



[2025] JMSC Civ 63

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

**FAMILY DIVISION**

**CLAIM NO. SU2023FD01478**

**IN THE MATTER OF** The Property (Rights of Spouses)  
Act

**AND**

**IN THE MATTER OF** the property known as Lot  
numbered Two Hundred and Seven, Tripoli Estate, in  
the parish of Saint Ann, registered at Volume 289 Folio  
84

**BETWEEN**

**CRAIG MARTIN**

**CLAIMANT**

**AND**

**MICHELLE CLARKE**  
(formerly Michelle Clarke Martin)

**1<sup>ST</sup> DEFENDANT**

**AND**

**MARIA LOBBAN**

**2<sup>ND</sup> DEFENDANT**

**IN CHAMBERS VIA VIDEOCONFERENCE**

**Ms. Camaleta Davidson instructed by CND Law Office appeared for the Claimant**

**Ms. Shanique Scott instructed by McLeod Scott Law appeared for the 1<sup>st</sup> Defendant**

**Ms. Tamoi Reid instructed by Karene N. Stanley & Co appeared for the 2<sup>nd</sup> Defendant**

**Heard: 19<sup>th</sup> and 20<sup>th</sup> March; 9<sup>th</sup> and 30<sup>th</sup> May 2025**

**Civil Procedure – Application for Extension of Time to Bring Claim – Delay –  
Reasons for the Delay – Prejudice – Is the Claim meritorious – Res Judicata – Is  
the Claim an abuse of process – Striking Out – Application to Strike Out Claimant’s  
Statement of Case Against the 2<sup>nd</sup> Defendant – Applicable Limitation Period –  
Property (Rights of Spouses) Act sections 13, 21, 22 and 23 – Civil Procedure Rules,  
2002 as amended, Rule 26.3**

**CORAM: A. MARTIN-SWABY J (ag)**

## INTRODUCTION

- [1] Section 13 of the **Property (Rights of Spouses) Act (“PROSA”)** provides that an application for distribution of property under this legislation should be brought within twelve (12) months of the termination of cohabitation or grant of nullity or dissolution of marriage. The Claimant, Mr. Craig Martin, states that he was not aware of this.
- [2] The Claimant filed a Fixed Date Claim Form (“FDCF”) on the 20th day of April 2023 against his former wife, Ms. Michelle Clarke, the 1st Defendant, seeking orders for the division of a matrimonial property approximately seventeen (17) years after the marriage between himself and the 1<sup>st</sup> Defendant was dissolved. Amongst the orders sought within the FDCF is an order for the extension of time to apply for the division of property under **PROSA**.
- [3] The property, which is the subject of this application, was acquired in the year 1992 by the Claimant for Four Hundred and Fifty Thousand Jamaican Dollars (JM \$450,000.00). However, it was solely registered in the name of the 1st Defendant. This property is located at 207 Runaway Heights, Runaway Bay in the parish of Saint Ann. A feature of this case is that the 1<sup>st</sup> Defendant sold the property to the 2<sup>nd</sup> Defendant, Maria Lobban, some ten (10) years prior to the FDCF being filed.
- [4] The sale, having taken place in the year 2013, the Claimant now seeks orders that the 2<sup>nd</sup> Defendant (in whose name the property is now registered) was not a bona fide purchaser for value but rather a “straw buyer”; a conveyance effected to defeat his interest in the property. He asserts that his estimation is that the property was valued at approximately Thirty Million Jamaican Dollars (JM \$30,000,000.00) whereas it was sold for Nine Million Three Hundred Thousand Jamaican Dollars (JM \$9,300,000.00). Unfortunately, there is no evidentiary material placed before this Court to support this estimated value.
- [5] The 2<sup>nd</sup> Defendant filed a Notice of Application to strike out statement of case of the Claimant against her. She is asking this Court to strike out this claim as against

her on the basis that she is a bona fide purchaser for value without notice and further that this claim would be statute barred as she is a third party and the sale was concluded ten (10) years prior to the filing of this Claim.

[6] Additionally, on the 18<sup>th</sup> day of March, 2025, the Claimant filed a Notice of application for Court orders seeking the disclosure of documents from Valerie Levy and Associates surrounding the valuation of the property at the time of sale as well as evidentiary material from Coldwell Banker regarding the listing and sale of the said property. Such disclosure is being sought to support the claim that the 2<sup>nd</sup> Defendant was in fact a straw buyer.

[7] Consequent on the above, the Court heard three (3) Applications on the 19<sup>th</sup> and 20<sup>th</sup> day of March, 2025 as well as a preliminary point raised by the 1<sup>st</sup> Defendant regarding the jurisdiction of the Court. The applications are as follows:

- i. An application for an extension of time to bring a claim under **PROSA** brought by the Claimant ("Application 1").
- ii. An application by the 2<sup>nd</sup> Defendant to Strike out Statement of Case ("Application 2").
- iii. A Notice of Application for Permission to Issue Witness Summons filed by the Claimant seeking orders for the disclosure of information filed by the Claimant ("Application 3").

## **BACKGROUND**

[8] Before turning to the substantive merits of the Applications now before this Court, it is necessary to first outline the factual background against which the Applications were brought.

[9] The Claimant and the 1<sup>st</sup> Defendant were married for 26 years from the 14<sup>th</sup> day of July, 1981 to the 21<sup>st</sup> day of September 2007. In or around March 1992, the Claimant entered into an agreement for sale with Tripoli Development Company

Limited for the purchase of a parcel of land being part of Tripoli Estate in the parish of Saint Ann, more particularly described and registered at Volume 1277 Folio 138 of the Register Book of Titles. The agreed consideration for this purchase was Four Hundred and Fifty Thousand Jamaican Dollars (JM \$450,000.00). This property, which was located at 207 Runaway Heights, Runaway Bay in the parish of Saint Ann was subsequently transferred and registered solely in the name of the 1<sup>st</sup> Defendant, who was the Claimant's wife at the time. The Claimant and the 1<sup>st</sup> Defendant subsequently separated on or about the 27<sup>th</sup> day of April 2005.

- [10] The 1<sup>st</sup> Defendant filed a Petition for Legal Separation in the Courts of Los Angeles. By agreement between the Parties, a Consent Order was made by the Los Angeles Court. This agreement included the following:

*“...there should be a sale of the Jamaican property located at 207 Runaway Heights, Runaway Bay, Saint Ann. The funds are to be used to discharge the community debt owed to Redwood mortgage investors. Any proceeds not used for this purpose shall be placed in a joint trust account to be distributed only by agreement between the parties or further order of the Court.”*

- [11] On or around the 13<sup>th</sup> day of November 2013, the 1<sup>st</sup> Defendant sold the property to the 2<sup>nd</sup> Defendant for a consideration of Nine Million Three Hundred Thousand Jamaican Dollars (JM \$9,300,000.00) as per a copy of the instrument of transfer which was exhibited to the Affidavit of the Claimant.
- [12] On the 23<sup>rd</sup> day of August 2018, the Claimant filed a Claim in the Superior Court of the State of California, County of Almeida “Unlimited Jurisdiction” against the 1<sup>st</sup> Defendant alleging that the Defendant disobeyed a Court Order by selling his separate property in Jamaica without conferring with him and collecting the proceeds of the sale that she later used to purchase real property in Oakland, California. He alleged fraud as well as claims for declaratory relief, accounting and for constructive trust.
- [13] The Court found (as per its tentative ruling delivered on the 29<sup>th</sup> day of January 2019 which is exhibited to the Affidavit of the 1<sup>st</sup> Defendant) that the 1<sup>st</sup> Defendant

had met her burden of establishing that the Claimant is unable to state a valid claim against her because the allegations relate to proceedings that are currently before the Family Law Division in the Los Angeles County Superior Court in the case of **Martin v Martin** (Case No. BD425347).

- [14] On the 22<sup>nd</sup> day of April 2021, the Superior Court of the State of California Court in Case # BD425347 gave judgment in respect of how the proceeds of the sale of the property should be applied. It pronounced that in a previous Court Order, by agreement, the Court ordered the 1<sup>st</sup> Defendant to sell the Jamaican property to pay on a community debt which was reduced to a judgment by Redwood Mortgage Investors and that if anything was left over, it should be divided evenly between the parties.
- [15] Regarding the debt to Redwood Mortgage Investors, the Court ruled that the 1<sup>st</sup> Defendant paid to Redwood the sum of Four Hundred and Eight Four Thousand One Hundred and Ninety-Five United States Dollars (US \$484,195.00). Of this, Seventy-Five Thousand Eight Hundred and Sixty-Seven United States Dollars and Fifty-Four Cents (US \$75,867.54) was paid from the sale of the Jamaican property. This left a balance of Four Hundred and Eight Thousand Three Hundred and Twenty-Seven United States Dollars and Forty-Six Cents (US \$408,327.46) on the community debt.
- [16] The Court found that the Claimant also paid Two Thousand and Ninety-Six United States Dollars and Seventy-One Cents (US \$2,096.71) towards this community debt and the 1<sup>st</sup> Defendant paid the remaining sum of Four Hundred and Five Thousand, Four Hundred and Twenty United States Dollars and Seventy-Five Cents (US \$405,420.75) towards extinguishing this debt. As a result, the Court found that the Claimant owes the 1<sup>st</sup> Defendant Two Hundred and One Thousand Two Hundred and Fifty-Seven United States Dollars and Two Cents (US \$201,257.02) with an additional sum of Two Thousand Nine Hundred and Two United States Dollars and Fifty Cents (US \$2,902.50) which remained to be satisfied on the community debt.

- [17] In addition to the above, the Claimant also advanced litigation against the 2<sup>nd</sup> Defendant in the Courts of Los Angeles. On or about the 27<sup>th</sup> day of November 2019, the Claimant filed an action in the Courts of Los Angeles against the 2<sup>nd</sup> Defendant, Maria Lobban, alleging among other things that “*Maria Lobban did not pay adequate consideration and is not a bona fide purchaser for value and the transfer was made to defraud Plaintiff of Plaintiff’s ownership in the above described property. Plaintiff alleges that MARIA LOBBAN is a straw buyer and is for MICHELLE CLARKE.*” The Claimant obtained default judgment against the 2<sup>nd</sup> Defendant in this claim.
- [18] On or about the 16<sup>th</sup> day of May 2022, a further motion for summary judgment was filed to dismiss the 2<sup>nd</sup> Defendant’s claim that the purchase of the property was a bona fide purchase. The motion for summary judgment was granted on the 26<sup>th</sup> day of January 2023.
- [19] The Claimant states that it is the challenge of enforcing this judgment against the 2<sup>nd</sup> Defendant in Jamaica which has resulted in his bringing this claim under **PROSA**.

## THE APPLICATIONS

### Application 1

- [20] Application 1 is concerned with an Order from the Court to extend the time to bring a claim to divide property pursuant to **PROSA** and is listed as Order 6 in the FDCF filed on the 20<sup>th</sup> day of April 2023. The Orders sought in the FDCF are as follows:
1. *A declaration that the property known as Lot numbered TWO HUNDRED AND SEVEN, TRIPOLI ESTATE, in the Parish of SAINT ANN, registered at volume 1277 Folio 138 ( with civic address at Lot No. 207 Runaway Heights, Tripoli Estate, Saint Ann) ( hereinafter referred to as the “property”) was acquired as common property during the course of the marriage between the Claimant and the 1<sup>st</sup> Defendant and the Claimant is entitled to*

*a 50% interest in or right to the said property which had been under the control of the 1st Defendant;*

- 2. That the 2<sup>nd</sup> Defendant, Maria Lobban was not a bona fide purchaser for value without notice and the disposition of the property to the said Maria Lobban be set aside and the Registrar of Titles be directed to register the property in the name of the Claimant;*
- 3. Alternatively, the current market value of the property is to be determined by a valuator selected by the Registrar of the Supreme Court and the 2<sup>nd</sup> Defendant shall pay to the Claimant's Attorney-at-Law a sum not exceeding the difference between the value of the consideration at the time of disposition (if any) and the current value of the property;*
- 4. Additionally, the 1<sup>st</sup> Defendant shall pay the Claimant a sum of money representing 50% of the consideration received from the 2<sup>nd</sup> Defendant at the time of disposition of the property;*
- 5. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants or any other person in possession or control of the property shall allow inspection by a valuator upon being provided with at least (3) days written notice;*
- 6. The time for filing this application be extended to the date of filing herein;***
- 7. Costs and Attorney's Cost;*
- 8. Such other Orders as this Honourable Court deems necessary or desirable.*

## **Application 2**

**[21]** Application 2 is brought by the 2<sup>nd</sup> Defendant who seeks to have the Claimant's claim against her struck out. The following orders are sought:

1. *Judgment for the Defendants on the basis that in the absence of leave of this Honourable Court the Court has no jurisdiction to hear the Claim;*
2. *The Fixed Date Claim Form filed on April 20, 2023 be struck out as disclosing no reasonable grounds for being brought against the 2<sup>nd</sup> Defendant;*
3. *Cost of this application and costs of the Claim to the 2<sup>nd</sup> Defendant to be taxed if not agreed;*
4. *That the Registrar of Titles is to discharge the caveat on the title of property known as Lot numbered TWO HUNDRED AND SEVEN, TRIPOLI ESTATE, in the Parish of SAINT ANN, registered at VOLUME 289 FOLIO 84 lodged by the Claimant.*

### **Application 3**

**[22]** Application 3 is brought by the Claimant who seeks the following orders;

1. *Permission is granted to issue a Witness Summons for David Levy, Real Estate Appraiser, Valerie Levy and Associates, 134 Constant Spring Road, Kingston 8, St. Andrew to attend court to give evidence and to produce documents in relation to the valuation conducted and the report provided in or about 2009 regarding Lot 207 Tripoli Estate, Saint Ann registered at volume 1277 Folio 138.*
2. *Permission is granted to issue a Witness Summons for Dawn Ruddock, Realtor, Coldwell Banker Jamaica Realty, 9-11 Barbican Road, Kingston 8, St. Andrew to attend court to give evidence and to produce documents in relation to the listing and sale of Lot 207 Tripoli Estate, Saint Ann registered at volume 1277 folio 138 through the Multiple Listing Service platform as MLS #6572 between 2010 and 2013.*



## SUBMISSIONS

[23] I would like to thank Counsel for their oral and written submissions in this matter. I have reduced these here and no disrespect is intended in so doing.

### The Claimant's Submissions

#### Re Application 1:

[24] Counsel argued that in respect of the application for an extension of time to bring the claim under the **PROSA**, the issues to be addressed are: (i) the length of delay and (ii) the reasons for delay. Counsel acknowledged that by virtue of section 13(2) of **PROSA**, the application for a division of property should be made within twelve (12) months of separation or dissolution of the marriage.

[25] Counsel argued that the Court of Appeal decision of **Angella Bryant- Saddler v Samuel Oliver Saddler and Fitzgerald Hoilette v Valda Hoilette and Others** [2013] JMCA Civ 11 ("**Saddler**"), has settled the procedural issue regarding how the application is made for such an extension. She argued that there is no need for a separate Notice of Application to be filed seeking the relief of an extension. Her position is that the order may be sought within the FDCF filed treating with the substantive claim.

[26] As it concerns the reasons for the delay, Counsel referred to paragraph 15 of the Affidavit of Craig Martin filed on the 20<sup>th</sup> day of April 2024 and stated that the delay was not intentional and granting leave would not cause prejudice to the Defendants. She states that the general reasons for delay are disclosed in the Affidavit where the Claimant outlines the steps taken in another jurisdiction and the understanding between the parties that the property was to be sold and the proceeds were to be distributed but that he found out late in the day in 2016 that it was sold and the proceeds were not shared. Since then, he got very active in seeking to address the matter and it was only eventually that he realised that those

proceedings could have no bearing here in Jamaica and he sought to lodge a caveat here.

- [27] Counsel then cited the case of **Roy Desado v Jennifer Brown** [2022] JMSC Civ 42. Counsel argued that In that case, the reason for delay was given as a lack of awareness that such proceedings could be brought and further that a delay of 18 years did not operate to bar leave being granted to bring a claim under **PROSA**.

#### **Re Application 2:**

- [28] Counsel urged that the issue of whether there is a realistic prospect of success in bringing this claim has been determined by the Court in a previous application brought by the 1<sup>st</sup> Defendant for this matter to be struck out. The court acknowledges that the learned Judge having heard that application ruled that the matter would not be struck out as against the 1<sup>st</sup> Defendant.
- [29] However, Counsel conceded that the points raised by the 2<sup>nd</sup> Defendant in this application are not the same as those raised by the 1<sup>st</sup> Defendant. The case against the 2<sup>nd</sup> Defendant differs in so far as the 2<sup>nd</sup> Defendant is a third party who holds legal title having purchased the property almost a decade prior to this claim being brought in this jurisdiction.
- [30] Counsel further argued that the Claimant's allegation is that the 2<sup>nd</sup> Defendant was a straw buyer as the property was valued at approximately Thirty Million Jamaican Dollars (JM \$30,000,000.00) at the time of sale. She indicates that the fact that the property was sold for Nine Million Three Hundred Thousand Jamaican Dollars (JM \$9,300,000.00) is an indication of some relationship between the Defendants and further that the Defendants acted jointly to deprive the Claimant of realizing an interest from the sale of the property.
- [31] She stated that the matters which were brought by the Claimant in another jurisdiction proceeded as undefended and the 2<sup>nd</sup> Defendant failed to disclose

documents in those proceedings which would demonstrate that it was not an arm's length transaction.

- [32] The Claimant further argues that sections 22(1) and 23(1) of the **PROSA** gives the court jurisdiction to set aside a conveyance which has been done to defeat the interest of a third party arising under the **PROSA**.

### **Re Application 3:**

- [33] On the issue of the application for disclosure, Mrs. Davidson argument simply put is that the evidence before the court suggests that the Claimant has good chance of succeeding and therefore, the Application should be heard and determined in her favour.

### **1<sup>st</sup> Defendant's Submissions**

- [34] Counsel filed written submissions on the 15th day of July 2024, and indicated that she would be relying on those submissions in addition to her oral submissions.

### **Re Application 1:**

- [35] Counsel argued that in respect of the claim being brought under section 13(1) and (2) of **PROSA**, that the 12-month deadline begins in this case from the date of the dissolution of the marriage in 2007. This Claim, therefore, should have been made from 2007 to 2008. She argued that the result is that there has been a seventeen (17) year delay.
- [36] On the issue of the reasons for the delay, Counsel argues that the Claimant's Affidavit is flawed in this regard as the reason posited for the delay in bringing proceedings under **PROSA** is his inability to enforce a summary judgment obtained against the 2<sup>nd</sup> Defendant as to whether she was a bona fide purchaser for value without notice. She invited the Court to consider carefully the reasons advanced which are contained in paragraph 12 and 13 of the Affidavit of Craig Martin filed on the 20<sup>th</sup> day of April 2024.

- [37] Counsel urged that based on the explanations given by the Claimant, he filed a claim in another jurisdiction against the 2<sup>nd</sup> Defendant to the effect that she was not a bona fide purchaser for value and when he failed to enforce the default judgment obtained therein, he now sought to bring claim for division of property under **PROSA**. Counsel argued that the Claimant has not given a reason why he did not seek division of property since 2007. She asserts that he has sought to explain the steps taken to obtain judgment against the 2<sup>nd</sup> Defendant and this has nothing to do with division of matrimonial property.
- [38] Counsel further argued that the order of the Court in Los Angeles was that there should be a sale of the property, and this was an order by agreement between the parties. It was also agreed that the proceeds of the sale should be used to service an outstanding mortgage debt. She argues that in looking at the first order being sought in the FDCF which is a declaration that the Claimant is entitled to a 50% interest in the property, this order is redundant and is of no practical purpose considering the order by agreement.
- [39] Counsel further argues that the Claim as against the 2<sup>nd</sup> Defendant is brought on the basis that she is not a bona fide purchaser for value and therefore the disposition ought to be set aside. Such application is grounded in section 22(1) of **PROSA**. Counsel urges that in this case, it cannot be said that the sale of the property was done to defeat an interest in the property as it was sold based on an agreement between the parties.
- [40] Counsel then sought to challenge the estimated value which was placed on the property by the Claimant. She stated that there is no basis on which he has arrived at that figure. She further noted that even if the property was sold below the market value, this does not prove that the 2<sup>nd</sup> Defendant was not a bona fide purchaser.

### **Re Application 3:**

- [41] Counsel also argued that Application 3 amounts to a fishing expedition. She posited that the Claimant being fully aware that his claim regarding the value of the

property is without foundation, now seeks to apply for a summons to be issued to prove the value of the property at the material time.

- [42] Counsel asserts that the Claimant ought to have sought a Norwich Pharmacal Order to seek the necessary disclosure from a third party as opposed to file a claim and then seek to obtain orders for disclosure with the hope of justifying the claim being brought.

## **2<sup>nd</sup> Defendant's Submissions**

### **Re Application 1:**

- [43] Counsel in her written submissions argued that the Court should not grant the extension of time to bring this application under **PROSA**. She argued that the Claimant should have filed an application for an extension of time under **PROSA** and for the permission for his claim to be served. In reliance on the case of **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36 ("**Allen v Mesquita**"), she argues that leave should be sought for an extension of time to bring the claim under **PROSA**.
- [44] Counsel asserted that the limitation period is applicable to the claim against the 2<sup>nd</sup> Defendant, being a third party. Subsequently, Counsel submits that the case against the 2<sup>nd</sup> Defendant is statute barred, having been brought 10 years after the sale was effected, and as such leave should be sought before the claim is brought against her.

### **Re Application 2:**

- [45] Counsel pointed the Court to consider the two (2) Affidavits filed by the 2<sup>nd</sup> Defendant; the first filed on the 15<sup>th</sup> day of April 2024 in Response to the Fixed Date Claim Form and the second filed on the 22<sup>nd</sup> day of November 2024 in support of Application.

- [46] It was submitted that the affidavits reveal that the 2<sup>nd</sup> Defendant does not know the 1<sup>st</sup> Defendant and has never met her. The 2<sup>nd</sup> Defendant was made aware of the sale of the property through a listing by Coldwell Banker Jamaica Realty, MLS listing #6572. The 2<sup>nd</sup> Defendant thereafter made an offer for the purchase of the property through the realtor and was represented by Ms. Diana Harrison while Miss Keva Hylton represented the 1<sup>st</sup> Defendant. It is asserted that the 2<sup>nd</sup> Defendant did not know any of the parties including her counsel prior to the transaction and based on the name of the registered owner on the title, she would have had no notice of the interest of the Claimant.
- [47] It was argued that since the purchase was finalized on the 22<sup>nd</sup> day of November 2013, the 2<sup>nd</sup> Defendant remained in sole, uninterrupted possession being more than 10 years. Further, that since purchasing the property, the original structure was gutted and a new home was built on the property. Pictures depicting the original structure and the new structure are exhibited to the Affidavit. The 2<sup>nd</sup> Defendant has expended significant sums of monies on the property over the years of ownership and stands to be severely prejudiced if the reliefs sought by the Claimant are granted.
- [48] Counsel asserted that as per the 2<sup>nd</sup> Defendant's Affidavit it is not true that the 2<sup>nd</sup> Defendant failed to comply with any response to inquiries regarding the property. However, it was admitted that summary judgment was entered against the 2<sup>nd</sup> Defendant on the 26<sup>th</sup> day of January 2023 owing to her absence and inability to retain counsel. It was asserted that the 2<sup>nd</sup> Defendant is a bona fide purchaser for value without notice of the Claimant's interest, whether actual, constructive or imputed. Reliance was placed on the case of **Pilcher v Rawlins** (1872) L.R. Ch. App. 259.
- [49] Further, it was submitted that section 71 of the **Registration of Titles Act** does not impose any duty upon a purchaser to inquire into or investigate the manner in which the vendor acquired title to the property. Counsel indicated that, in response to the Claimant's assertions that he made attempts to obtain relevant

documentation from the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant received no such requests. On this basis, she urged the Court to strike out the Claim.

## ISSUES

**[50]** The following issues and sub-issues arise for determination and must be addressed to resolve the claim before the Court:

1. Whether the Court has the jurisdiction to consider Application 1?
2. Whether an extension of time should be granted to the Claimant to bring this claim under **PROSA**?
  - a. Is there a good reason for the delay?
  - b. Which Party would be more prejudiced by the grant or refusal of the application?
  - c. Does the Claimant have a claim worthy of a grant? (i.e. is the claim res judicata or an abuse of process? Is the claim meritorious?)
3. Whether this matter should be struck out as against the 2<sup>nd</sup> Defendant?
4. Whether the Application for disclosure should be granted in the circumstances?

## LAW AND ANALYSIS

### ***Issue 1 – Whether the Court has the jurisdiction to consider Application 1?***

**[51]** I will deal with this issue briefly. Ms. Scott filed written submissions on the 15<sup>th</sup> day of July 2024, raising a preliminary point that the Claimant, having filed the instant claim outside the 12-month limitation period, must first seek the Court's leave to proceed out of time in order to bring himself within the Court's jurisdiction and, by extension, enable the Court to hear the matter

- [52] Ms. Scott relied heavily on the decision of Harris JA in **Allen v Mesquita** which she argued was upheld in **Bernard Walker and Another v Michelle Edwards-Walker** [2023] JMCA Civ 37 ("**Walker v Walker**"), in seeking to advance that the Claimant must first obtain leave under section 13 of **PROSA** before the Court has the jurisdiction.
- [53] Unfortunately, I cannot agree with counsel's arguments. Phillips JA in the Court of Appeal decision of **Sadler** placed the decision in **Allen v Mesquita** under the microscope. Concerning Harris JA's pronouncements that there was the need for leave to make an application for extension of time under **PROSA**, Phillips JA determined that this issue which was raised therein as a point in limine on appeal was not fully ventilated before the court on that occasion and as such the Court was not put in a position to carefully assess the scope of section 13(2) of **PROSA**. Phillips JA settled the issue at paragraph 86 of the judgment of the Court of Appeal in **Saddler**. Her reasoning and conclusion was that section 13(2) **PROSA** does not go to jurisdiction. Further, that the provision must be given its ordinary and literal meaning. There being no requirement within the section to obtain leave, such limitation bar should not be read into the section. This position was not disturbed in the case of **Walker v Walker**. In fact, it followed the decision in **Saddler**.
- [54] The authorities are also clear that there is no need for a Notice of Application for Extension of Time to bring the claim to be filed before filing the FDCF or after the filing of the FDCF. Seeking the order for extension within the FDCF itself is also not improper. This was the approach taken in **Walker v Walker** where the first order sought in the FDCF was "*that the time prescribed for [Mrs. Edwards- Walker] to seek orders under PROSA be extended to the date hereof...*". The Court in **Walker v Walker** did not determine that this was inappropriate.
- [55] Accordingly, the Court is properly seized of jurisdiction to consider Application 1, as there is no procedural or legal impediment to a request for an extension of time being made within the FDCF. The application is therefore properly before the Court and may now be addressed on its merits.



***Issue 2 – Whether an extension of time should be granted to the Claimant to bring this Claim under PROSA?***

**The Law**

[56] Section 13(2) of **PROSA** stipulates that applications for the division of matrimonial property should be brought within twelve (12) months of the separation of the parties or the dissolution of marriage. However, the Judge is seized of a discretion after hearing an application, to grant an extension of time within which the application may be made.

[57] The considerations which must be brought to bear in the exercise of this discretion were discussed in the cases of **Brown v Brown** [2010] JMCA Civ 12 and **Allen v Mesquita**. These cases have been found to be most helpful.

[58] In **Brown v Brown**, Morrison JA (as he then was) said at paragraph [77]:

*“On an 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 merits of the case (on a purely prima facie basis), delay and prejudice, also taking into account the overriding objective of the Civil Procedure Rules of ‘enabling the court to deal with matters justly’ (rule 1.1(1)).*

[59] In the case of **Allen v Mesquita**, Harris JA held at paragraph [18] that:

*“The court, in exercising its discretion for an extension of time, is required to take into consideration such factors as the length of the delay, the reasons for the delay, whether an applicant has a claim worthy of a grant of an extension of time and the question of prejudice to the other party-see Haddad v Silvera SCCA No. 31/ 2003 delivered on 31 July 2007...”*

***The Length of the Delay***

[60] In this case, the court bears in mind that this application should have been brought within twelve (12) months of the dissolution of the marriage. Seventeen (17) years has elapsed before the commencement of this claim. The Court is constrained to find that the delay is inordinate.

*Is there a good reason for the delay?*

- [61] The Court considers that the burden rests on the Applicant, in seeking an extension of time, to place before the Court a plausible explanation for the delay.
- [62] Regarding the issue of the delay and reasons, Mrs. Davidson urged the court to say that cogent reasons have been given for the delay in filing the application. In this case, based on the affidavit evidence, the application under **PROSA** appears to have been an afterthought and a mere consequence of the inability to enforce a summary judgment against the 2<sup>nd</sup> Defendant in the United States – a judgment which touches and concerns whether she was a bona fide purchaser for value without notice.
- [63] The Claimant has sought to explain the delay by alluding to the fact that the proceeds of the sale of the property was not shared as per the agreement between the parties. Therefore, the delay was as a result of various failed attempts to have the consent order enforced and the sale meaningfully challenged in the Los Angeles Court.
- [64] I must indicate that on a careful reading of the consent order, the proceeds of the sale were not to be shared between the parties as is being asserted now by the Claimant. The effect of the order which bore the consent of the parties was that the proceeds should be used to service a mortgage debt in the United States **and if any funds were left over, it would be shared.**
- [65] The Court finds the Claimant's interpretation of the Consent Order to be strained and unreasonable. The language of the Order, read in its ordinary and contextual meaning, does not support the interpretation advanced by the Claimant. Consequently, the Court finds that the reasons advanced by the Claimant for the substantial delay in filing the application under **PROSA** are neither cogent nor compelling,

[66] However, this finding alone will not define the outcome of this Application. In invoking **PROSA**, the Claimant must now confront the prejudice inherent in attempting to open the question of the division of property between himself and the 1<sup>st</sup> Defendant an issue which Counsel for the Defendants argue was already the subject of a consent order issued in the Los Angeles Court. The existence of that prior adjudication raises a serious question as to whether this claim is res judicata and amounts to an impermissible collateral attack on settled matter.

*Which Party would be more prejudiced by the grant or refusal of the Application?*

[67] I have asked myself whether it would be fair to the Defendants and the proposed Claimant to allow the application under the **PROSA** to be brought at this time after seventeen years since the separation of the parties and the unique feature of an order by consent regarding the method of disposal of the property.

[68] The Court is duty-bound to consider the issue of prejudice in a balanced and impartial manner. It must weigh the potential prejudice that may befall the Claimant should the application for an extension of time be refused, against any prejudice that may be occasioned to the Defendants if the application is granted. The case law seems to suggest that while both aspects are relevant; particular emphasis must be placed on the degree of prejudice likely to be suffered by the Defendants if the extension is allowed. This evaluative exercise is central to ensuring fairness and preserving the integrity of the judicial process.

[69] In **Allen v Mesquita**, Harris JA opined at paragraph 30 as follows:

*“The common thread which runs through these cases is that a court will not grant an extension of time to file a claim, on the application of one party, where to do so may cause prejudice to the other party and that an applicant must show that there are substantial reasons why the other party should be deprived of the right to limitation given by the law. There is absolutely no reason why these principles could not be applied in the instant case.”*  
(emphasis in the original)

[70] The Court struggles to discern the unfairness to the Claimant if this application is refused. The evidence is that the proceeds of the sale was used to reduce a debt

which was jointly owned by the Claimant and the 1<sup>st</sup> Defendant and therefore, the sale has put the Claimant in a better position regarding the amount owing on the mortgage debt.

**[71]** The Court is of the view that granting the extension of time would be prejudicial to the 1<sup>st</sup> Defendant because the property was sold by the 1<sup>st</sup> Defendant pursuant to the consent order, which stipulated that any funds derived from the sale were to be used to service a significant mortgage debt, and the evidence demonstrates that the sale proceeds were in fact exhausted for that very purpose, a position affirmed by a judgment of the Los Angeles Court in April 2021.

**[72]** Importantly, the Claimant neither sought to vary the terms of the consent order nor appealed it, despite having the opportunity to do so. Instead, he now seeks to revisit the issue of how the proceeds were applied nearly nine years after the property was sold, at a time when the proceeds have long since been applied in accordance with the consent order. To allow such a claim at this stage would not only be unfair to the 1<sup>st</sup> Defendant, who would be prejudiced by the delay and the reopening of settled issues, but could also amount to an abuse of the Court's process.

**[73]** The Court accepts the 2<sup>nd</sup> Defendant's contention that the delay in the institution of this claim, coupled with the significant expenditure and investment made by the 2<sup>nd</sup> Defendant into the property, has resulted in clear and measurable prejudice. The Claimant, through the FDCF, seeks inter alia the revocation of the sale of the property to the 2<sup>nd</sup> Defendant, an extraordinary remedy that would effectively unwind a transaction concluded nearly a decade ago. In the alternative, the Claimant seeks compensation equivalent to the difference between the property's current market value and the consideration paid in 2013.

**[74]** The Court finds the reliefs sought by the Claimant to be not only far-reaching in their nature, but also inherently prejudicial to the 2<sup>nd</sup> Defendant. She stands to suffer a significant disruption of her settled proprietary interests and be exposed to

a financial burden that would require her to account for the difference between the property's current market value and the price paid at the time of purchase. This approach is particularly problematic, as the increase in the property's value is, on the evidence before the Court, in large part attributable to the 2<sup>nd</sup> Defendant's own sustained investment, maintenance, and improvements over the intervening years. To compel her to pay the difference in value, without accounting for the enhancements she effected, would be unjust. Moreover, the request for revocation of the sale or transfer of title, in the absence of cogent evidence demonstrating that the 2<sup>nd</sup> Defendant was a straw purchaser, would be manifestly unfair.

- [75] The Court further observes that this claim is being pursued almost ten (10) years after the transaction was completed, which raises legitimate concerns as to whether it is statute barred in relation to the 2<sup>nd</sup> Defendant. Even if not ultimately barred by limitation, the equities weigh heavily in the 2<sup>nd</sup> Defendant's favour. The passage of time has seen the 2<sup>nd</sup> Defendant take possession, invest substantially in the property, and benefit from its appreciation in value, all of which occurred in reliance on the apparent finality of the sale. To now expose her to the risk of divestment or financial liability would, in the absence of any evidence of fraud, in the Court's view, be manifestly unfair and contrary to principles of legal certainty.

*Does the Claimant have a claim worthy of grant?*

- [76] This sub-issue requires the court to look at the merits of the case of the Claimant on a prima facie basis to determine if the Claimant has a meritorious claim. To determine this, I must first consider whether the claim is res judicata or an abuse of the court's processes.

*Res Judicata*

- [77] The doctrine of res judicata is aimed at avoiding the re-litigation of a matter and ensuring that there is an end to litigation. At the core of this doctrine is the fact that endless litigation proceedings serve to defeat the interest of the due administration of justice. The Court of Appeal in **Gordon Stewart v Independent Radio**

**Company and Wilmot Perkins** [2012] JMCA Civ 2 outlined the purpose of the doctrine as follows:

*“The doctrine of res judicata is to protect courts from having to adjudicate more than once on issues arising from the same cause of action and to protect the public interest that there should be finality in litigation and that justice should be done between the parties.”*

- [78] In the case of **Fletcher & Company Limited v Billy Craig Investments Limited and Scotia Investments Limited** [2012] JMCA Civil 128 (“**Fletcher & Company Ltd.**”), McDonald-Bishop J (as she then was) set down the law in relation to the principle of res judicata. I have found her explanation of the doctrine at paragraphs 26-30 of the judgment to be quite useful. As explained by her in the judgment, res judicata is usually pleaded by way of estoppel and arises on the plea of three forms of estoppel: (i) cause of action estoppel, (ii) issue estoppel; and (iii) an extension of the principle as enunciated in the case of **Henderson v Henderson** (1843) 3 Hare 100.
- [79] In the case at bar, I must examine whether these estoppels arise in the present case and therefore would operate to bar the proceedings.
- [80] As regards cause of action estoppel, it arises where a cause of action in later proceedings is identical to that in earlier proceedings, where the latter was between the same parties or their privies and involved the same subject matter. In such a case the bar is absolute in relation to all points decided unless an allegation of fraud or collusion is made so as to justify setting aside the earlier judgment (see: **Arnold v National Westminster Bank PLC** (No.1) [1991] 2 A.C 93).
- [81] Buckley J in **Carl- Zeiss-Stiftung v Rayner Keeler Ltd. (No. 3)** [1969] 3 ALL ER 897, at 909 stated that the party who wishes to rely on the estoppel must establish the following:
- a. That there has already been a judicial decision by a competent court or tribunal.

- b. That the decision refers to the same question as that sought to be put in issue by the plea in respect of which the estoppel is claimed; and
- c. That the decision must have been between the same parties or their privies as the parties between whom the question is sought to be put in issue.

[82] **Halsbury's Laws of England** 4<sup>th</sup> edition, Volume 16 at paragraph 1528 notes as follows:

*"In order for the defence of res judicata to succeed it is necessary to show not only that the cause of action was the same but also that the plaintiff has had an opportunity for recovery and but for his own fault might have recovered in the first action that which he seeks to recover in the second action...It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it was actually put in issue or claimed..."*

[83] Having explored cause of action estoppel, I now wish to consider issue estoppel. The latter is distinct from the former in so far as it arises where the cause of action is different but a particular issue which is a necessary ingredient of the cause of action had been previously litigated and decided on and in circumstances where one of the parties seeks to further litigate the issue in subsequent proceedings between the same parties in a different cause of action.

[84] In explaining the doctrine, McDonald Bishop J at paragraph 65 of the judgment in **Fletcher & Company Ltd.** stated as follows at paragraph 65:

*"[65] The principle as I have accepted from the Halsbury's Laws of England, 4<sup>th</sup> edition, Vol. 16, paragraph 1530, and which I apply to this matter, is that for issue estoppel to arise to sustain a plea of res judicata, it must be shown that the party to be estopped is seeking to re-litigate a precise point which had 'once been distinctly put in issue in an earlier proceeding and which has been solemnly and with certainty determined against him'. It must be shown that the matter on which the decision was alleged to have been made in the earlier action was one that had come directly (not collaterally or incidentally) in issue in the first action and embodied in a judicial decision that is final... "Lord Diplock in **Thoday v Thoday** stated that the issue on which the party is to be estopped must have been determined by a court of competent jurisdiction either upon evidence or upon admission by a party to the litigation.*

[85] The law is clear that the point must have been directly put in issue. It is not sufficient that the point arose collaterally or accidentally. This must be carefully considered in relation to the case at bar and will be discussed further in this judgment.

[86] Having considered the issue of issue estoppel, I will now explore the third category which is outlined in the judgment of Sir James Wigram V-C in the case of **Henderson v Henderson**. Sir James Wigram V-C stated as follows at pages 114-115:

*“In trying this question, I believe I state the rule of the court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

[87] It is unsurprising that the Claimant disputes the applicability of the doctrine of res judicata in the present case. Counsel for the Claimant, Ms. Davidson, contends that the significance of the consent order is not that it disposes of the matter in a final and conclusive manner, but rather that it affirms and acknowledges the Claimant’s beneficial interest in the property. She further submits that, insofar as the property is situated in Jamaica, a foreign court lacks jurisdiction to adjudicate questions relating to title or interest in land within this jurisdiction.

[88] Equally unsurprising is the united position of the Defendants, who assert that the consent order constitutes a binding and final arrangement between the Claimant and the 1<sup>st</sup> Defendant concerning their respective interests in the property. As such, they argue that the Claimant is estopped from revisiting or relitigating the issue, which they submit has already been conclusively resolved. The Defendants



emphasize that the consent order recognises the Claimant's 50% interest in the property and, in their view, this precludes any further challenge. The 1<sup>st</sup> Defendant, in particular, argues that the **Henderson v Henderson** principle is applicable in these circumstances.

[89] I will deal firstly with the Claimant's submission that properties in Jamaica cannot be dealt with by foreign courts. According to **Dicey, Morris & Collins on the Conflict of Laws** 14<sup>th</sup> Edition (pp. 613–614), a fundamental rule of private international law is that a court in a foreign jurisdiction has no authority to determine questions concerning the title to, or the right of possession over, immovable property located outside its territorial boundaries. This is known as the Mocambique Rule which indicates that the proper forum for actions involving title to land is the *lex situs*.

[90] There is an exception to every general rule. One exception to the Mocambique Rule, is known as the *in personam* exception. Dunbar-Green J (ag) (as she then was) discussed this exception in **Miller v Miller** [2015] JMSC Civ 18 by relying on **Cheshire and North's** 11<sup>th</sup> edition at page 257 which states:

*"If the conscience of the defendant is affected in the sense that he has become bound by a personal obligation to the plaintiff, the court, in the exercise of its jurisdiction in personam, will not shrink from ordering him to convey or otherwise deal with foreign land."*

[91] In so far as is relevant to these proceedings, the consent order states that:

*"...there should be a sale of the Jamaican property located at 207 Runaway Heights, Runaway Bay, Saint Ann. The funds are to be used to discharge the community debt owed to Redwood mortgage investors. Any proceeds not used for this purpose shall be placed in a joint trust account to be distributed only by agreement between the parties or further order of the Court."*

[92] In the simplest terms this is what the Claimant is seeking:

- a) **Recognition of Ownership:** He wants a declaration that the property in Saint Ann was bought during his marriage to the 1<sup>st</sup> Defendant and that he owns 50% of it.

- b) **Undoing the Sale:** He claims the 2<sup>nd</sup> Defendant (Maria Lobban) wasn't an innocent buyer and asks the Court to cancel the sale to her and return the property into his name.
- c) **Alternative Compensation:** If the Court doesn't cancel the sale, he wants financial compensation from the 1<sup>st</sup> Defendant specifically, the difference between what was paid for the property when it was sold and what the property is worth today.

**[93]** In the Court's view, the consent order issued by the Los Angeles Court was an order made in personam, not in rem. It gave judicial effect to a private agreement entered by the Claimant and the 1<sup>st</sup> Defendant, namely, that the Jamaican property would be sold, with the proceeds applied to discharge the community debt owed to Redwood Mortgage Investors. Any surplus remaining after satisfaction of that debt was to be held in a joint trust account and disbursed only by mutual agreement or further order of the court. The foreign court did not purport to adjudicate proprietary rights or confer title to either party over the Jamaican property. While the order may have acknowledged that both parties held some interest in the property, it stopped short of declaring any definitive rights in the nature of ownership. Its effect was limited to upholding the parties' consensual arrangement, as is characteristic of a consent order, and did not amount to a determination of proprietary entitlements binding upon the land situated in Jamaica.

**[94]** I am further of the view that the judgment of the Los Angeles Court is enforceable against the Claimant. At the time the consent order was made, the Claimant was ordinarily resident in the state of California and therefore subject to the jurisdiction of their courts. Moreover, the Claimant has, on multiple occasions, actively engaged the jurisdiction of the California courts by seeking and enforcing orders against the Defendants in these very proceedings. He voluntarily appeared and submitted himself to the authority of their court, thereby affirming their jurisdiction over him (see: **Emanuel v Symon** (1908) 1 K.B. 302 at 309 cited with approval at para 96 of **Miller v Miller**).

- [95] Having now settled that the consent order is in personam and is indeed enforceable, I must now determine whether this claim is res judicata. Firstly, I accept that while the consent order reflected the Claimant and the 1<sup>st</sup> Defendant's agreement to sell the Jamaican property and apply the proceeds to discharge certain debts, it did not amount to a final and conclusive adjudication of proprietary rights in the property. The order affirmed a procedural arrangement rather than determined with finality any entitlement to the property under Jamaican law. It follows that the threshold requirements for cause of action estoppel have not been satisfied.
- [96] Additionally, issue estoppel does not arise. The specific issues in the instant Claim are, inter alia: whether the Claimant has a 50% legal or beneficial interest in the Jamaican property, whether the 2<sup>nd</sup> Defendant is a bona fide purchaser for value without notice, and if not, whether any relief is due to the Claimant in the form of compensation. These issues were not distinctly and/or finally determined in the earlier proceedings; the consent order did not decide these issues on their merits nor were they squarely or necessarily in issue before the Los Angeles Court at the time when the consent order was made.
- [97] Further, the **Henderson v Henderson** principle does not apply in these circumstances. There is no evidence of abuse of process or of any deliberate omission by the Claimant to bring forward the claims he now asserts. It is not the case that these matters should or could have been brought in the prior proceedings; rather, they fall within the exclusive jurisdiction of the Jamaican courts, being matters that concern title to land located in Jamaica. The lex situs principle, and the Mocambique Rule to which it gives effect, underscore the appropriateness and necessity of these issues being adjudicated locally.
- [98] Accordingly, while the consent order is enforceable as between the Claimant and the 1<sup>st</sup> Defendant in relation to the personal obligations it creates, it does not estop the Claimant from bringing these present proceedings before this Court. The Claim is therefore not barred by res judicata.

### *Abuse of Process*

- [99]** The Defendants have argued that to allow the extension of time would be an abuse of the court's process. Abuse of process is a distinct and broader concept, rooted in the court's inherent jurisdiction to prevent misuse of its procedures in a manner that would bring the administration of justice into disrepute. The doctrine is engaged where proceedings are oppressive, vexatious, or tend to undermine the integrity of the judicial process.
- [100]** On the face of it, this Court understands why the Defendants argue that the present claim amounts to an abuse of process. After all, the 1<sup>st</sup> Defendant and the Claimant previously agreed via a consent order in the foreign proceedings to dispose of the property in a particular way. Now, the Claimant appears to be seeking to reopen that arrangement by asking this Court to dispose of the property differently. That concern is not without merit. However, it is essential to consider the context in which this claim is brought.
- [101]** The Claimant alleges that the consent order was used as a vehicle by the Defendants to execute a sham transaction, one in which the property was sold significantly below market value to the 2<sup>nd</sup> Defendant, thereby depriving the Claimant of any real share in the proceeds. According to the Claimant, the property in question represented his retirement plan. He feels aggrieved, and if his allegations are ultimately proven, then it would be open to this Court to cancel the registered title held by the 2<sup>nd</sup> Defendant and make further orders as to the proper disposal or division of the property. The Claimant proposes that the property be divided equally between him and the 1<sup>st</sup> Defendant or, in the alternative, that he be compensated in damages.
- [102]** It is, in my view, logical that, if the title is set aside on the basis of fraud, then the property would revert to the 1<sup>st</sup> Defendant, and at that stage the Claimant's entitlement, whether as a former spouse or otherwise, would need to be realized through a fair division of the beneficial interest. That is the underlying objective of

the relief sought. Crucially, this is not a matter that could have been properly determined by the foreign court.

**[103]** While the phrasing of some of the orders sought may be questionable, the core of the Claimant's case is clear: he alleges that the foreign consent order was used to facilitate an undervalued sale of the Jamaican property to defeat his interest.

**[104]** The question, then, is whether the reopening of the issue of how the property is to be disposed of, in circumstances where serious allegations of fraud are made, constitutes an abuse of process. In this Court's view, the answer is no.

**[105]** Allegations of fraud, if properly pleaded and supported by evidence, are among the clearest exceptions to the finality of prior agreements or orders. To shut out the Claimant at the threshold stage would be to deny him access to justice where he has not yet had an opportunity to ventilate these allegations before a court with jurisdiction over the subject matter.

**[106]** Moreover, the 1<sup>st</sup> Defendant remains at liberty to raise any legitimate concerns about the financial context in which the consent order was crafted including the nature and settlement of the community debt. She is not precluded from seeking relief that reflects fairness in that context, should she consider such relief appropriate under Jamaican law. Additionally, the 2<sup>nd</sup> Defendant, having regard to the investments she has made in the property, may also seek orders that reflect fairness in the circumstances. These are matters for trial.

**[107]** Accordingly, this Court is not persuaded that the present proceedings amount to an abuse of process. The issues raised are serious, jurisdictionally appropriate, and have not yet been determined by any competent court.

*Is the claim meritorious?*

**[108]** Having now determined that the issues of res judicata and abuse of process do not bar a grant. I must look at the case which is before me and determine prima facie, if the Claimant has a meritorious case.

[109] I have considered particularly the assertions made by the 1<sup>st</sup> Defendant that the proceeds of the sale were in fact used towards the mortgage debt which was owed in accordance with the consent order which was determined to be valid and enforceable and further that the ruling of the Los Angeles Court supports this. The Claimant has therefore misinterpreted the consent order. However, the fact that the Claimant has misinterpreted the consent order is only one aspect.

[110] The other aspect is that the 2<sup>nd</sup> Defendant is a straw buyer and I have also considered this. However, the Order seeking an extension of time does not apply to this aspect of the claim. I address this in greater detail when disposing of Application 2 but for present purposes, it is sufficient to note that, the Claimant's success on this part of the claim is essentially for the 2<sup>nd</sup> part of the claim, which is the division of the property pursuant to **PROSA**.

[111] It is arguable that even if fraud is found to have occurred in relation to the sale of the property, the consent order remains valid and enforceable, and continues to be the appropriate mechanism through which the property should be disposed of. If monetary compensation becomes payable, it is likely that such funds would be directed toward the satisfaction of the community debt. That debt is now discharged, and a liability exists in favour of the 1<sup>st</sup> Defendant against the Claimant. Accordingly, the amount payable would most likely be directed towards settling that liability, to reflect that position, and to give effect to the consent order. In light of these considerations, I do not find that the claim in respect of the division under **PROSA** has merit and is worthy of a grant. I am mindful of the need to avoid conducting a mini-trial at this stage, and I trust that I have not done so.

[112] However, if I have, then for the reasons set out in my analysis of Application 2, I am not persuaded that the Claimant has a meritorious claim. As such, even if the extension of time were granted, there would be no practical effect, as the claim would not be able to proceed to a division of the property in any event.

[113] Accordingly, upon a holistic consideration of all the relevant circumstances, namely: the inordinate delay in bringing the claim, the absence of cogent or credible reasons for that delay, the evident prejudice that would be occasioned to the Defendants, and the lack of merit inherent in the claim itself; the Court is of the considered view that the cumulative effect of these factors weighs decisively against the grant of relief. Resultantly, the Court refuses the Orders sought to grant an extension of time to bring the matter under **PROSA**.

***Issue 3: Whether this matter should be struck out as against the 2<sup>nd</sup> Defendant?***

[114] As previously indicated, the order extending time to bring the matter under **PROSA** pertains specifically to the claim for division of the property and does not extend to the reliefs sought in relation to the case against the 2<sup>nd</sup> Defendant. This distinction will be addressed in greater detail below. However, it is for this reason that the Court is still required to determine the issue of the sale and the related allegations independently.

[115] The Court bears in mind that the 1<sup>st</sup> Defendant did in fact file an application for the matter to be struck out as against her. Mrs. Davidson has urged that the Court is therefore restricted in how it may handle a similar application now being brought by the 2<sup>nd</sup> Defendant as the issues were already fully ventilated before a Judge of equal jurisdiction and that decision has not been challenged on appeal.

[116] However, Mrs. Davidson also conceded that the points raised by the 2<sup>nd</sup> Defendant and the case against the 2<sup>nd</sup> Defendant differs from the case against the 1<sup>st</sup> Defendant. She does nonetheless form the view that the matter would be res judicata. The Defendants however argue that this Application must be considered afresh. Ms. Reid argues that the 2<sup>nd</sup> Defendant challenge the claim against her on a different ground.

[117] As regards the case against the 2<sup>nd</sup> Defendant, it is premised on the argument that she is not a bona fide purchaser for value and that the sale was done to defeat the

interest of the Claimant. The Claimant has brought this aspect of the claim pursuant to sections 22(1) and 23(1) of the **PROSA**.

[118] Having exhaustively looked at the law for res judicata earlier in the judgment, I can briefly indicate that the doctrine of res judicata does not apply in this instance. The Court is entitled to consider the present application brought by the 2<sup>nd</sup> Defendant on its own merits since it is being brought by the 2<sup>nd</sup> Defendant on different grounds. Moreover, the nature of the claim against the 2<sup>nd</sup> Defendant is distinct in certain respects, warranting a separate and independent determination.

[119] Rule 26.3(1)(b) of the Civil Procedure Rules (“CPR”) provides that the court may strike out a statement of case or part of a statement of case if it is an abuse of process or is likely to obstruct the just disposal of the proceedings.

[120] Rule 26.3 (1)(c) of the CPR provides that the court may strike out a statement of case or part of a statement of case if it appears to the court that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending the claim.

[121] I have considered the Court of Appeal decisions of **First Union Financial Company Limited v Sharca Brown** [2024] JMCA Civ 41 and **Bengal Development Company Limited v Wendy Lee et al** [2025] JMCA Civ 9 (“**Bengal Development**”) to be helpful in considering the approach to be taken in treating with applications of this nature under rule 26.3(1)(b) and (c).

[122] The power conferred on the Court by virtue of Rule 26.3 to strike out a statement of case must be sparingly utilized and only in the clearest of cases. McDonald Bishop P in paragraph 35 of the judgment in **Bengal Development** emphasized that:

*“The reason for this is that the exercise of the jurisdiction deprives a party of its right to a trial and, therefore, its ability to strengthen its case through the process of disclosure and other court procedures, such as requests for further information. Also, the cross examination of witnesses often changes the complexion of a case. Therefore, the accepted rule was and remains*



*that striking out is limited to plain and obvious cases where there is no point in having a trial (see **Three Rivers District Council and Others v Governor and Company of the Bank of England No (3)** ('Three Rivers No (3)') [2003] 2 AC 1, 77).*

- [123] Striking out a statement of case under Rule 26.3(1)(c) should be reserved for plain and obvious cases where the statement of case fails to disclose a proper claim. As noted by Cooke JA in **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009 at para 14:

*“... At this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim ...”*

- [124] Under Rule 26.3(1)(c), the Court must assess only the pleadings and must assume that the pleadings are in fact correct and having done so, consider whether they, in fact are true, disclose a proper claim. Therefore, the 2<sup>nd</sup> Defendant must demonstrate that the statement of case on the face of it does not disclose a proper claim. At this stage, the prerogative of the court is not to consider the evidence and determine its viability but only the pleadings.

- [125] As regards rule 26.3(1)(b), the power to strike out finds its foundation in the court's role as guardian of its processes against misuse and to further the overriding objective of treating with cases fairly. **Bengal Development** cited with approval the decision of **Hunter v Chief Constable of the West Midlands Police and Others** [1981] UKHL 13, wherein Lord Diplock stated as follows:

*“It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people.”*

This limb allows the Court to consider the issue of unfairness to a litigant if the impugned claim is allowed to proceed.

[126] In considering the above, and particularly Rule 26.3(1)(c), it cannot be said that the statement of case does not disclose a cause of action against the 2<sup>nd</sup> Defendant. The claim of her being a straw buyer at this stage may be deemed to lack sufficient evidentiary material to substantiate certain assertions being made in respect of the estimated value of the property at the time it was disposed of. However, to follow the development of the law in this area, the Court is not permitted at this stage to hold a mini-trial. To do so would disregard the fact that such matters may be addressed through additional disclosures or by cross examination. On the face of it, there is a cause of action regardless of its apparent strength at this stage.

[127] However, I must also consider whether this claim would be statute barred and therefore, ought to be struck out as argued by the 2<sup>nd</sup> Defendant. The pleadings disclose that this claim as against the 2<sup>nd</sup> Defendant is being brought under sections 22(1) and 23(1) of **PROSA**.

[128] Section 22(1) of **PROSA** states as follows;

*“Where court is satisfied that any disposition of property referred to in section 21(4) has been made in order to defeat the claim or rights of any other person; the court may, on the application of that other person order that*

- a) The person to whom the disposition was made other than a bona fide purchaser for value without notice (hereinafter referred to as the recipient) or his personal representative*
  - i. Shall transfer the property or any part thereof to such person as the Court directs; or*
  - ii. Shall pay in to court or to such person as the Court directs, a sum not exceeding the difference between the value of the consideration (if any) and the value of the property; or*
- b) Any person who, not being a bona fide purchaser for value without notice, received any interest in the property from the recipient shall*
  - 
  - i. Transfer that interest to such person as the Court directs; or*

- ii. *Pay in to court or to such person as the Court directs, a sum not exceeding the value of the interest...*

[129] Section 22(1) of **PROSA** specifically indicates that the dispositions which are governed by that section are those which are covered by Section 21(4) of **PROSA**. The latter provision states as follows:

*“The disposition mentioned in subsection 1 is a disposition of property made whether for value or not, by or on behalf of or by any direction of or in the interest of any person.”*

[130] By virtue of the wording of section 21(4) of **PROSA**, dispositions for value are covered by section 22(1) of **PROSA**. When both sections are read together, the understanding of the Court is that these statutory provisions allow the Court to intervene after a disposition of property is made whether for value or not, where such was done to defeat a party’s rights or interest in the property.

[131] Section 23(1) of **PROSA** states that without prejudice to the other statutory provisions within the legislation, the Court is given a list of powers regarding spousal properties which include the sale of property and division of proceeds and the vesting of property in either spouse.

[132] As regards these provisions, the Court must consider whether the statutory limitation period would be applicable to the pursuit of such reliefs under the **PROSA**.

[133] Ms. Davidson has argued that there is no time limit which is prescribed under **PROSA** for bringing matters in relation to sections 22 and 23. She asserts that any time limit would be the 12 years which is advanced by the **Limitation of Actions Act**. In those circumstances, the claim would be brought in time.

[134] Ms. Reid had previously indicated that, pursuant to the **Limitations of Actions Act**, the limitation period was six (6) years. However, she seems to have resiled from this position and joined Ms. Scott in submitting that the limitation period would be 12 months as outlined in section 13 of **PROSA**. They argue that applications being brought under sections 22 and 23 of **PROSA** are contingent on the division

of property to which section 12 relates. Ms. Scott went further to indicate that the equitable principle of laches would also apply to bar the Claimant.

[135] I form the view that the limitation period contained in section 13(2) of **PROSA** and the discretion to extend is specifically applicable to those applications brought for the division of property and not to orders sought under section 22(1) and 23(1) of **PROSA**. The statute is clear in this regard.

[136] The cause of action under sections 22(1) and 23(1) of **PROSA** fundamentally concerns allegations of fraud. It is well established that the limitation period for claims based on fraud is six (6) years. The Claimant's reliance on a twelve (12) year limitation period stems from land dispute claims for recovery of possession, which is not the nature of the present claim. Here, the Claimant is not seeking recovery of possession but is instead challenging the validity of the sale, disputing the status of the 2<sup>nd</sup> Defendant as a bona fide purchaser, and asserting that the property was intentionally sold significantly below market value to prevent him from benefiting from the proceeds, actions that, in essence, amount to fraud.

[137] The limitation period for a cause of action based on fraud begins to run from the date when the fraud could have been discovered with reasonable diligence. The property was sold in 2013, and the Claimant would have been aware of this sale, which was for Nine Million Three Hundred Thousand Jamaican Dollars (JM \$9,300,000.00). With reasonable diligence, the Claimant would have conducted research and recognized that the property was sold for significantly less than its market value, and further, that the 2<sup>nd</sup> Defendant was likely a straw buyer. Therefore, it is my considered view that the limitation period commenced in 2013, and the six-year period expired in 2019. Consequently, it is clear that the limitation period has elapsed, and the claim against the 2<sup>nd</sup> Defendant cannot proceed as it would be futile.

[138] However, the Claimant also asserts that he obtained information regarding the sale of the property to the 2<sup>nd</sup> Defendant in the year 2016. If the Court is incorrect in its

calculation of the limitation period from the date of sale and were to use the date of the discovery by the Claimant of the sale as the starting point, the limitation period would have expired prior to the initiating of these proceedings. The employment of such calculations would bring the expiration of the 6-year period to the year 2022. The Claim form was filed in April 2023.

[139] Accordingly, the case is struck out as against the 2<sup>nd</sup> Defendant.

***Issue 4: Whether the Application should be granted for disclosure in the circumstances?***

[140] It is unnecessary assess this application and make any determinations on the merits considering that I am not granting the extension of time to bring the claim under **PROSA** and I am also striking out the claim as against the 2<sup>nd</sup> Defendant. Accordingly, this Application is dismissed.

**ORDERS**

[141] In final disposition of this matter, the Court makes the following orders:

1. Order 6 in the Fixed Date Claim Form filed the 20<sup>th</sup> day of April 2023 seeking an extension of time to bring the Claim under the **Property (Rights of Spouses) Act** is refused.
2. The Claim is struck out against the 2<sup>nd</sup> Defendant.
3. The Notice of Application for Court Orders filed by the Claimant on the 18<sup>th</sup> day of March 2025 seeking disclosure is dismissed.
4. Costs awarded to the Defendants to be taxed if not sooner agreed, save that Costs of the Application to Strike Out is awarded solely to the 2<sup>nd</sup> Defendant to be taxed if not sooner agreed.
5. Leave to Appeal is granted.
6. Claimant's Attorney-at-law is to prepare, file and serve this order.

**Sgd. A. Martin-Swaby  
Puisne Judge (ag)**