

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2006HCV01526

BETWEEN	FITZGERALD HOILETTE	CLAIMANT
AND	VALDA HOILETTE	DEFENDANT
AND	DAVION HOILETTE	1 <sup>ST</sup> INTERESTED PARTY
AND	SIMEON DAVIS	2 <sup>ND</sup> INTERESTED PARTY

IN CHAMBERS

Ms Catherine Minto instructed by Nunes Scholfield DeLeon and Company for the claimant

Mr. Gordon Steer instructed by Chambers, Bunny and Steer for the defendant

Ms. Ana-Lisa Chapman instructed by Gayle Nelson and Company for the interested parties

Heard 27 and 28, October and November 4, 2011

### **ORAL JUDGMENT**

#### **Fraser J.**

1. The Fixed Date Claim Form (FDCF) in this matter was filed on April 26, 2006.
2. On the 10<sup>th</sup> day of July 2007 an order was made by P. Williams J. granting permission to amend that FDCF to include a claim under the Property (Rights of Spouses Act) 2004. The order went on to state that, "The Amended FDCF filed herein on June 20, 2007 stands as a valid Claim Form."
3. On 7<sup>th</sup> November 2007 a consent order was made by Thompson-James J. in respect of one property covered by the FDCF.
4. On the 24<sup>th</sup> January 2011 an application was made by the defendant to have that Consent Order varied. The application was refused by Simmons J. (Ag.) on August 24, 2011.
5. The outstanding matters on the FDCF were set for Trial in Chambers on October 27 and 28, 2011. At the commencement of the matter on October 27, 2011,

counsel for the defendant raised a preliminary point submitting that the FDCF on which the action rests was invalid in light of the Court of Appeal authority of ***Delkie Allen v Trevor Mesquita*** SCCA 8/2011 (October 7, 2011). This authority he submitted held that where a FDCF was filed outside the time prescribed by the Property (Rights of Spouses) Act (PRSA), until the court has granted leave to an applicant to bring his claim, no valid claim can be brought, and as a matter of law, the validity of a claim could not be corrected by a subsequent order of the court. He maintained that before the matter could proceed, counsel for the claimant would have to seek leave to extend time and obtain the grant of an extension of time to file the claim.

6. Counsel for the claimant resisted that submission contending that what was held by ***Allen*** was misread by counsel for the defendant. She submitted that what was outlined by counsel for the defendant as held by the court was the submission of counsel for the appellant and it was not clear in the judgment that it was adopted by the court. She maintained that the true ratio of the case was that the order made by the learned trial judge in ***Allen*** was bad, as no application for leave was made and no reasons placed before the Court justifying the extension of time. Therefore she maintained the case was not holding that the validity of a claim form could not be corrected by a subsequent order.
7. Counsel for the claimant also submitted that in any event this court does not have the jurisdiction to go behind an order of a judge of coterminous jurisdiction; therefore the matter should proceed there being on the face of it a valid order of P. Williams J. permitting the claim form to stand.
8. Further counsel for the claimant submitted that this preliminary point was being raised against a background of there having been no challenge for four years to the order of P. Williams J. All parties had therefore proceeded to this point holding the view that the claim form was valid. This point was highlighted by the fact that the defendant has made an application for maintenance and for a declaration that she has an interest in two buses she alleges are owned by the claimant. Two sons of the parties (Davion Hoilette and Simeon Davis (by

informal adoption on the account of the defendant)), have also intervened claiming the real property that remains in dispute belongs to them.

9. On the facts of **Allen** the claim form was filed out of time on 12<sup>th</sup> June 2009 and the application for that claim form to stand was filed on 14<sup>th</sup> July 2009. On 3<sup>rd</sup> November 2009 it was ordered that “The issue of whether the Claimant in claim No. 2009HCV03221 is entitled to an extension of time within which to bring his claim pursuant to the [PRSA] is to be dealt with as a preliminary issue at trial.”
10. On 8<sup>th</sup> and 9<sup>th</sup> December 2010 Mangatal J. heard arguments on the preliminary point and on 18<sup>th</sup> January 2011 ordered that the FDCF filed on the 22<sup>nd</sup> June 2009, which was filed outside of the time period set out under section 13 of the PRSA be permitted to stand.
11. Having considered the submissions and the case of **Allen** I find as follows:
12. In **Allen**, the **preliminary point** concerned a challenge to the validity of the claim form ab initio.
13. The **merits of the appeal** concerned a challenge to the exercise of discretion by the learned trial judge in purporting to hear and grant an application for an extension of time for the filing of the claim under the PRSA. In effect the appellant alleged that the discretion was wrongly exercised in light of (i) the insufficient evidential basis advanced by the claimant in support of the application and (ii) the inadequate regard given by the learned trial judge to the accrued right of the defendant to a limitation of actions defence.
14. On my reading of **Allen** it held as follows:
  - a. On the **preliminary point**:
    - i. The validity of a claim filed out of time under the PRSA cannot be corrected by a subsequent order of the court;
    - ii. 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 the court to justify his right to do so. Such reasons should explain the delay in filing the claim. The grant of leave is a precursor to the grant or refusal of an extension of time

- b. On the **merits of the appeal**:
- i. The absence of good reason for delay is not in itself sufficient to justify a refusal of an application to extend time, however some reason must be advanced. No reasons having been advanced, it must lead to the inevitable conclusion that there was no foundation upon which a finding in favour of the grant of an extension of time could have been anchored;
  - ii. The grant of the application by the learned trial judge would have caused the applicant to suffer substantial prejudice;
  - iii. The claimant had not showed any reason why the defendant should be deprived of the accrual of the right to a limitation of actions defence. In the circumstances to permit the action to proceed would amount to a grave injustice;
  - iv. In the circumstances of the case it was unnecessary to consider the prospects of the respondents case.
15. In the instant case the amended claim form was filed on June 20, 2007 and the permission for it to stand as a valid claim form was granted on the 10<sup>th</sup> day of July 2007.
16. In light of my finding that the Court of Appeal in ***Allen*** held on the preliminary point that the validity of a claim filed out of time under the PRSA cannot be corrected by a subsequent order of the court the question is: how should this court treat with the fact that P. Williams J. made an order on 10<sup>th</sup> July 2007 for the claim, already filed out of time, to stand?
17. Assistance on this point is derived from the case of ***Annette Brown v Orpheil Brown*** SCCA 12/2009 (26 March 2010). In ***Brown's*** case the claim form under the PRSA was filed in January 2007. In the same month subsequent to the filing, an application was made for leave for the Application to be made out of time. On the 28<sup>th</sup> June 2007 leave was granted to the appellant to present her application out of time. When the matter came on for trial counsel for the respondent raised

the issue of whether or not the court had jurisdiction to hear the matter. Marsh J. answered in the negative holding that the PRSA was not retrospective and did not apply, the marriage between the parties having been dissolved prior to the coming into force of the PRSA. This ruling was subsequently overturned on appeal. However the value of the ruling made by Marsh J. to the determination of this matter is seen at paragraph 14 of the report of the appeal in the judgment of Cooke J.A.

He there stated:

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 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 jurisdiction.

18. In light of the reasoning in **Brown**, as the question of jurisdiction would not have been addressed at the hearing before P. Williams J., and even if it had, it would not have been addressed on the basis that has now arisen in light of the Judgment in **Allen**, this court is properly seized of the capacity to rule on the jurisdictional point raised by counsel for the defendant.
19. The effect of the judgment of **Allen** is that the FDCF having been amended out of time to include a claim under the PRSA, that amendment, without the prior grant of extension of time so to do, was invalid. The effect also is that the invalid inclusion of a claim under the PRSA in the Amended FDCF filed on June 20, 2007, could not have been corrected by the subsequent order on July 10, 2007 that the Amended Claim Form should stand as a valid Claim Form. Hence there is currently no valid claim under the PRSA before the court on which to proceed.

20. The claimant is however free to now make an application for leave to extend time and for the grant of an extension of time to file the claim under the PRSA; bearing in mind the factors which the case of **Allen** held should be addressed in such an application.
21. After the ruling of the court on the jurisdictional point, counsel for the claimant submitted that the matter could proceed under common law principles by virtue of section 48 of the Judicature (Supreme) Court Act and the decision of Straw J. in **Monica Bernard v Michael Bernard** HCV 01865/2006 (April 2, 2008). Counsel for the defendant opposed the submission on a variety of legal bases, including that section 4 of the PRSA had replaced common law and equitable principles in matters of this nature. That point was taken in **Bernard's** case but it did not there find favour with Straw J. Counsel for the defendant and for the interested parties also opposed the submission on some factual grounds peculiar to this claim. There was inadequate opportunity for these submissions to be fully ventilated. I therefore make no finding in relation thereto. Counsel for all parties may therefore renew their submissions on this issue when the matter next comes on for hearing.
22. In the event leave is desired, leave to appeal granted.