ORAL JUDGEMENT [2018] **JMSC Civ. 8**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 04955

BETWEEN	**ALLAN ADOLPHUS JOHNSON**	**CLAIMANT**
AND	**KATHLEEN KELLY-JOHNSON**	**DEFENDANT**

IN CHAMBERS

Mrs. Viviene Washington for the Claimant

Miss Vinette Grant for the Defendant

Heard: 3rd, 17th and 29th January 2018

Notice of Application for court orders filed pursuant to Rule 26.5 after striking out of defendant's statement of case - Whether applicant permitted to claim in notice of application for items which were not claimed in the Fixed Date Claim Form - No supporting evidence in affidavit in support of Fixed Date Claim Form - Evidence contained in affidavit in support of Notice of Application

ANDREA PETTIGREW-COLLINS, J. (AG.)

[1] The claimant filed his fixed date claim form supported by affidavit on the 10th of September 2012. He subsequently filed an Amended Fixed Date Claim Form (AFDCF) on the 20th of September 2013 along with another affidavit. The defendants also filed affidavits in the matter. Without detailing everything that transpired it is necessary to mention that on the 12th of March 2016 the court made an Unless Order. The matter was set down for trial on the 14th of December 2015. The defendant's statement of case was struck out pursuant to

that Unless Order. An Application for Relief from Sanctions was made that day but was subsequently discontinued. The claimant then filed a Notice of Application for Court Orders followed by an Amended Notice of Application for Court Orders supported by affidavit. The defendant filed her own Notice of Application for Court Orders and various affidavits thereafter. The court took the view that her application was not properly before the court given that her statement of case was struck out. A number of orders were sought in the Notice of Application which were not sought in the AFDCF. This application was filed pursuant to the provisions of Rule 26.5 of the CPR. Rule 26.5(1) states:

> *"This rule applies where the court makes an order which includes a term that the statement of case of a party be struck out if the party does not comply with the "unless order" by a specified date."*

Rule 26.5(6) states:

> *"Where the party applying for judgment is the claimant and the claim is for some other remedy the judgment shall be such as the court considers that the claimant is entitled to."*

Rule 26.5(8) states;

> *"Where a decision of the court is necessary to determine the terms of the judgment, the party making the request must apply for directions."*

[2] The defendant agrees that the claimant is entitled to the following orders:

i) A fifty percent (50%) interest in all that parcel of land located at 186c Dolphin Way, Old Harbour P.O. in the parish of Saint Catherine, registered at Volume 1296 Folio 720 of the Register Book of Titles;

ii) That the defendant should pay to the claimant the sum of One Hundred and Thirty Thousand ($130,000.00) which represents his interest in 1992 Nissan Motor car with registration Nos. 1032FQ and PE 4040 and chassis No. HU 13075083;

iii) That the defendant should pay to the claimant the sum of Seventy Five Thousand Dollars ($75,000) which represents the costs awarded to the Claimant by consent on the 14th April, 2016 and

iv) That the net amount due to the defendant is to be paid over to her Attorney at Law within seven days of the date of the order.

[3] The defendant's Attorney-at-law objected to the court making any of the other orders sought and contends that the claimant is seeking orders in his Notice of Application for Court Orders that were not sought in his Fixed Date Claim Form. Counsel contends that the court should look at the state of the claimant's case as at the date when the defendant's case was struck out and consider what is it that the claimant had asked for and what was the evidence that the claimant had put before the court in support of his case. She further contends that any order which the claimant now seeks must be constrained by those two matters. The claimant's amended fixed date claim form makes no mention specifically of the subject matters of some of the orders being requested. The omnibus word liability cannot cure the lack of specificity she says. There is nothing in the first affidavit or the supplemental affidavit of the claimant to establish what the liabilities are. She asserts that had the matter been tried, there would have been nothing before the court on which the court could make a finding as to what the liabilities are, if any. She asked the court to have regard to the decision of **Patrika Wiggan-Chambers v Anthony Delroy Chambers** 2009 HCV 00035 at paragraph 69. There was nothing before the court she says to assist the court in making a determination as to whether the claimant was entitled to any sums with respect to the mortgage payment. There is nothing in the pleadings with respect to orders numbers 2 iii, v, vii, viii, ix and xii. (Mortgage liability, the sums owed to the National Water Commission, the sum representing 50% of the costs of the claim, the sums representing the value of items removed from the property, 50% of the amount due for property taxes and the division of the furniture and chattels contained in the matrimonial property.) She expressed that her difficulty in relation to order xiii was the short space of time within which her client was being

asked to vacate the premises after she has been compensated. When one considers what are the liabilities the claimant speaks of in his notice of application counsel contends, they are essentially debts which the claimant says are owed to him. Such debts counsel says ought to have been particularized in the pleadings and must be supported by cogent evidence such as receipts. Counsel also further contends that the matter regarding the outstanding water bill would have arisen subsequent to the striking out and so did the removal of the fixtures and so cannot be the subject of any order in these proceedings.

[4] Counsel further points out that the claimant is seeking consequential orders. Therefore anything not specifically stated in the amended fixed date claim form which are now included in the amended notice of application for court orders are to be construed by the court as consequential orders. The items which have been claimed in monetary terms cannot be considered consequential orders and are more akin to special damages and there was no claim for special damages in the Amended Fixed Date Claim Form. She asked the court to have regard to the case of **Pearline Gibbs v Vincent Stewart** SCCA Civ. Appeal 17 2011. The claimant is in effect seeking to amplify his affidavit evidence pursuant to rule 29.9 of the CPR in circumstances where he would not have been permitted to do if the case had gone to trial. She further contended that costs cannot be quantified in the way counsel is seeking to do it at paragraph 2 vii. In this case the court ought to direct that each party stand his own cost. Counsel concluded by saying that a claimant cannot get more in a default judgment than he requested in his original claim and in essence this is what the claimant is seeking to do.

[5] Counsel for the claimant in her response, pointed out that rule 29.9 which speaks to amplification of witness statements at trial is not relevant to these proceedings and that all the submissions made would be relevant only if there was a trial where viva voce evidence is given. She observed that by virtue of the striking out, the claimant was forced to return to court to seek a list of orders. The applicant has done what he is required to do which is to make an application based on the provisions of rule 26.5. The matter at hand falls to be dealt with

under a specific piece of legislation i.e. PROSA. Under PROSA given the presumption of entitlement to a 50% interest in the matrimonial home, with that entitlement the standard modus operandi is that the liabilities are shared accordingly. She cited the case of **Aubrey Forrest v Dorothy Forrest** SCCA No. 78/93. She was mindful that **Forrest v Forrest** was a pre PROSA decision made under the married women property act. She also referenced the case of **Narine Marlene Lewis v Anthony Patrick Lewis** HCV 03544 OF 2007, a decision made pursuant to PROSA**.**

[6] She pointed out that there is ample evidence in the applicant's affidavit in support of his notice of application with respect to the outstanding mortgage and that mortgage as a liability was pleaded from the outset. Orders made in matrimonial matters normally address the interest as well as the liabilities of the parties and a consequent activity in perfecting those orders is an accounting. It is these specifics such as water, mortgage, property taxes which are outstanding which must be addressed in the division of property. As at the 20th September 2013, the date of the Amended Fixed Date Claim Form, all the liabilities of the defendant could not have been ascertained; those that could have been ascertained are set out in paragraphs 2 and 3 of the Amended Fixed Date Claim Form.

[7] She accepted that the issue of the water arose since the striking out but states that the matter ought to be addressed because the liabilities ought to be divided equally. She states that the property taxes are matters that will be dealt with in an accounting. She says too that the issue of sharing furniture is a matter that the court would have to address. She further states that the parties would ordinarily return to court in relation to matters to which they cannot agree. The claimant has set out the items of furniture to be divided and he is in fact seeking to allot to the defendant the major portion of these items. She at this point requested that the order as set out in the Amended Notice of Application be amended to reflect that "the items of furniture and other chattels located at the matrimonial home be divided in accordance with the list of furniture exhibited at AJ 5a to the claimant's affidavit filed in support of the Amended Notice of Application."

[8] On the 17th of January 2018 Mrs. Washington continued her submissions. She stated in essence that statutory provisions i.e. 5.48(g) of the Supreme Court Act, the rules of equity, the court exercising its inherent jurisdiction as well as the provisions of rule 1.1 of the CPR allow the court to take into consideration matters which were not pleaded but were raised for the first time in the claimant's NACO. She stated that as long as evidence is presented to the court, "fresh" or otherwise, in keeping with the overriding objective the court is empowered to act on that evidence. She stated further that when the court makes orders in cases such as the one presently before the court, a liberty to apply clause is invariably included and that such clause enables either party to come back before the court to seek orders that either of them would have been entitled to. She cited the case of **Roxanne Peart v Shameer Thomas and others** [2017] JMSC Civ. 60 and attempted to point out the distinction between that case and **Patrika Wiggan-Chambers v Anthony Delroy Chambers.**

[9] The issues to be determined arise because of the order sought in paragraph 5 of the AFDCF to the following effect.

"That within twenty-one (21) days of receiving the valuation report, the claimant pays to the defendant, a sum representing fifty percent (50%) of the value of the said property, less her outstanding liabilities."

[10] The major questions to be answered are what may be regarded as liabilities as referred to in the above order and whether there was evidence put before the court in the claimant's affidavits filed in relation to his AFDCF to justify the orders sought and if there was not sufficient evidence adduced at that stage, whether the claimant should be permitted to put such evidence before the court in its Notice of Application for Court Orders filed pursuant to the provisions of Rule 26.5.

[11] Before addressing the specific subject matters to be dealt with, I will briefly address certain matters raised in the submissions of counsel for the claimant Mrs. Washington.

[12] I am fully cognizant of the provisions of section 48(g) of the Judicature (Supreme Court Act) which states

> *"the Supreme Court in the exercise of the jurisdiction vested in it by this act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim* ***properly*** *brought forward by them respectively in such cause or matter; so that far as possible, all matters so in controversy between the said parties respectively may be completely and finally determined and multiplicity of proceedings avoided." (****Emphasis mine)***

[13] I have placed emphasis on the word properly because it goes without saying that the matters to be decided must be "properly" brought forward. I understand that in essence to mean that the matters ought to be brought forward in the manner required by the rules of procedure which means that the matters must be pleaded and there must be evidence put forward in support of the matters to be determined.

[14] Without giving details of the matter, **Roxanne Peart** was a case in which the claimant's case was pleaded as one in negligence and the defendant contended that the evidence established an intentional tort of assault and therefore the court ought to dismiss the claim. At paragraph 82 of the judgment, the Honourable Mrs. Justice V. Harris observed that a claimant is required to state in the claim form and particulars the facts on which he relies and that there was no mandatory requirement that the cause of action be pleaded

[15] In paragraph 81 she referenced Rule 8.9A which addresses the consequence of not setting out the case.

> *"the claimant may not rely on any allegation or factual argument which is not set out in the particulars of claim, but which could have been set out there, unless the court gives permission."*

[16] Harris J was clear in pointing out that in circumstances where the facts do not accord with the cause of action pleaded, i.e. where the relevant facts have been pleaded but the correct cause of action was not identified, it was not fatal to the

claim. It is my considered view that this is not the scenario with which we are faced in this case. The claimant in his AFDCF and supporting affidavit made no reference to any claim for furniture to be divided or for outstanding taxes. It is true that he could not have mentioned the claim in respect of the outstanding water bill or removal of the light fixtures and fittings as those matters arose subsequent to the filing of the claim. The fact is that those matters were not previously raised in the AFDCF as matters to be determined and there was no evidentiary material I respect of them.

[17] Both attorneys made reference o the case of **Patrika Wiggan-Chambers v Anthony Delroy Chambers,** specifically to paragraph 69. Harris V. J (Ag.) (as she was at the time of the judgment) declined to make any order in respect of a claim that was made in the pleadings for a refund of mortgage payments to the claimant by the defendant. Her stated reason was that no arguments were advanced in relation to the issue and she would therefore treat it as having been abandoned. I fail to see how this decision can assist either the claimant or the defendant in this case.

[18] Counsel for the defendant takes issue with the valuation and so does not agree that the sum of $6,300,000 is the amount which represents the defendant's 50% interest in the property in question. She contends that in the real estate business, a valuation is valid for 6 months and the valuation having been done on the 6th of May 2016, is no longer valid. I initially disagreed with her position that this valuation should not be utilized and still think that a new valuation is hardly likely to change in any significant way the value assigned to the property. I do however, accept her observation as it relates to the useful life of a valuation report in the context of the real estate industry and reluctantly agree that a new valuation should be done. In that regard I now make an order that the property be valued by a reputable valuator chosen by the parties within 14 days of this order and that the cost of the valuation be borne equally between the parties.

[19] As it relates to the order sought that

> *"The defendant to pay the sum of $821,133.45 which represents 50% of the mortgage liability attached to the property located at 18C Dolphin Way, Old Harbour P.O. in the parish of Saint Catherine, registered at Volume 1296 Folio 720 of the Register Book of Titles as at December 31, 2009 which is the date of separation of the parties."*

[20] I disagree with the defendant's contention that these sums are not to be included as outstanding liabilities referred to in paragraph 5 of the amended fixed date claim form. As the claimant's Attorney has pointed out, the claimant, in paragraph 5 of his affidavit filed on the 10th of September 2012 in support of the fixed date claim form, stated that himself and the defendant took a joint mortgage from the National Housing Trust in the amount of $1,600,000.00 and in paragraph 6 that he alone has paid and continues to pay the mortgage. It is accepted that it is only in his affidavit in support of the Notice of Application for Court Orders that he has provided proof of what sums are presently owed to the National Housing Trust. Proof was provided in the way of a statement from the National Housing Trust which is exhibited to his affidavit as **AJ9b,** showing the sums owed as at the 1st of January 2010. This statement shows that as at that time, 1,642,266.97 was the outstanding sum. It is accepted by both sides that the date of separation of the parties is December 2009 and therefore the interest of the respective parties would have crystallized as at the date of separation and that based on the decision in **Forrest v Forrest** referred to earlier and applied in **Lewis v Lewis** (also referred to earlier), the claimant is to be refunded/credited 50% of the mortgage payments made after the date of separation by him, which the defendant would have been responsible to pay as a 50% beneficial owner as at the date of separation.

[21] Whereas the defendant's Attorney did not expressly agree, neither did she disagree that the defendant should in principle be responsible for 50% of the liabilities in respect of the house. My finding that she is responsible for the sums claimed is based on my view that there was sufficient evidence contained in the

affidavit in support of the fixed date claim form for the court to be able to determine that there was mortgage liability in respect of the property. Though a specific sum was not claimed, there was clearly reference to the fact that there was a mortgage and that payments were still being in respect of the mortgage. I find that paragraph 5 of the amended fixed date claim form in which the claimant requested "that within 21 days of receiving the valuation report, the claimant pays to the defendant, a sum representing 50% of the value of the said property, less her outstanding liabilities, was sufficient reference so as to allow the claimant to give further details in the notice of application quantifying the liability. I cannot accept the defendant's position that this sum cannot be covered by the "omnibus" term "liabilities" as used in paragraph 5 of the fixed date claim form.

[22] As it relates to the water bill, the claimant sought the following order.

> "The defendant to pay the sum of $232,302.56 which represents 50% of the amount owed to the National Water Commission for water usage for the period January 2014 to February 2016;

[23] As it relates to the order claiming the sum of $137,392.80 representing the value of items removed from the family home subsequent to the filing of the Amended Fixed Date Claim Form and the outstanding water bill which also arose subsequent to the filing of the Amended Fixed Date Claim Form, I am constrained to agree that these claims cannot be maintained in these proceedings as they were not and could not have been pleaded in the AFDCF.

[24] There was no order sought in the AFDCF and there was no evidence adduced with respect to the furniture.

[25] As it relates to the order requesting that the defendant pays 50% of the property taxes due in relation to the subject property for the period March 2010 to present, and in relation to the claim that the items of furniture and other chattels located at the matrimonial home are to be divided equally between the claimant and the defendant, the court declines to make those orders on the basis of the absence

of a request in the AFDCF and the non-existence of evidence in the supporting affidavit relating to those matters. The court is unable to make orders in relation to matters that were not addressed in the AFDCF. To do so would be tantamount to allowing the claimant to bring a new claim in his Amended Notice of Application for Court Orders.

[26] In my view it would have made good sense for the parties to arrive at some consensus with regard to all the outstanding issues raised in the notice of application that were not raised in the AFDCF as such consensus could have put an end to litigation between the parties. However, in the face of strong opposition, even recognizing the principle that the court should make an effort to settle all controversy between the parties in a single claim, the court recognizes that there is merit in counsel's contention and so decline to make the orders sought in respect of these matters.

[27] Counsel for the defendant did not disagree in principle that the sums due to the claimant are to be subtracted by the claimant's Attorney at Law from the sum representing the defendant's 50% share of the matrimonial home. Her disagreement was in respect of the sums as itemized by the claimant. The court therefore orders that the sums due in respect of outstanding mortgage as at the 1st of January 2010 i.e. $821,133.45, the sums claimed in item iv of paragraph 2 i.e. $130,000.00 and that claimed at item vi of paragraph 2, i.e. $75,000.00 to which the claimant consented are to be subtracted by the claimant's attorney at law from the sums representing the defendant's 50% share of the value of the matrimonial home.

[28] The defendant's attorney also did not take issue with order xiii which requested that the defendant vacate the matrimonial home after payment of the net proceeds of the defendant's interest in the home. Her only issue was with the time frame within which she is being asked to vacate the premises. She took the view that 30 days is a more reasonable time frame. I am mindful that the defendant would retain no right to remain in the premises after she has been paid

what she is entitled to. She would be encroaching on the claimant and would be present there incurring expenses. Based on the level of acrimony between the parties, the claimant would hardly be inclined to extend a hand of kindness to the defendant. The claimant has strenuously opposed an order allowing her to remain at the premises for any longer period. In the circumstances, I think that 7 days is a reasonable time. She would have known well ahead of time that she would be required to vacate the premises and so must make the necessary preparations to vacate in a timely way.

[29] The claimant also sought an order requesting that the defendant pays 50% of the cost of the claim which $950,000.00. I am uncertain as to the claimant's method of quantification. Counsel did not however persist in this application and took the position that she would yield to the court on the matter of cost. I am of the view that there is no winner or loser in this matter and that each party should bear his own cost. I therefore make the order accordingly.

[30] In the light of the foregoing, the court makes the following orders:

1) The defendant is entitled to a fifty per cent(50%) interest in all that parcel of land located at 186C Dolphin Way, Old Harbour P.O. in the parish of Saint Catherine, registered at Volume 1296 Folio 720 of the Register Book of Titles;

2) The property located at 186C Dolphin Way is to be valued by a reputable valuator to be chosen by the parties within fourteen (14) days of this Order. The cost of the Valuation is to be borne equally between the parties. In the event the parties are unable to agree to a valuator within fourteen (14) days, the Registrar of the Supreme Court is empowered to select a valuator.

3) The defendant is to pay the sum of $821,133.45 which represents 50% of the mortgage liability attached to the property located at 18C Dolphin Way, Old Harbour P.O. in the parish of Saint Catherine,

registered at Volume 1296 Folio 720 of the Register Book of Titles as at December 31, 2009 which is the date of separation of the parties.

4) The defendant is to pay the sum of $130,000 which represents his interest in the 1992 Nissan Motor car with registration number PE 4040 and chassis No. HU 13075038.

5) The defendant is to pay a sum of Seventy Five Thousand Dollars ($75,000.00) which represents the costs awarded to the Claimant by consent on the 14th April 2016.

6) The sums identified in paragraphs 3,4 and 5 of this order are to be subtracted by the Claimant's Attorney-at-Law from the Defendant's fifty percent (50%) share of the value of the matrimonial home.

7) The net amount due to the Defendant is to be paid over to her Attorney-at-Law within seven (7) days of the date of the receipt of the Valuation report;

8) The defendant is to vacate the property located at 186C Dolphin Way, Old Harbour P.O. in the parish of Saint Catherine registered at Volume 1296 Folio 720 within seven (7) days of the payment of the net proceeds of the Defendant's interest in the matrimonial home;

9) Each party to bear his own costs in relation to the proceedings.