, the parties purchased property located at 2 Vilma Avenue, Kingston 20, Hughenden in the

parish of Saint Andrew and registered at Volume 1054 and Folio 34, in the Registered Book of Titles (the Property), which they currently own as joint tenants.

**[2]** An application was made by the claimant under the Property Rights of Spouses Act (PROSA), by way of fixed date claim filed on the 5<sup>th</sup> day of October, 2020. An affidavit in support filed on the same day, outlines the basis of his claim to an interest in the Property.

**[3]** The claimant seeks the following orders of the court –

1. A declaration that the property situated at 2 Vilma Avenue, Kingston 20 in the parish of St. Andrew comprised in the duplicate certificate of title registered at Volume and Folio 34 in the Register Book of Title was the family home and shared between the claimant applicant and the defendant;
2. A declaration that the claimant is entitled to fifty percent to 50% share and interest in the property situated at 2 Vilma Avenue Kingston 20 Hughenden in the Parish of St. Andrew comprised in the duplicate certificate of title registered at Volume 1054 and Folio 34 of the Register Book of Title which was the family home;
3. An order that the property be valued within 30 days by a registered appraiser appointed by the Supreme Court. The cost of the appraiser is to be borne equally by the parties.

**[4]** The attorney for the defendant raised a preliminary point, which was that there was an irregularity in the application for the division of property, because it was made outside of the 12 months period prescribed under PROSA. It was submitted that an application should be made to seek the court's permission to file the claim as the time for doing so exceeded the maximum 12 months prescribed under PROSA. Counsel for the claimant in response filed an application for an extension of time within which to bring a claim under section 13 of PROSA, for an interest in the Property (the Application).

- [5] I was asked to determine on the application pursuant to section 13(2) whether time should be extended for making an application for division of property, where the application was made eighteen years after the parties separated.
- [6] The attorney-at-law for the claimant filed the application for extension of time pursuant to section 13 of the Property (Rights of Spouses) Act on the following grounds:
1. The parties were previously in a common-law relationship;
  2. The parties separated in or about the year 2002;
  3. The property the subject matter of the instant claim was acquired during the course of the common-law union and was the family home of the parties.
  4. The overriding objective should be considered in the granting or refusal of the extension of time.
- [7] Counsel for each party was asked to make written submissions and the matter was adjourned to January 17th 2022. In their submissions counsel for the parties relied on section 13 of the PROSA as well as several authorities on the point.

### **SUBMISSIONS BY THE PARTIES**

- [8] Attorneys-at-law for both parties found unison on the applicable case law in respect of the principles for an extension of time: prima facie case, delay, prejudice and the overriding objective for example: Sharon Smith V Vincent Service [2013 JMSC Civ 78; Calvern Gavin v Laretta Gavin [2017] JMSC Civ 119; Derrick Wooburn Gentles v Kenneth Carr [2019] JMCA Civ 31; Natalie Tenn v Wayne Wiltshire [2020] JMSC Civ 246 and in reliance thereof made submissions in respect of:
1. Whether the court should grant the extension of time under section 13 of PROSA

2. Whether the Respondent would be prejudiced in the grant the extension of time under section 13 of PROSA.
3. Whether the overriding objective can be preserved in the grant or refusal of the extension of time under section 13 of PROSA.

**[9]** After the common law union ended in 2002, the claimant averred that he was physically barred and made attempts to re-enter the family home in 2019 and 2020, some 17 to 18 years later. He did so after being evicted from a house he had rented.

**[10]** The claimant conceded that he delayed in making the application, because he did not know about the 12 months prescription under PROSA, nor did it enter his mind that he would have to apply for division of something that he is part owner. The claimant did not think that the Court's intervention was necessary to realize his interest in the family home, and thought that his interest could be realised or determined without the intervention of the court. The claimant further avers that his former spouse was aware he was not forfeiting his share.

**[11]** The defendant in response to the application, avers that the delay in filing the fixed date claim form is approximately 18 years and would be considered to be extremely inordinate delay. She denies that the inordinate delay was due to her actions in 2003, of barring the applicant from entering the property. The defendant says that what precipitated the claimant seeking the court's intervention, was a cease and desist letter regarding the Property. She avers that the claimant's interest in the Property would have been defeated by the effluxion of time under the Limitations of Actions Act.

**[12]** The defendant refutes the information asserted in the claimant's affidavit pointing to several instances, which suggests the claimant's assertions are superfluous, contrived and lacks credibility.

## ANALYSIS

[13] The PROSA seeks to extend protection to both men and women in common law unions who would otherwise be left without an interest in the premises they occupied as a family. Section 13(1)(a) provides that a spouse shall be entitled to apply for division of property at the termination of the cohabitation. However, on the evidence before me the claimant and the defendant were not only in a common law union, but had acquired the Property jointly. The parties agree that the Property, which was acquired during their common law union and for which they are registered as joint tenants, was in fact referred to as the family home. The circumstances would therefore bring the application by the claimant within the provisions of PROSA. Therefore, at this interlocutory stage what is to be determined is whether the court should allow the claim to continue.

[14] Section 13 (2) does not set out the criteria for making a determination whether to grant an extension of time except to say that an application for extension of time shall be made within twelve months or such longer time as allowed by the court. The decision of *Delkie Allen v Trevor Mesquita*, [2011] JCMA Civ 36 confirms it is one for the exercise of judicial discretion.

[15] Harris JA in *Allen v Mesquita* stated at paragraph 26:

*A court in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating.*

[16] In the case of ***Smith v Service*** [2013] JMSC Civ 78 paragraphs 10 and 13, Sykes, J as he then was stated:

*... in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court reasons to be evaluated by court to justify his right to do so ...*

*...unless there is good reason not to do so. The court's starting point then should be in favour of the defence when it is raised and that benefit which accrued to the defendant should only be taken away on good reason being shown.*

- [17] Guidance as to how one makes a determination as to what constitutes good reasons is set out in ***Brown v Brown [2010] JMCA Civ 12*** Morrison JA said:

*On the application under section 13(2), it seems to me, that all 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, prejudice and overriding objective of enabling the court to deal with matters justly (rule 1.1(1)).*

#### **PRIMA FACIE CASE**

- [18] On the evidence it is beyond clear that in 2002, the claimant had a prima facie claim to an interest and very likely have been able to establish an equal share in the Property which he asserts was the family home.

- [19] Reliance is placed on the decision of Sykes, J in the case of ***Westdeutsche Landesbank Girozentrale v Islington Borough Council 1996 AC 669, 70*** per Lord Brown Wilkinson in determining whether the claimant had a prima facie case. The learned judge found that the claimant has a prima facie case under the normal principles of equity and the limitation defence under PROSA would not prevent a claim in equity.

- [20] At paragraph 24 of the judgment Sykes J stated:

*In this case, there is no doubt that Miss Smith has a prima facie case to an interest in the property. Her name is on the title and at present there is nothing to suggest that her name was placed on the title for any reason other than to give her an interest.*

## DELAY

- [21] The case law on the point of extension of time under PROSA suggests that 18 years delay in making the application to claim an interest in family home is inordinate. In ***Smith v Service; Tenn v Wiltshire*** the court found that 14 years was inordinately long. In the decisions of ***Alcron Development Limited v Port Authority of Jamaica*** [2014] JMCA App 4; and ***Gavin v Gavin*** [2017] JMSC Civ 119, a delay of 9 years was held to be inordinately long in each case.
- [22] However, the decision of ***Gavin v Gavin*** recognizes that delay in and of itself, is not a bar to a claimant making an application under PROSA. In that case it was also held that a claim to a legal or equitable interest may be allowed notwithstanding an inordinate delay, where there is a reasonable explanation for the delay.
- [23] In the decisions of ***Smith v Service*** and the decision of ***Natalie Tenn v. Wayne Anthony Wiltshire 2020 JMSC CIV 246***, the court in each case found the equity in the property arose from the fact that the claimant was a registered proprietor. In ***Smith v Service***, notwithstanding the delay of 15 years, it was determined that there was a case to which the respondent should answer.
- [24] After 18 years the names of the claimant and the defendant remain on the title, which was acquired by both parties. At the termination of the union both the claimant and the defendant each had a half share in the family home. I am of the view that given the circumstances, the delay in and of itself in this context, is not a bar to making the application for an extension of time under section 13(1) of PROSA.

## PREJUDICE

- [25] Consideration is to be given as to the likely prejudice in allowing the extension of time. It is submitted by counsel for the defendant that she would suffer prejudice as the claimant's right has been exhausted by virtue of the Limitation of Actions

Act. It was further submitted that granting an extension of time would prevent the claimant's interest being defeated by a possessory title.

[26] ***Natalie Tenn v Wayne Wiltshire 2020 JMSC Civ. 246***, concerned an application to extend time under PROSA. In this case the application was in respect of the matrimonial property. It was submitted on behalf of the respondent, that to allow the application would automatically deny the claim he wished to make and that he had adversely possessed any interest the applicant had in the property. Barnaby J (Ag), as she then was held in that case that the Limitations of Action Act provided a defence which the respondent could assert in answer.

[27] Barnaby J (Ag) at paragraph 21, in her analysis stated:

*Furthermore, I do not believe that a claim for adverse possessory title through adverse possession would be lost to a Respondent on the claim for division of the matrimonial home under PROSA.*

[28] Barnaby J (Ag) at paragraph 5 in her conclusion stated:

*... there would be no significant prejudice to the Respondent if the claim is allowed to be made at this time, thereby enabling the court to deal justly with the disputed matters, including any issue as to possessory acquisition of the Applicant's share in the Property since the dissolution of marriage.*

[29] I adopt the statement of law by Barnaby, J to say that in the circumstances of this case, I do not agree that the defendant will suffer prejudice if I allow the extension of time. The defendant can at the appropriate stage invoke a defence under the Limitation of Actions Act and claim a possessory title. The court will then determine the legal and factual issues.

[30] At this stage what is to be determined is whether there is prima facie basis to the claim or if there is merit in the claim. I am not required to make any findings of fact one way or the other and I have not done so.

## **OVERRIDING OBJECTIVE IN DEALING WITH CASES JUSTLY**

**[31]** To borrow the words of Lindo, J in **Gavin v Gavin paragraph 17**

*It is well settled that where issues of limitation arise, and these are debatable, it is inappropriate or undesirable to attempt to decide them on interlocutory applications, except in the clearest of cases.*

In determining the parties' entitlement under the PROSA, it is for the trial judge after examining the basis of the claim to determine the respective interests of the parties. Therefore, in considering the overriding objective in dealing with cases justly, I refer to sections 6 and 7 of PROSA, which combined operates to allow for a claim in interest of the Property at the end of cohabitation and for the court to determine the such interest in such an event. It must be stated that the factors to be taken into account in determining a party's interest listed under subsection 7(1) are not intended to be exhaustive.

**[32]** The claimant and the defendant say they have paid the mortgage and upkeep of the family home. However, neither party has brought evidence in support of such assertions.

**[33]** The defendant in these circumstances therefore has a case to respond to by virtue of the legal and equitable interest alleged and the relevant statutory provisions. At this stage, it is yet to be determined whether the claimant did indeed intend to abandon his interest.

## **ORDERS**

**[34]** I Therefore in all the circumstances outlined above make the following orders:

1. The claimant is granted an extension of time to make an application under PROSA.
2. The Fixed Date Claim Form and affidavit in support filed are to stand as filed.

3. Affidavits filed on behalf of the defendant are to stand as filed
4. Trial is set for November 28, 29 and 30, 2022 before a Judge in chambers
5. Respondent is to file affidavit in response on or before July 29<sup>th</sup> 2022
6. Claimant is permitted file a response if necessary on or before September 2<sup>nd</sup> 2022
7. No further affidavit to be filed after September 30<sup>th</sup> 2022
8. Core bundle and index to filed on or before November 11<sup>th</sup> 2022
9. Costs to be cost in the claim
10. Applicant/claimant's attorney to prepare file and serve orders herein.