



[2021] JMSC Civ 90

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN CIVIL DIVISION
CLAIM NO. SU2019CV02085**

BETWEEN	KAREN ELIZABETH WATSON-SAMUELS	1ST CLAIMANT
AND	JEDDIE MICHAEL BOURNE	2ND CLAIMANT
AND	VERNON VINCENT BOURNE	3RD CLAIMANT
AND	MICHAEL SAMUELS	DEFENDANT

IN CHAMBERS

Mr Ewan Thompson instructed by Ewan Thompson and Associates for the 1st, 2nd and 3rd Claimants

Ms Kerona Spence for the Defendant

Heard: March 1 and June 1, 2021

Division of property – The proper procedure for the commencement of proceedings under the Property (Rights of Spouses) Act – Whether the purported claim is an irregularity or a nullity – Whether the irregularity is a defect that can be cured – Limitation period – Whether the purported claim is statute barred – Effect of failure to file an application to extend time to apply for the division of property – The division of property under the Partition Act – The Property (Rights of Spouses) Act, sections 2(1) and 13, The Partition Act, sections 2(2), 4 and 5, The Civil Procedure Rules, 2002, rules 8.1(4), 8.8, 26.9, 76.3, 76.4 and 76.6

A. NEMBHARD J**INTRODUCTION**

- [1] This matter concerns the property rights of the Claimants and the Defendant. The 1st Claimant, Mrs Karen Elizabeth Watson-Samuels and the Defendant, Mr Michael Samuels, were married on 9 September 2012. The marriage was dissolved on 21 September 2018.
- [2] The 2nd Claimant, Mr Jeddie Michael Bourne and the 3rd Claimant, Mr Vernon Vincent Bourne, are the children of Mrs Watson-Samuels.
- [3] In 2014, Mrs Watson-Samuels and Mr Samuels purchased property located at Lot 219 Olive Park, Santa Cruz, in the parish of Saint Elizabeth, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles (“the subject property”).
- [4] The subject property was purchased for Two Million Eight Hundred Thousand Dollars (\$2,800,000.00), of which Mrs Watson-Samuels contributed the sum of Five Hundred Thousand Dollars (\$500,000.00). Mr Samuels contributed the sum of Two Million Two Hundred Thousand Dollars (\$2,200,000.00).¹
- [5] The subject property is registered in the names of the parties as tenants in common in unequal shares; four undivided one tenth shares and interest to Mrs Watson-Samuels; four undivided one tenth shares and interest to Mr Samuels; one undivided one tenth share and interest to Mr Jeddie Michael Bourne; and the remaining one undivided one tenth share and interest to Mr Vernon Vincent Bourne.
- [6] Mrs Watson-Samuels and Mr Samuels are the joint legal owners of a 2007 Toyota Mark X registered 0400GQ (“the motor vehicle”).

¹ There is a lacuna in the evidence in respect of the remaining One Hundred Thousand Dollars (\$100,000.00) of the purchase price for the subject property.

- [7] Mrs Watson-Samuels is the sole proprietor of the business K-Dzyne which is located at 60 Main Street, Santa Cruz, in the parish of St. Elizabeth.

THE ISSUES

- [8] The following issues arise for the Court's determination: -
- a. Whether there is a valid claim before the Court to initiate proceedings under the Property (Rights of Spouses) Act;
 - b. What is the effect of the twelve (12) month limitation period prescribed by section 13(2) of the Property (Rights of Spouses) Act;
 - c. Whether the property located at Lot 219 Olive Park, Santa Cruz, in the parish of Saint Elizabeth, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles, should be sold and the proceeds of sale distributed in accordance with the respective shares of the parties, in accordance with the Partition Act;
 - d. Whether the Defendant is entitled to more than a fifty percent (50%) share in the 2007 Toyota Mark X registered 0400GQ; and
 - e. Whether the Claimants are entitled to occupation rent from the Defendant in respect of the property located at Lot 219 Olive Park, Santa Cruz, in the parish of Saint Elizabeth, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles.

THE FIXED DATE CLAIM

- [9] By way of a Fixed Date Claim Form, filed on 17 May 2019, ("the Fixed Date Claim"), the Claimants seek the following Orders: -

- a. That the property situate at Lot 219, part of Bybrook called Olive Park, in the parish of Saint Elizabeth which is registered at Volume 1351 Folio 410 of the Register Book of Titles and owned by the Claimants and Defendant as tenants in common, be sold and the proceeds of sale distributed amongst the parties according to their respective shares in the property;
- b. That the said property be valued by a reputable valuer to be agreed upon by the parties and the cost of the valuation be borne by the parties according to their respective shares in the property;
- c. Alternatively, that the Defendant do pay the Claimants for their respective shares in the property within ninety (90) days of receipt of the valuation report;
- d. That the Registrar of the Supreme Court be empowered to sign all such documents necessary to effect the sale of the property, or, to give consent where consent is necessary in the event any of the parties shall, for whatever reason, fail and or refuse to sign any such documents necessary to give effect to the Order of the Court, or, to give consent where consent is necessary;
- e. That the Defendant do pay to the Claimants, occupational rent for occupying their respective shares in the property, commencing on the 1st day of October 2017, to the date of the determination of this matter and the valuer be ordered to determine the fair and reasonable monthly rental of the said property for that purpose;
- f. That the Defendant do pay to the 1st Claimant within thirty (30) days of the Order of this Court, her half share in the 2007 Toyota Mark X registered 0400 GQ, which is owned by the 1st Claimant and the Defendant jointly, failing which the said motor car is to be

sold on the open market and the proceeds of sale distributed equally between the 1st Claimant and the Defendant;

- g. An Order that the said 2007 Mark X motor car be valued by a reputable motor vehicle assessor to be agreed on by the parties within fourteen (14) days of the Order of this Court and the cost of the valuation be shared equally between the 1st Claimant and the Defendant;
- h. An Order that, in the event of the sale of the property situate at Lot 219 Olive Park, Santa Cruz, in the parish of Saint Elizabeth, the Claimants' Attorney-at-Law has carriage of sale;
- i. That in the event the Mark X motor car is to be sold, the parties shall within thirty (30) days of the Order of this Court agree on an Auto Broker who shall be responsible for effecting the sale of the said motor car and the fees due to the Auto Broker be paid equally by the 1st Claimant and the Defendant;
- j. Such further or other relief as this Honourable Court deems just;
and
- k. Costs and Attorney-at-Law costs.

THE DEFENDANT'S RESPONSE

- [10]** For his part, Mr Samuels is claiming an entitlement to pursue his 'claim' under the Property (Rights of Spouses) Act and to obtain benefits enunciated in that statute, including declarations of the legal and beneficial interests in the division of property, other than the family home.
- [11]** In his Affidavit in Response to the Fixed Date Claim, which was filed on 9 December 2019, Mr Samuels seeks the following Orders: -

- a. A Declaration that the Defendant is entitled to a fifty percent (50%) legal and beneficial interest in the business K-Dzyne, located at 60 Main Street, Santa Cruz, in the parish of Saint Elizabeth; and
- b. A Declaration that the Defendant is entitled to a two thirds (2/3) legal and beneficial interest in the property located at Lot 219, part of Bybrook called Olive Park, in the parish of Saint Elizabeth, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles.

THE CLAIMANTS' SUBMISSIONS

The subject property

- [12] Mrs Watson-Samuels contends that she purchased the subject property with Mr Samuels, in 2014. She contends that it was agreed that her children would be gifted shares in the subject property and that, as a consequence, their names were added to the Certificate of Title in respect of the subject property.
- [13] Mrs Watson-Samuels avers that, in addition to her contribution to the purchase price of the subject property, she bore additional expenses amounting to in excess of Two Hundred Thousand Dollars (\$200,000.00). This included attorney's fees, transfer tax and the cost of obtaining a valuation report in respect of the subject property.
- [14] Mrs Watson-Samuels does not accept Mr Samuels' assertion that the three (3) bedroom dwelling house situated on the subject property was constructed solely by him. She asserts that they pooled their resources to construct the dwelling house; that monies were withdrawn daily from her business to purchase materials for the construction of the said dwelling house and to pay the construction workers.
- [15] She asserts that, in or around February or March 2017, she demanded that the subject property be sold and that Mr Samuels has been uncooperative.
- [16] Mrs Watson-Samuels does not agree that the respective shares of the parties in the subject property may be varied under section 7 of the Property (Rights of Spouses)

Act and asserts instead that the property rights in the subject property ought properly to be determined under The Partition Act.

Occupation rent

- [17] The Claimants contend that since December 2016, Mr Samuels has been occupying the subject property to their exclusion and that, as a result, they have been unable to realize any benefit from the subject property.
- [18] Mrs Watson-Samuels contends that Mr Samuels' conduct demonstrates that he never intended for them to live together as a family at the subject property. She contends further that, since September 2017, she has been unable to visit the subject property, as a result of Mr Samuels' hostility towards her.
- [19] As a consequence, the Claimants seek occupation rent for the period 1 October 2017 to the date of the determination of the instant matter, at a monthly rate of Fifty Thousand Dollars (\$50,000.00).

The motor vehicle

- [20] In this regard, Mrs Watson-Samuels asserts that Mr Samuels gave her the motor vehicle as a mother's day gift and that his name was added to the Certificate of Title as a matter of convenience. She also asserts that Mr Samuels has taken sole control of the motor vehicle thereby depriving her of the use and benefit of same.
- [21] As a result, Mrs Watson-Samuels seeks an order that Mr Samuels purchases her half (1/2) share in the motor vehicle, failing which, that the motor vehicle be sold and the proceeds of sale distributed equally between them.

The business

- [22] Mrs Watson-Samuels does not agree that Mr Samuels is entitled to a fifty percent (50%) share in the business, K-Dzyne. She maintains that it is she who

established this business, on 1 October 1988, in excess of twenty-two (22) years prior to the commencement of her relationship with Mr Samuels.

- [23] Mrs Watson-Samuels insists that, after the commencement of their relationship, she invited Mr Samuels to operate his own business (that of the sale of phone cards) from within her store. This she did in an effort to assist him. She asserts that Mr Samuels did not pay her any rent to operate from within her store and that he retained all the profit from his business. She maintains that, for the period 2013 to 2016, Mr Samuels was an employee of the business K-Dzyne and that he never contributed, financially or otherwise, to the establishment, conservation or development of the said business.
- [24] Finally, Mrs Watson-Samuels denies the existence of any agreement between herself and Mr Samuels that he would retain the motor vehicle in exchange for his share in the business K-Dzyne.

THE DEFENDANT'S SUBMISSIONS

The subject property

- [25] For his part, Mr Samuels contends that he is entitled to a two thirds (2/3) share in the subject property. The gist of his assertions in this regard is captured and summarized below.
- [26] Mr Samuels asserts that he contributed the sum of Two Million Two Hundred Thousand Dollars (\$2,200,000.00), towards the purchase price of the subject property and that the dwelling house that was constructed on it was constructed solely by him.
- [27] Mr Samuels maintains that Mrs Watson-Samuels contributed Five Hundred Thousand Dollars (\$500,000.00) towards the purchase price of the subject property and that the 2nd and 3rd Claimants made no financial contribution towards the acquisition of the subject property. Mr Samuels asserts that he pays all the expenses attached to the subject property, including maintenance costs and

property taxes. He insists that he makes all the improvements to the subject property.

[28] Mr Samuels asserts that the subject property is matrimonial property, as contemplated by the Property (Rights of Spouses) Act and that, pursuant to section 7 of the Act, the Court may vary the equal share rule with respect to the subject property.

[29] Alternatively, Mr Samuels submits that the land and the dwelling house should be valued separately and that the parties' respective shares, if any, in the land be apportioned. He maintains that the Claimants did not contribute to the construction of the dwelling house and that, as a result, they should not be entitled to an interest in same.

Occupation rent

[30] In this regard, Mr Samuels denies that he has occupied the subject property to the exclusion of the Claimants. He avers that he resided with the Claimants at 64 Ashwood Drive, Santa Cruz, in the parish of Saint Elizabeth and that it was agreed among them that they would occupy the subject property once it became suitable for occupation. Mr Samuels asserts that, when the subject property became suitable for occupation, the Claimants refused to reside there with him. He asserts further, that Mrs Watson-Samuels claimed that the subject property was neither convenient nor comfortable and chose to remain with the 2nd and 3rd Claimants at the Ashwood Drive property.

[31] Mr Samuels avers further that he occupies one (1) of the bedrooms of the dwelling house that is located on the subject property and that the remaining two (2) bedrooms remain unoccupied.

The motor vehicle

[32] Mr Samuels asserts that he is entitled to more than a fifty percent (50%) share in the motor vehicle. He asserts that it was purchased solely by him and that it was for

that reason that Mrs Watson-Samuels agreed that he could retain the motor vehicle in exchange for his share in the business, K-Dzyne.

- [33] Mr Samuels contends that currently utilizes the motor vehicle in the course of his business.

The business

- [34] It was submitted on Mr Samuels' behalf that he is entitled to a fifty percent (50%) share in the business K-Dzyne. This, it was submitted, is on the basis of his investment of his time and money in the said business, during the period 2012 to 2018, for the development and improvement of same.

- [35] Finally, Mr Samuels avers that his credit card was used to purchase stock and to pay the utility bills of the business. He avers that he obtained a loan to satisfy Mrs Watson-Samuels' outstanding credit card debt, a debt which she accrued as a result of purchasing merchandise for the business.

THE LAW

The procedure for the commencement of proceedings under the Property (Rights of Spouses) Act

- [36] The Property (Rights of Spouses) Act ("the Act"), came into operation on 1 April 2006 and was primarily established to provide a comprehensive mechanism for the division of property belonging to spouses. It utilizes what Morrison JA (as he then was) in **Annette Brown v Orphiel Brown**² termed a 'composite approach' to matrimonial property.

- [37] Section 2(1) of the Act provides that 'property' means any real or personal property, any estate or interest in real or personal property, any money, any negotiable instrument, debt or other chose in action, or any other right or interest whether in possession or not to which the spouses or either of them is entitled.

² [2010] JMCA Civ 12, at paragraph [34]

- [38] Section 13 of the Act provides that a spouse shall be entitled to apply to the Court for a division of property on the grant of a decree of dissolution of a marriage or termination of cohabitation or on the grant of a decree of nullity of marriage or where a husband and wife have separated and there is no reasonable likelihood of reconciliation or where one spouse is endangering the property or is seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property earnings.
- [39] Any application made under section 13(1)(a), (b) or (c) of the Act, shall be made within twelve (12) 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.
- [40] For the purposes of sections 13(1)(a) and (b) and 14 of the Act the definition of 'spouse' shall include a former spouse.
- [41] While the legislation expressly states who has *locus standi* to make an application and when the application is to be made, it is silent on how an application for division of property is to be commenced. As a consequence, the Act must be read in tandem with the Civil Procedure Rules, 2002 ("the CPR"), which apply to all civil proceedings in the Supreme Court.³

The Civil Procedure Rules

- [42] Part 76 of the CPR governs matrimonial proceedings, including proceedings for the division of property.
- [43] Rule 76.4 of the CPR specifically outlines the procedure for the commencement of proceedings, by way of a petition, for the dissolution of marriage, for a decree of nullity of marriage, or, for a decree of presumption of death and dissolution of the marriage. The rule also provides for the inclusion of claims, such as a claim for the division of property, in the petition.

³ Rule 2.2 of the CPR

[44] Additionally, rule 76.6 of the CPR states that where in a petition or a fixed date claim, a part of the relief claimed is, inter alia, division of property, the relief may be granted upon an application for court orders.

[45] Rule 76.6 of the CPR reads as follows: -

“76.6 (1) Where in any petition or fixed date claim form a part of the relief claimed is custody, maintenance, education of or access to children or division of property, such relief may be granted upon an application for court orders.

(2) It is the duty of the parties in all applications and responses, to set out in detail the facts and circumstances in support of or in opposition to the claim being made in the application.”

[46] An application for court orders may be made before, during or after the course of proceedings.⁴

[47] In the absence of a petition for the dissolution of marriage, for a decree of nullity of marriage, or for a decree of presumption of death and dissolution of the marriage or an application for court orders, an application for the division of property under the Act is commenced by way of a Fixed Date Claim Form.

[48] Rule 76.3 of the CPR expressly states that, subject to certain exceptions, the other provisions of the CPR are applicable to matrimonial proceedings. This includes Part 8, which governs the general commencement of proceedings, by way of a Claim Form or a Fixed Date Claim Form.

[49] Rule 8.1(4) of the CPR outlines the circumstances in which a Fixed Date Claim Form is to be used. The rule provides as follows: -

“8.1 (4) Form 2 (fixed date claim form) must be used -

⁴ Rule 11.1 of the CPR

- (a) *in mortgage claims;*
- (b) *in claims for possession of land;*
- (c) *in hire purchase claims;*
- (d) *where the claimant seeks the court's decision on a question which is unlikely to involve a substantial dispute of fact;*
- (e) *whenever its use is required by a rule or practice direction;*
and
- (f) *where by any enactment proceedings are required to be commenced by petition, originating summons or motion."*

[50] Rule 8.8 of the CPR prescribes the required content of a Fixed Date Claim Form.

The effect of an irregularity in the commencement of proceedings under the Property (Rights of Spouses) Act

[51] Rule 26.9 of the CPR grants the court the general power to rectify matters where there has been a procedural error. The rule reads as follows: -

- "26.9 (1) *This rule applies only where the consequence of failure to comply with a rule, practice direction or court order has not been specified by any rule, practice direction or court order.*
- (2) *An error of procedure or failure to comply with a rule, practice direction or court order does not invalidate any step taken in the proceedings, unless the court so orders.*
- (3) *Where there has been an error of procedure or failure to comply with a rule, practice direction, court order or direction, the court may make an order to put matters right.*
- (4) *The court may make such an order on or without an application by a party."*

The limitation period under section 13(2) of the Property (Rights of Spouses) Act

- [52] Section 13(2) of the Act imposes a time limit within which a party may initiate proceedings under subsections (1)(a), (b) or (c). It mandates that an application must be made within twelve (12) 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.
- [53] 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.⁵ The limitation period is a benefit and a defence afforded a defendant after the expiration of the twelve (12) month period allowed for a claimant to file a claim for the division of property.
- [54] Notwithstanding, section 13(2) of the Act empowers the court to extend the time for filing a claim under the Act, after hearing the applicant.
- [55] If a claimant files a claim under the Act outside of the twelve (12) month period prescribed by section 13(2) of the Act and before an application for extension of time is made or granted, the claim is considered to be irregular and cannot proceed until the application is granted.
- [56] In **Sharon Smith v Vincent Service**,⁶ Sykes J (as he then was) adopted and applied the conclusions of Phillips JA in **Angela Bryant-Saddler v Samuel Oliver Saddler**,⁷ that, a claim filed under the Act and before an extension of time is granted, is not invalid but irregular or in a state of suspended validity until the application for extension of time is granted.
- [57] At paragraph [20], Sykes J stated as follows: -

⁵ See - **Sharon Smith v Vincent Service** [2013] JMCA Civ 78, at paragraph [8], per Sykes J (as he then was)

⁶ (supra)

⁷ [2013] JMCA Civ 11

*“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.”*

[58] In order for the court to exercise its discretion in favour of an applicant and, for an application for extension of time to be successful, the applicant must satisfy certain requirements.

[59] In **Delkie Allen v Trevor Mesquita**,⁸ Harris JA listed the factors that the court, in exercising its discretion for an extension of time under section 13(2) of the Act, is required to take into consideration. She posited at paragraph [18] as follows: -

“The court, in exercising its discretion for an extension of time, is required to take into consideration factors such 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.”

[60] Furthermore, in **Annette Brown v Orphiel Brown**,⁹ Morrison JA stated at paragraph [78]: -

‘On an application under section 13(2), it seems to me, all that the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort,

⁸ [2011] JMCA Civ 36

⁹ supra

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)).’

- [61] If the application is unsuccessful and, if the time is not extended by the court, as the matter could proceed no further, the limitation defence would succeed, as, although a procedural defence, it is a complete defence, and the claim would be statute barred.¹⁰

ANALYSIS AND FINDINGS

Whether there is a valid claim before the Court to initiate proceedings under the Property (Rights of Spouses) Act

- [62] This action was commenced by way of a Fixed Date Claim Form, filed on 17 May 2019, for the division of property under the Partition Act. It is within this action that Mr Samuels purports to make a claim under the Act, by way of an Affidavit in Response to Fixed Date Claim Form, filed on 9 December 2019.
- [63] In that Affidavit, Mr Samuels seeks a Declaration that he is entitled to a fifty percent (50%) legal and beneficial interest in the business K-Dzyne, located at 60 Main Street, Santa Cruz, in the parish of Saint Elizabeth; and a Declaration that he is entitled to a two thirds (2/3) legal and beneficial interest in the subject property.
- [64] The CPR provide that, in the absence of a petition for the dissolution of marriage, for a decree of nullity of marriage, or for a decree of presumption of death and the dissolution of the marriage, the proper procedure for the commencement of an application for division of property under the Act is either by way of an application for court orders or by way of a Fixed Date Claim Form.
- [65] It is clear from a reading of the documents that have been filed in the instant matter, that Mr Samuels has not complied with these requirements of the CPR. Consequently, the Court is constrained to find that Mr Samuels’ use of an affidavit,

¹⁰ See - *Angela Bryant-Saddler v Samuel Oliver Saddler* (supra), at paragraph [44], per Phillips JA

to initiate proceedings under the Act, is irregular and that there is no valid claim under the Property (Rights of Spouses) Act before the Court on which it can proceed.

- [66] Once a spouse, as defined in the Act, applies to the court on the basis of the matters set out in section 13(1)(a) – (d) of the Act and in accordance with section 13(2) of the Act and the claim form is in compliance with Part 8 of the CPR, relating to the commencement of proceedings, the claim would be valid.
- [67] It is also significant to note that the CPR do not impose any sanctions for the failure to comply with rules 76.6 or 8.1(4).
- [68] It is for these reasons, that the Court finds that the procedural irregularity in the commencement of an action, pursuant to the Act, is not an absolute bar. It does not mean that the Act does not apply to the relationship between Mr Samuels and Mrs Watson-Samuels and that their rights cannot be determined by the application of its provisions.
- [69] In the circumstances of this case, the option available to Mr Samuels would be to bring a fresh proceeding, by way of a Fixed Date Claim Form, under the Act.

The effect of the twelve (12) month limitation period prescribed by section 13(2) of the Property (Rights of Spouses) Act

- [70] Of course, Mr Samuels would nonetheless have to comply with section 13(2) of the Act, in order to obtain any benefits under the statute.
- [71] Section 13(2) of the Act is a provision which establishes a time line for the application for division of property under the Act. There are certain events which trigger that right to apply. They are set out in section 13(1)(a), (b), (c) and (d) of the Act. The application, if being made under subsections (a), (b) or (c), shall be made within twelve (12) months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, separation or **such longer period as the court may allow after hearing the applicant.** [Emphasis added]

- [72] The marriage between Mr Samuels and Mrs Watson-Samuels was dissolved on 21 September 2018. It is on this basis that Mr Samuels purports to make an application under the Act, to determine his interest in the subject property and in the business, K-Dzyne. Mr Samuels would therefore have had twelve (12) months from 21 September 2018, to bring his claim under the Act.
- [73] Although time is limited, that time period is flexible and can be extended, once the court exercises its discretion in favour of the applicant, after hearing him/her.
- [74] To date, Mr Samuels has not made an application for an extension of time within which to bring a claim under the Act. Consequently, where section 13(2) of the Act is a limiting section, thus providing a limitation defence, if a claim is filed outside the time limited in the section, the action certainly could not proceed without the court allowing the time period to be extended. To do otherwise would be in breach of the specific words of the section.
- [75] If the time is not extended by the court, as the matter could proceed no further, the limitation defence would succeed, as, although a procedural defence, it is a complete defence and the claim would be statute barred.¹¹
- [76] The authorities are clear that, a claim filed before an extension of time is granted is in 'procedural purgatory' or 'a state of suspended validity' and can only be cured by a subsequent order of the court.¹²

¹¹ See - **Fitzgerald Hoilette v Valda Hoilette** [2013] JMCA Civ 11, at paragraphs [41] - [44], per Phillips JA

The defence that a limitation period has expired is a procedural defence and is normally one that has to be raised as a defence and resolved at trial. If the defence is pleaded, it is open to the defendant, in a clear case, to apply to have the claim, or the affected part thereof, struck out as being an abuse of the process of the court. See - **Bertram Carr v Von's Motor & Company Ltd** [2015] JMCA App 4, per Brooks JA (as he then was), at paragraph [11]; and **Ronex Properties Ltd v John Laing Construction Ltd and others (Clarke, Nicholls & Marcel (a firm), third parties)** [1982] 3 All ER 961, at page 965, per Donaldson LJ.

¹² See - **Sharon Smith v Vincent Service** (supra), at paragraph [20], per Sykes J (as he then was)

- [77] It is also clear from the authorities that the court may only treat such a claim as an application for an extension of time where there is some evidence to indicate the reason(s) for the failure to have brought the claim within the statutory period.¹³
- [78] An examination of Mr Samuels' Affidavit in Response does not reveal any evidence to account for the failure to have brought a claim within the limitation period.
- [79] As a consequence, the Court finds that, until an application is made and the court grants an extension of time within which to make an application for division of property under the Property (Rights of Spouses) Act, Mr Samuels is precluded from claiming the benefits under the Act within this action.

Whether the subject property should be sold and the proceeds of sale distributed according to the parties' respective shares in the subject property in accordance with the Partition Act

- [80] The Partition Act, 1873 provides for the partition and sale of property and the distribution of the proceeds of sale.
- [81] Section 2(2) of the Partition Act states that, for the purposes of the Act, in a claim for partition of property, it is sufficient for a claimant to bring a claim for a sale of the property and distribution of the proceeds. It is not necessary to claim a partition.
- [82] Section 2(2) of the Partition Act reads as follows: -

“For the purposes of this Act, an action for partition shall include an action for sale and distribution of the proceeds; and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.”

- [83] Section 4 of the Partition Act provides that where an interested party or parties, to the extent of one moiety or upwards in property, requests the court to direct a sale of the property and a distribution of the proceeds, the court is required to

¹³ See - **Fitzgerald Hoilette v Valda Hoilette** (supra), at paragraph [65]; **Delkie Allen v Trevor Mesquita** (supra), at paragraph [16]

direct a sale of the property and to give all necessary and consequential directions, unless there is good reason to the contrary. Section 4 reads as follows: -

“In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the Court to direct a sale of the property, and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the Court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.”

[84] In **Porter v Lopes**,¹⁴ Jessel MR examined section 4 of the UK’s Partition Act, 1868, which reads identical to section 4 of our Partition Act. After careful examination of the section, he opined as follows: -

“Now, therefore, there is an absolute right in the owner of a moiety to require a sale subject to this; unless it sees good reason to the contrary, the Court shall direct a sale... Contrary to what? As I read it, it is contrary to a sale. It can mean nothing else. The Court must see some good reason why there should not be a sale. I do not say there may not be some other good reason from the peculiar nature of the property, but it must be a good reason against the sale.”¹⁵

[85] Furthermore, in **Cynthia Stephens v Clemenston Stephens**,¹⁶ P Williams J (as she then was), on an examination of section 4 of the Partition Act, posited as follows: -

“This section is regarded as making it imperative on the Court, to order a sale unless it sees good reason to the contrary. The party interested in sale is entitled to such sale as of right unless there is some good reason to the contrary shown, the onus then is on the party opposing to show what the Court will consider good reason.”

¹⁴ (1877) 7 Ch D 358

¹⁵ (supra), at page 363

¹⁶ [2012] JMSC Civ 134, at paragraph [6]

[86] Section 5 of the Partition Act outlines the procedure to be adopted where an interested party in the property requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division. The section provides as follows: -

“In a suit for partition, where, if this Act had not been passed, a decree for partition might have been made, then, if any party interested in the property to which the suit relates requests the Court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the Court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given the Court may order a valuation of the share of the party requesting a sale in such manner as the Court thinks fit and may give all necessary or proper consequential directions.”

[87] In the instant case, the Claimants seek an Order that the subject property be sold and that the proceeds of the sale be distributed among the parties, according to their respective shares in the subject property. This is an absolute right which they are entitled to exercise, unless the Court finds that there is good reason to the contrary. The onus then is on the opposing party to demonstrate that there is good reason to the contrary, that is, for the Court to decline to grant the Orders sought.

[88] The Court is hard pressed to find that Mr Samuels has demonstrated that there is good reason to the contrary and that it ought properly to decline to grant the Orders sought in this regard. The Court has noted that Mr Samuels has raised no objection to the subject property being sold and the proceeds of the sale being distributed among the parties, in accordance with their respective shares in the subject property. The relief that he seeks is a variation, under the Property (Rights of Spouses) Act, of his interest held in the subject property and a declaration that he is entitled to a legal and beneficial interest that is greater than that which is indicated on the Certificate of Title.

[89] Regrettably, Mr Samuels has failed to bring a valid claim before the Court to initiate proceedings under the Property (Rights of Spouses) Act, on the basis of which the Court could properly proceed.

[90] In the circumstances, the Court is left to determine what the balance of justice demands. The Court does not find that the Claimants' case should be hamstrung by virtue of Mr Samuels' failure.

[91] As a consequence, the Court finds that the subject property is to be sold and that the proceeds of sale are to be distributed among the parties, in accordance with their respective shares in the subject property, in accordance with the Partition Act.

Whether the Defendant is entitled to more than a fifty percent (50%) share in the 2007 Toyota Mark X registered 0400GQ

[92] Mrs Watson-Samuels and Mr Samuels are the registered joint owners of the motor vehicle. Mr Samuels asserts that he is entitled to more than a fifty percent (50%) share in the motor vehicle because it was purchased solely by him. He asserts further that he currently utilizes the motor vehicle in the operation of his business.

[93] Mrs Watson-Samuels has not challenged these assertions. Nor does she claim to have contributed, whether financially or otherwise, to the acquisition of the motor vehicle. She avers that the motor vehicle was given to her as a gift by Mr Samuels.

[94] In light of Mr Samuels' contention, the burden rests on him to prove that the beneficial interest in the motor vehicle is different from the legal interest and that they (Mrs Watson-Samuels and Mr Samuels) had a different common intention at the time of the acquisition of the motor vehicle or that they later formed the common intention that their respective interest would change.

[95] In this regard, Mr Samuels has produced in evidence a manager's cheque and a receipt which reveal the payment of One Million Seven Hundred Thousand Dollars (\$1,700,000.00), as proof of his purchase of the motor vehicle.

- [96] While financial contribution is a relevant factor in ascertaining the parties' common intention, it is not the only or decisive factor.¹⁷ The court is hesitant to displace the presumption that, where there is joint legal ownership, there is also joint equitable ownership. This is especially so in matters involving family disputes where strong feelings are aroused when relationships have broken down.¹⁸
- [97] In **Jones v Kernott**,¹⁹ the House of Lords re-examined the decision of **Stack v Dowden** and provided further guidance on how the court should approach the issue of the determination of beneficial interests in the context of joint ownership.
- [98] Lord Walker and Lady Hale posited that the presumption of joint legal and beneficial ownership can be displaced by showing that the parties had a different common intention at the time when the property was acquired or that they later formed the common intention that their respective shares would change. Their common intentions are to be deduced objectively from their words and actions. A number of factors may be relevant in deducing the parties' true intentions. These include any advice or discussions at the time of the transfer which cast light on their intentions; the reasons for which the property was acquired in the joint names of the parties; the purpose for which the property was acquired; the nature of the parties' relationship; how the purchase was financed; how the parties arranged their finances, whether separately or together or a bit of both; and the parties' individual characters and personalities.
- [99] The Court finds that Mr Samuels has not provided sufficient evidence to displace or rebut the presumption of joint legal and beneficial ownership in respect of the motor vehicle. Consequently, the parties' legal and beneficial interest in the motor vehicle should not be disturbed.

¹⁷ See - **Stack v Dowden** [2007] UKHL 17, per Lady Hale, at paragraph 56

¹⁸ See - **Stack v Dowden** (supra), at paragraph 68

¹⁹ [2011] UKSC 53

Whether the Claimants are entitled to occupation rent from the Defendant in respect of the subject property

[100] In **Reid v Reid**,²⁰ Bertram-Linton J (Ag) (as she then was) stated the general principle regarding tenants in common and claims for occupation rent. At paragraph [46], she stated as follows: -

“The law does not allow tenants in common to reap rent from one another for mere occupation of the premises. This position is grounded by the proposition that co-owners are jointly entitled to the entire estate and each is entitled to enjoy possession along with the other.”

[101] There are, however, several exceptions to this principle. The pertinent exception, for present purposes, is where an occupying co-owner ousts or excludes the other co-owner(s) from the property.

[102] Evan Brown J, in **Blake v Blake**,²¹ at paragraph [18], stated as follows: -

“Where land is held by several co-tenants they are all, as between themselves, entitled to possession of the whole. Hence there is no remedy in trespass against an occupying co-owner unless he has ousted or excluded the other or others. There is no exclusion if one merely stays away, allowing the other to occupy a house or take all the profits whether by way of rents, crops or minerals. Where one ousts the other or others, he will be liable for an occupation rent. Where there is no ouster there is no such liability in the absence of any contract to pay rent or other assumption of liability. If one co-tenant was dissatisfied with the situation, his remedy was to apply to the court for an order compelling partition. From 1868 the court was empowered, in the alternative, to order a sale of the jointly-owned land.”

[103] Brown J stated further, at paragraph [27]: -

²⁰ [2016] JMSC Civ 204

²¹ [2016] JMSC Civ 63

“Thirdly, an occupation rent is payable if the claiming co-owner was excluded from the property by way of an ‘ouster’. Actual or constructive exclusion of a co-owner is the typical case in which an occupation rent has been charged.”

[104] The Claimants contend that, since December 2016, Mr Samuels has occupied the subject property to their exclusion and that, as a result, they have been unable to realize any benefit from the subject property. To ground that assertion, they rely on the authority of **Dennis v McDonald**.²²

[105] In **Dennis v McDonald**, the claimant and the defendant were husband and wife. They contributed in equal shares to the purchase of a dwelling house with the intention that it would be the family home. The property was registered in both their names as tenants in common in equal shares. During the marriage, the claimant left the dwelling house on several occasions because of the defendant’s violence towards her. After twelve (12) years of cohabitation, the claimant permanently left the dwelling house. The Defendant continued to occupy the dwelling house. The court held that, the claimant was entitled to occupation rent as she was forced to leave the dwelling house as a result of the violence or threatened violence of the defendant.

[106] The case of **Dennis v McDonald** is properly to be distinguished from the instant matter. Firstly, it is important to note that in **Dennis v McDonald**, the parties resided at the dwelling house for a number of years. Secondly, the dwelling house was the family home. Thirdly, the claimant was forced to leave the dwelling house as a result of the defendant’s acts of violence towards her and the threats of continued violence.

[107] In the instant case, the Claimants and Mr Samuels have never lived together at the subject property. Mrs Watson-Samuels asserts that Mr Samuels’ actions indicate that it was never his intention for them to live together at the subject property. She contends that Mr Samuels never provided her with keys to the subject property and

²² [1977] 1 WLR 810

that he has kept in his possession both the keys and the remote garage openers. Mrs Watson-Samuels further contends that, since September 2017, she has been unable to visit the subject property, as a result of Mr Samuels' hostility towards her.

[108] The Court finds that the Claimants have not adduced any cogent evidence to support the assertion that Mr Samuels' actions excluded them from the subject property. Nor have they adduced any evidence that Mr Samuels deprived them of any benefit that they would otherwise have obtained from the use of the subject property.

[109] In the circumstances, the Court finds that the Claimants are not entitled to occupation rent and that the Fixed Date Claim fails on this ground.

CONCLUSION

[110] In summary, the Court finds that Mr Samuels' use of an affidavit to initiate proceedings under the Property (Rights of Spouses) Act, is irregular and that there is no valid claim before the Court under the Act, on which it can proceed.

[111] Secondly, until an application is made and the court grants an extension of time within which to make an application for division of property under the Property (Rights of Spouses) Act, Mr Samuels is precluded from claiming the benefits under the Act, within this action.

[112] The subject property is to be sold and the proceeds of sale distributed among the parties, in accordance with their respective shares in the subject property, in accordance with the Partition Act.

[113] Mr Samuels has not provided sufficient evidence to displace the presumption of joint legal and beneficial ownership of the motor vehicle. As such, the parties' beneficial interest in the motor vehicle should not be disturbed.

[114] Finally, the Court finds that the Claimants are not entitled to occupation rent.

DISPOSITION

[115] It is hereby ordered as follows: -

- a. The property situated at Lot 219, part of Bybrook called Olive Park, in the parish of Saint Elizabeth, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles, is to be sold and the proceeds of sale distributed among the parties, in accordance with their respective shares in the said property;
- b. The property is to be valued by a reputable valuator to be agreed by the parties and the cost of the valuation is to be borne by the parties, in accordance with their respective shares in the property being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles;
- c. Alternatively, the Defendant is to pay the Claimants for their respective shares in the property, being the land comprised in Certificate of Title registered at Volume 1351 Folio 410 of the Register Book of Titles, within One Hundred and Eighty (180) days of receipt of the valuation report;
- d. The Registrar of the Supreme Court is empowered to sign all such documents necessary to effect the sale of the property, or, to give consent where consent is necessary, in the event that any of the parties, shall, for whatever reason, fail and/or refuse to sign any such documents necessary to give effect to the Orders of the Court, or, to give consent where consent is necessary;
- e. The Claimants' Attorney-at-Law shall have carriage of sale of the property situate at Lot 219, part of Bybrook called Olive Park, in the parish of Saint Elizabeth, being the land comprised in Certificate of

Title registered at Volume 1351 Folio 410 of the Register Book of Titles;

- f. The 2007 Toyota Mark X registered 0400 GQ is to be valued by a reputable valuator, to be agreed on by the 1st Claimant and the Defendant, within thirty (30) days of the date of this Order and the cost of the valuation shall be borne equally by the 1st Claimant and the Defendant;
- g. The Defendant shall be at liberty to purchase the 1st Claimant's share in the 2007 Toyota Mark X registered 0400 GQ, within thirty (30) days of the date of this Order, failing which the said motor vehicle registered 0400 GQ is to be sold on the open market and the proceeds of sale distributed equally between the 1st Claimant and the Defendant;
- h. In the event that the 2007 Toyota Mark X registered 0400 GQ is to be sold on the open market, the 1st Claimant and the Defendant shall, within thirty (30) days of the date of this Order, agree on an Auto Broker who shall be responsible for effecting the sale of the said motor vehicle and the fees due to the Auto Broker shall be borne equally by the 1st Claimant and the Defendant;
- i. Each party is to bear his/her own costs;
- j. Liberty to apply; and
- k. The Claimants' Attorney-at-Law is to prepare, file and serve the Orders made herein.