



[2019] JMSC Civ. 18

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

**IN THE CIVIL DIVISION**

**CLAIM NO. 2016 HCV 01577**

<b>BETWEEN</b>	<b>MARSHA SALMON</b>	<b>CLAIMANT</b>
<b>AND</b>	<b>NEVILLE SCOTT</b>	<b>DEFENDANT</b>

**IN CHAMBERS**

**Mr. Demetrie Adams instructed by Green Morgan Stephenson for the Claimant**

**Mr. Samuel Smith for the Defendant**

**Heard: 5<sup>th</sup> July, 2017 & 11<sup>th</sup> February, 2019**

**Civil Practice and Procedure– Oral application to strike out Claimant’s Statement of Case for breach of Order of the Court - Rule 26.3 (1) (a) of the Civil Procedure Rules - The Property (Rights of Spouses) Act - Extension of time not sought or granted before the claim was filed - Validity of the claim.**

**Cor: Rattray, J.**

[1] The matter before this Court is the adjourned first hearing of the Claimant’s Fixed Date Claim Form originally filed on the 19<sup>th</sup> April, 2016, claiming *inter alia*, damages, division of property and businesses. It came before Lawrence-Beswick J on the 23<sup>rd</sup> June, 2016, where she granted leave to the Claimant to file and serve an Amended Fixed Date Claim Form with Supporting Affidavit within thirty (30) days from the date of her Orders, that is, by the 23<sup>rd</sup> July, 2016. Permission was also granted to the Defendant to file and serve Affidavits in Response within forty-two (42) days of service

of the Supporting Affidavit. In addition, costs of the day were awarded to the Defendant to be agreed or taxed.

[2] On the 11<sup>th</sup> August, 2016, nineteen (19) days outside the time specified by the Order of the Court, the Claimant filed an Amended Fixed Date Claim Form seeking *inter alia*, “a Declaration that for the relevant periods the Claimant was the spouse of the Defendant” together with an Amended Affidavit of Marsha Salmon in Support of Fixed Date Claim Form. The Defendant to date however, has not filed any Affidavit in Response.

[3] Counsel Mr. Smith in an effort to assist the Court started to give a brief history of the matter. However, Counsel’s efforts quickly turned into an oral application to strike out the Claimant’s Statement of Case for her failure to comply with the Orders of Lawrence-Beswick J, within the time stipulated.

[4] Mr. Smith submitted that the Claimant has shown disregard for the Orders of the Court, by not filing her Amended Fixed Date Claim Form within the time stipulated by the Court. The Claimant he contended, filed her Amended Fixed Date Claim Form about a year after the Order was made, and this he argued, greatly prejudiced his client who has not been able to respond to the Claimant’s Affidavit evidence. He further submitted that the Court should exercise its discretion to strike out the Claimant’s Statement of Case pursuant to Rule 26.3 (1) (a) of the **Civil Procedure Rules (CPR)**, which reads: -

*“...the court may strike out a statement of case or part of a statement of case if it appears to the court-*

*(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings.”*

[5] In addition, he argued that the Fixed Date Claim Form does not conform with the provisions of Rule 8.8 (c) of the **CPR**, which provides that: -

*“Where the claimant uses form 3, the claim form must state-*

*(c) where the claim is being made under an enactment, what that enactment is”*

[6] Further, Mr. Smith argued that the fundamental reason why the Claimant's Statement of Case should be struck out, is the fact that the Claimant has not sought an extension of time to file her Fixed Date Claim Form, pursuant to section 13(2) of the **Property (Rights of Spouses) Act (PROSA)**. That section indicates that: -

*"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."*

[7] He argued that the parties had ceased cohabitation since 2014, and the claim was brought in 2016, outside the one (1) year limitation period, without an extension of time being applied for and granted by the Court. He further went on to submit that in the circumstances, an extension of time was a precursor to the filing of the claim, and if such an extension was not granted before the claim was filed, it ought to be struck out. In support of this contention he relied on the case of **Deidre Anne Hart Chang v Leslie Chang** (unreported), Supreme Court, Jamaica, Claim No. 2010 HCV 03675, judgment delivered on the 22<sup>nd</sup> November 2011. It should be noted however, that a copy of this authority was not provided to either the Court or Counsel for the Claimant.

[8] Counsel Mr. Smith also argued that there was sufficient time within which the Claimant could have sought an extension of time before the claim was filed. Furthermore, he maintained that there is ample authority to suggest that an extension of time could have been sought as a relief in the Fixed Date Claim Form.

[9] Mr. Adams in reply indicated that he was not in a position to respond to Mr. Smith's submissions, as he was holding for the Attorney-at-Law who had conduct of the matter. In light of that, he was not in a position to respond to such an application. He argued that an application of this nature ought properly to have been made in writing and not orally, as such an application was tantamount to an ambush. He also argued that the Defendant's Counsel was well aware that the Claimant had not complied with the Orders of Lawrence-Beswick J within the stipulated time, and yet, Mr. Smith took no steps in that regard to raise any complaint.

[10] Mr. Adams conceded that the claim was brought outside the one (1) year period pursuant to section 13(2) of **PROSA** and that his client ought properly to have sought an extension of time before filing her claim.

[11] There is no dispute that the Court has the power pursuant to Rule 26.3 (1) (a) of the **CPR** to strike out a party's Statement of Case or a part of the Statement of Case for failing to comply with a Rule, Practice Direction or an Order of the Court. However, the striking out of a party's Statement of Case is a drastic measure that should only be utilised as a matter of last resort. F Williams JA in the case of **Garbage Disposal & Sanitations Systems Ltd v Noel Green and Ors** [2017] JMCA App 2, stated that: -

*"[46] ... While rule 26.3(1)(a) of the CPR gives the court power to strike out a statement of case where it appears that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings, there is a plethora of authorities that emphasize that striking out should be used only as a last resort and only where so warranted by the circumstances of the case. Thus, the particular circumstances of each case must be considered."*

[12] In the case of **Biguzzi v Rank Leisure plc** [1999] 4 All ER, Lord Woolf MR at page 940 had this to say: -

*"The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.*

*Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.*

*There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of*

*the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."*

**[13]** The issue of a striking out ought to involve a balancing exercise of the rights of the respective parties. In the instant case, if the oral application of the Defendant's Counsel were to be granted, the Claimant's case would be brought to an abrupt end. In embarking on this task, the Court must consider the question of whether a striking out of the Claimant's Statement of Case is a proportionate response to her failure to file the Amended Fixed Date Claim Form with Supporting Affidavit within the time ordered by Lawrence-Beswick J.

**[14]** I am of the view that to adopt such a course is too drastic in the circumstances of the instant case, as there are lesser sanctions that can be imposed. These include an "Unless Order" and/or an Order for the payment of costs within a certain time, failing which certain consequences would attach. Such an Order would demonstrate to the Claimant, that the Orders of the Court must be complied with within the stipulated time.

**[15]** The Claimant failed to comply with the Orders of Lawrence-Beswick J within the stipulated time, but she did comply, although admittedly late on the 11<sup>th</sup> August, 2016, nineteen (19) days outside the time stipulated, and not approximately a year as contended by Counsel Mr. Smith. That being said, it cannot be emphasized too often that the Orders of the Court must be complied with, especially where time limits are set.

**[16]** Furthermore, it must be noted that the Defendant is also in breach of the Orders of Lawrence-Beswick J, as to date he has not filed an Affidavit in Response. Counsel Mr. Smith has also not put forward any explanation as to why his client has not filed an Affidavit to date.

**[17]** I am obliged to comment on the fact that although the Rules do not prohibit a party from making an oral application to strike out another party's Statement of Case, such a course of action in my view, ought to be used sparingly, if at all. The days are long gone when parties who appear before the Court are suddenly faced with an oral

application, of which they are completely unaware. An application by ambush is and ought to be, a thing of the past. No application ought to be heard by the Court, of which the other side is unaware, except perhaps in exceptional circumstances, if the Court is to fulfil its mandate of dealing with matters justly.

[18] On the complaint by Counsel Mr. Smith, that the Claimant's Statement of Case ought to be struck out, she not having sought an extension of time to file the Fixed Date Claim Form within the twelve (12) month period, pursuant to section 13(2) of **PROSA**, I can do no better than to refer to and rely on the dicta of Phillips JA in the case of **Angela Bryant-Saddler v Samuel Oliver Saddler and Fitzgerald Hoilette v Valda Hoilette, Davion Hoilette and Simeon Davis** [2013] JMCA Civ. 11. There, the learned Judge of Appeal quite eloquently made the point that in a claim under **PROSA**, an application for extension of time can be made after the claim was filed. She indicated that if an extension of time is not sought before the claim was filed, the claim can be considered to be irregular until an application for extension is made.

[19] At paragraph 86 of the above cited case, Phillips JA laid down the following principles: -

*“(i) The mischief that the statute was promulgated to address which was to facilitate the efficient resolution of family disputes must be examined so that the courts are faithful to the legislative context.*

*(ii) No useful purpose can be served by adopting an inflexible approach to statutory interpretation, once the court has jurisdiction. Any interpretation should avoid inconvenient outcomes, for instance, unnecessary expense, such as refiling, re-issue, and re-service of pleadings.*

*(iii) Section 13 of PROSA does not go to jurisdiction, but is a procedural section setting out the process to access the court and the remedies available. Jurisdiction of the court is conferred in the main by sections 6, 7 and 14.*

*(iv) As the provision is procedural, and not a condition precedent to the jurisdiction of the court, any irregularity can be remedied by a subsequent order, that is nunc pro tunc, in the interests of justice, particularly as the grant of the order is under the court's control through the exercise of its discretion.*

*(v) The claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted.*

(vi) *The specific words of the statute are important and must be perused with care. The Legislature must be clear in its intent, and must state specifically if leave is required; if leave is a condition precedent; and what, if any, is the consequence of the failure to obtain it if so required.*

(vii) *There are no express words used in PROSA requiring that leave be obtained.*

(viii) *The cases support the principle that even if leave was specifically required before an action is brought, if the leave has not been obtained the omission is not a fundamental irregularity and can be cured nunc pro tunc.*

(ix) *On any study of the language of section 13 of PROSA the focus was on extension, that is, on such longer period as the court may allow, and not on leave.*

(x) *Section 13 of PROSA was not promulgated to create a limitation bar.*

(xi) *If the claim is filed outside the 12-month time period set out in the statute, extension of time must be obtained from the court for the matter to proceed, but no leave is required, and so no application for leave and extension is required.*

***(xii) There are no words indicating that the application for extension of time must be filed before the claim form is filed, if the claim form is filed outside the time limited in PROSA. There is no indication that the application for extension cannot be filed after the claim is filed, and the order granted nunc pro tunc.***

[My emphasis]

**[20]** I am therefore not prepared to accept the submission of Counsel Mr. Smith, that the claim ought to be struck out because no extension of time was sought before the claim was filed. In such circumstances, the Court is not minded to accede to Mr. Smith's application and the Order therefore is as follows: -

- a) Application to strike out the Claimant's Statement of Case is refused;
- b) Matter stayed pending the filing by the Claimant of an application for extension of time, such application to be made within twenty-one (21) days of the date of this ruling;
- c) Costs to be costs in the claim;
- d) Leave to appeal refused.