



[2013] JMSC Civ 78

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2011 HCV 05416

BETWEEN	SHARON SMITH	CLAIMANT
AND	VINCENT SERVICE	DEFENDANT

IN CHAMBERS

Pierre Rogers instructed by Rogers and Associates for the claimant

Lancelot Cowan instructed by Lancelot Cowan and Associates for the defendant

May 8 and May 30, 2013

**APPLICATION FOR EXTENSION OF TIME TO APPLY UNDER SECTION 13 (2) OF
THE PROPERTY (RIGHTS OF SPOUSES) ACT – FACTORS TO BE TAKEN INTO
ACCOUNT**

SYKES J

[1] It was the year 1993. Miss Sharon Smith and Mr Vincent Service met. They were attracted to each other. An intimate relationship blossomed and out of that relationship two children were born by 1995. In the year 2000, Miss Smith's keen eyes fell upon an advertisement for a town house development at 99A Old Hope Road, Kingston 6. She brought it to the attention of Mr Service. They decided to purchase the property. The property was purchased. Its civic address was 16 Retreat Manor. It was registered at volume 1348 folio 312 of the Register Book of Titles. Miss Smith contributed JA\$1m to the purchase price by way of a loan from her mother. Both names were placed on the title. The property became the family home and there they lived until 2007 when the relationship came under severe stress and eventually collapsed in the same year. She moved out in July 2007.

[2] This breakdown is one of the trigger events under section 13 (1) of the Property (Rights of Spouses) Act which would entitle her to make an application for a determination of her interest in the property. Under section 13 (2) she had until July 2008 to make this application. She failed to make the application within the time. She has done so again (the current application filed August 29, 2011) having abandoned the previous claim filed in 2009. Her abandonment was precipitated by her financial condition.

[3] She was met with the reply that she was out of time and needed to apply for an extension of time within which to file her application before she can even file an application under the statute.

[4] After hearing the matter on May 8, Miss Smith's application was granted. These are the reasons.

The time limit

[5] Section 13 (1) of the PROSA provides that:

(1) A spouse shall be entitled to apply to the Court for a division of property –

(a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or

(b) on the grant of a decree of nullity of marriage; or

(c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or

(d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant

[6] It is common ground that Miss Smith was the spouse of Mr Service for the purpose of PROSA. The definition of spouse in section 2 includes single man and single woman living together for at least five years before the separation or breakdown of the relationship. Based on the uncontested evidence they began living together in 1994 and continued until the relationship broke down. The cohabitation broke down in July 2007.

[7] It is common ground that Miss Smith's application is out of time. The issue now is whether time should be extended.

Extension of time

[8] Mr Cowan opposed the extension of time on the basis that it was too late in the day for Miss Smith to seek the benefit of PROSA. Learned counsel did not dispute that the court had the power to extend time but submitted, quite strongly, that Miss Smith has waited for years (almost) before she acted. In this time, Mr Service was entitled to conclude that Miss Smith was not pursuing any claim in respect of the soon-to-be disputed property. Counsel relied heavily on the dictum of Lord Griffith in **Donovan v Gwentoy's Ltd** [1990] 1 WLR 472, 479A which was cited and quoted approvingly by Lord Slynn in **Marsal v Apong** [1998] 1 WLR 674, 678. Lord Griffith said in **Donovan** that:

The primary purpose of the limitation period is to protect a defendant from the injustice of having to face a stale claim, that is, a claim with which he never expected to have to deal.

[9] Mr Cowan's stance is fully supported by the case of **Allen v Mesquita** [2011] JMCA Civ 36. In the case the claim under PROSA was filed outside the limitation period. The trial judge had ordered that the claim filed outside the time should stand and then proceeded to hear the matter on the merits. It was argued on appeal that the trial judge committed two cardinal sins. The first was that her Ladyship granted an extension of time for filing the claim even though the claim was filed before the application for extension of time was heard. Second, her Ladyship's hearing on the merits was a nullity because until the extension of time was granted then no claim form could be filed and the claim formed filed before the extension of time was invalid and could not be brought to life retrospectively.

[10] The Court of Appeal accepted all these submissions as well as their corollaries. The most important corollary being that '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' ([14]). There has been modification of some parts of this dictum but the core position remains, namely, that when the applicant is out of time he or she must get permission for extension of time within which to file an application under PROSA and reasons must be advanced for the delay.

[11] Her Ladyship reminded at [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.

[12] Harris JA took a strong line in favour of upholding the limitation defence. Her Ladyship held at [31]:

Section 13 (2) of the Act places a limit on the time within which a party may initiate proceedings. This limitation is a benefit which the appellant is entitled to enjoy. Such entitlement should operate to her advantage after the expiration of the one year permitted for the respondent to file a claim. ... He advanced no reasons for the failure to file his claim, nor has he proffered any reason to show why the appellant should be deprived of the accrual of her right.

[13] So there is clear authority consistent with Mr Cowan's position that limitation defences under PROSA should be upheld 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.

What should be taken into account when considering whether to exercise the discretion to extend time within which to make an application under section 13 (2) of PROSA?

[14] In **Brown v Brown** [2010] JMCA Civ 12, Morrison JA said at **[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 the merits of the case (on a purely prima facie basis), delay and prejudice, and 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)).

[15] In **Mesquita** Harris JA held at **[18]**:

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.

[16] The importance of the applicant giving reasons for the delay in applying within the time was underscored by Harris JA in **Mesquita**. In that case the applicant did not advance any reasons for the delay. Harris JA concluded at **[16]**:

There being no evidentiary material before her outlining the reasons for the respondent's failure to have made the application within the statutory period, she erred in treating

the application as being one for an extension of time to file the claim and ordering that the fixed dated (sic) form should stand.

[17] The case of **Saddler v Saddler** [2013] JMCA Civ 11, despite its important modification of **Mesquita**, did not alter the point on the necessity for reasons for the delay to be put before the court. In **Saddler**, two appeals were heard together but were not consolidated. In the **Saddler** case, the applicant filed the claim form (January 2007) before applying for an extension of time (June 2007). According to **Mesquita**, this was fatal. Under **Saddler**, it is no longer so. According to Phillips JA 'the claim was not invalid, but irregular, and could not proceed if the order was not granted' ([46]).

[18] Phillips JA, having traveled from Jamaica to England to Australia, concluded at [86] that leave was not required to apply for an extension of time. This holding is the important qualification of **Mesquita**. Before this case Harris JA had held at [16]:

.... that before an extension of time can be made, leave must be granted. No application was made for leave. Before making the order, the learned judge was under an obligation to satisfy herself that she was clothed with jurisdiction to hear and determine the application.

[19] This is no longer the case. Harris JA was a member of court in **Saddler** and did not seek to defend her previous position and can be taken as accepting that Phillips JA's position is now the correct one.

[20] According to Phillips JA a claim filed before an extension of time is granted is in procedural purgatory or to use her Ladyship's expression, in a 'state of suspended validity', and any irregularity (as would be the case if the claim is filed

before the extension of time is granted) can be cured by a subsequent order. Thus a claim form filed before an application for extension of time is made or granted is not a nullity (modifying **Mesquita** on this point) and can be validated by a subsequent order. If extension of time is not sought before the claim is filed that 'omission is not a fundamental irregularity and can be cured *nunc pro tunc*' (italics in original), meaning that the later order (granting the extension and therefore taking the claim form out of its state of suspension) operate to correct the earlier procedural irregularity. Thus the Saddler claim form was not fatally flawed 'and could be cured if the application before the court is successful' ([88]).

[21] One of the issues raised by Mr Cowan is that under the present dispensation there is no time which is too late for a claim to be brought under PROSA. The court would agree that under the present law even if the parties were separated many years before PROSA, provided the applicant can satisfactorily explain the delay and there is no injustice to the defendant then a claim can be brought under the legislation.

Application to case

[22] Mr Rogers submitted that while, in principle, he had no difficulty with Mr Cowan's position regarding limitation periods, in this case, Mr Service had every reason to expect this claim. Learned counsel pointed to the following matters:

- a. the parties were engaged in discussions regarding their respective shares in the property;
- b. the negotiations commenced during the one year limitation period;
- c. it appeared that at one point the parties were close to an agreement;
- d. since the parties were close to an agreement initially, there was no need to file a claim;

- e. the negotiations broke down and Miss Smith filed a claim in 2009. The claim was not pursued for want of funds.
- f. Miss Smith obtained services of another counsel who discontinued the 2009 claim and commenced the instant claim seeking the same remedies.

[23] These reasons were set out in an affidavit filed by Miss Smith. Mr Service filed no affidavit in opposition but rested his case on the limitation point.

[24] 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. It has been well established that unless there is some reason or evidence to suggest the contrary, legal title and equitable title remain together in the persons whose names appear as the legal title holder. Unless there is a separation the legal and equitable interests remain together. This is the position indicated in **Westdeutsche Landesbank Girozentrale v Islington Borough Council** [1996] AC 669, 706 (Lord Browne-Wilkinson). Nothing has been said so far that would indicate that there was to be a separation of legal and equitable title at the time the property was acquired.

[25] Also, Miss Smith contributed to the purchase price by way of acquiring a loan from her mother. This court is not saying that she has an interest only to the extent of the amount of the loan as a proportion of the purchase price. Her interest may well be more or even less. It all depends on the intention of the parties at the time of acquisition and whether there was any change in the proportion of the property held by either party. This is to say that even without PROSA, Miss Smith has a prima facie claim to a share in the property.

[26] What is the advantage to Miss Smith under PROSA? Since the property was the family home she starts with a presumption of half share. This presumption can be rebutted by Mr Service.

[27] In the scheme of things Mr Service would still be subject to a claim in equity even if PROSA had not been passed. Therefore, the significance of the limitation period is reduced considerably. The limitation period would only apply to a claim under PROSA but would not have immunised him from suit at all.

[28] It is also the case that the parties were attempting to settle the matter without litigation. This is an important consideration in this case.

[29] I do not place great weight on the lack of funds. There is no evidence that Miss Smith sought to engage the Legal Aid Clinic which has reduced fees.

Conclusion

[30] Miss Smith has successfully established a case for the grant of an extension of time within which to file her claim under PROSA. The decisive factor is that she has, prima facie, a claim under normal principles of equity and therefore, the limitation defence under PROSA would not prevent a claim in equity. Coupled with this is that there is no assertion by Mr Service that he would be hampered in defending claim in any way.

[31] The other factors such as the parties negotiating during the year after the breakdown carries some weight but not as decisive as that mentioned in paragraph 29.

Disposition

[32] Miss Service is granted permission to file a claim under PROSA. The claim filed prior to this order can stand and is to be treated in accordance with Phillips JA's reasoning and conclusion in **Saddler**.