



[2013] JMSC CIV. 184

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

CLAIM NO. 2012 HCV 05479

BETWEEN	AGATHA SANDCROFT	CLAIMANT
AND	ERNEST SANDCROFT	DEFENDANT

Mrs. T. Powell- Francis for the Claimant

Mr. Leon Palmer instructed by WM&P for the Defendant

Heard: Heard March 12th 2013, October 1st 2013, October 11th 2013 & November 29th 2013

Oral Judgment

Division of Matrimonial property- Family property (Rights of Spouse Act)-Brown v Brown retroactivity of the PRSOA- Application for extension of time within which to apply -requirement of leave for provision of time to apply for extension of the meaning of spouse pursuant to section 2.

Campbell QC, J

[1] The following facts were agreed that the parties whom I shall call the wife and husband were married on the 7th day of November, 1970. The property known as 1 Berlin Avenue was acquired in the parties' names as joint tenants in 1978. The property, Northern Parade, was acquired in the husband's sole name in 1979/1980. The husband left the island in 1987 to work in the United States. In 1997 the parties were divorced.

The husband then married one, Winsome Addassa Lewis, in Canada on the 22nd day of June, 1997. The husband was divorced from Winsome Lewis on the 17th October 2006.

[2] According to the wife, the parties agreed to a divorce in order to facilitate the husband obtaining permanent resident status in the United States. The agreement was that when he achieved that status, the parties would re-marry. According to the wife, although they never re-married they lived together as man and wife. The wife said on the 4th November 2008, the parties celebrated their “wedding anniversary”.

[3] The husband’s account was that he went to the United States in 1987, remitted funds to complete an extension on the property and on his return the extension was not completed. When he returned to Jamaica in 1992, he had a dispute with his wife about her infidelity. On his return to the United States he filed for divorce which was made final in 1997. Because she had nowhere to go he said he allowed her to stay in the house. He denied that they cohabited on his return to Jamaica in 2004. Since his permanent return to Jamaica although sharing the same house, they have no marital relations.

[4] On the 8th June 2010, the wife complained of being threatened, abused and locked out of the “matrimonial home”. She was allowed to reenter through the intervention of the police. On the 19th October 2010, the court granted a Protection Order, pursuant to Domestic Violence Act 1995, prohibiting the husband from interfering with the wife. The court also made a final Occupation Order, giving the parties the “right to occupation” of separate areas of the premises.

Married Women’s Property Act

[5] The wife alleges that the abuse continued, and she was forced to seek alternative accommodations. On the 5th July 2010, the wife filed a Fixed Date Claim Form, for the division of matrimonial property. That claim was withdrawn, the reason in paragraph 41 of the wife’s affidavit of 17th August 2012, was stated; “That the said claim was filed under the Married Women’s Property Act but given our marital status

this claim could not stand and was discontinued by my Attorney-at-law on the 12th day of July 2012.”

Wife's Claim pursuant to Family Property (Rights of Spouses) Act

[6] On the 22nd August 2012, the wife filed a Fixed Date Claim Form, entitled; In the matter of the Family Property (Rights of Spouses) Act, and seeking among other orders a 50% share, in the properties at 1 Berlin Avenue, Passagefort, Gregory Park, and 55 Northern Parade, Portsmouth both situated in the Parish of St. Catherine. The wife also sought an injunction to restrain the husband from selling the property at Northern Parade and seeking consequential orders to deal with the sale of 1 Berlin Avenue. The wife sought, at paragraph 4, An order that the time prescribed for the Claimant to seek Orders under the Family Property (Rights of Spouses) Act to be extended to the date hereof. In her affidavit in support the wife outlined her contributions to the acquisition and maintenance of the property.

[7] The husband in his affidavit in opposition filed on the 8th July 2013 stated that the wife contributed, “not even a dollar”, to the acquisition and extension of 1 Berlin Avenue. However, he admits that he used her life insurance policy to collateralize the mortgage loan. That according to the husband was her only contribution to the purchase. Her policy document was returned to her on completion of the mortgage payments by him. He prays that the court will hold that the wife is not entitled to one half share of the property. Further, that the wife holds her interest as endorsed on the Certificate of Title in trust for and on behalf of himself.

[8] Mr. Palmer contended that the wife's claim could not be pursued under the jurisdiction of the Family Property (Rights of Spouses) Act as the husband was lawfully divorced from the Claimant in 1997 and the Family Property (Rights of Spouses) Act was not enacted until the year 2004. He denied that the wife made any contribution to the household expenses. She said the husband sent US\$300 per month for utilities and

groceries and \$50 per week to provide lunch money and bus fare for the children to go to school. The sums were sent through Western Union.

[9] The husband denied that he was at any time unemployed. He said on the 22nd day of June, 1997 he married Winsome Addassa Lewis and was divorced from her on the 17th October, 2006. He claims that the wife did not know when and how the house at Northern Parade was acquired it had been allotted to him as an employee of western terminal in 1979/80 under an arrangement with the National Housing Trust. He said he has a son Garfield to whom he has given that house.

[10] It was submitted on behalf of the wife that the application ought to be determined by the provisions of the Property (Rights of Spouses) Act 2004. Counsel relied on **Brown v Brown SCCA No. 12/2009** as affirming the question of the retroactivity of the Act and declared that

“Persons who were divorced or who had terminated their relationship before the coming into operation of the Act were to have the benefits.”

Counsel further submitted that the relevant provisions of the Act are sections 2(1), 6, 7, 13 and 14. Counsel submitted that Section 13 of the Act makes allowance for applications brought after the requisite period. Section 13(1) (a) provides;

- (1) On the grant of a decree of dissolution of marriage or termination of cohabitation;
or
- (2) An application under subsection (1) (a)shall be made within twelve months of the dissolution of marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the court may allow after hearing the applicant. Counsel asserts an express provision for the exercise of the court's discretion to extend the period beyond the twelve months prescribed by the provision. Counsel submitted that such an application may be made orally, before the hearing and relied on **Boswell v Boswell**

[11] There were two questions for the resolution of the court;

- (a) What was the status of the wife at the time of the separation?
- (b) Whether the claim was properly before the court

Counsel for the husband, submitted that the matter first came before the court by way of Fixed Date Claim 1, filed on 5th May, 2010 under the Married Women's Property Act, the property in dispute then was limited to 1 Berlin Avenue. On the 26th January, 2011 an Amended Fixed Date Claim Form was filed pursuant to the Family Property (Rights of Spouses) Act, this included the property of Northern Parade. In August 2012, the present claim was filed. There is no indication that the earlier claim was discontinued.

[12] Mr. Palmer contends that the wife's claim is based on her cohabitation with the husband from 2004 up to 2010 a total of six years, which would satisfy the period of duration under the Act. However, the husband was married to another woman from June 1997 to October 2006. The earliest period from which time could run in the calculation of her period as a spouse, would be from the date of his divorce from Winsome Lewis in October 2006. The requisite period of cohabitation would be from October 2006 to June 2010, and insufficient for the purposes of the Act.

[13] It is settled that a Claim brought under the Property (Rights of Spouses) Act shall be made within twelve months of the dissolution of marriage or of a separation or such longer period as the court may allow. Where it is sought to bring a Claim after the period of twelve months has elapsed, the Claimant must first seek leave of the court to proceed with the case. Such an application for leave must set out among other things the reason for the delay in bringing the Claim.

Discussion

[14] The Property (Rights of Spouses) Act provides, at Section 13 (1) (a), Section 13 (2), provides;

“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 application.”

[15] The parties were divorced in 1997. The husband remarried, Winsome Addassa Lewis that same year and that marriage ended in 2006. The Claimant could not be treated as a spouse for any duration of time she alleges she cohabited with the Defendant during the currency of his marriage to Winsome Lewis because Section 2 of the Act provides that, “spouse” includes;

- (a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years,
- (b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years, immediately preceding the institution of proceedings under this Act of the termination of the cohabitation as the case may be.

The terms “single woman” and “single man” used with reference to the definition of spouse include “widow” or “widower” as the case may be or a divorcee.

[16] The Defendant has denied that he cohabited with the Claimant after his divorce from Winsome Lewis but even if I should accept the Claimant’s version that they lived together as man and wife after their “facilitatory” divorce the claim must fail for two reasons The Claimant has firstly, failed to prove that the Defendant was a spouse for the purposes of Section 2 (1), because he is not a divorcee, single man or a widower, as required by S2(2). The unchallenged evidence adduced by the Defendant proves the contrary that he was married to another woman other than the Claimant, from 1997until 2006.

[17] Secondly, the cohabitation period on which the Claimant relied runs from October 2006. The claim was filed in July 2010, therefore the period of cohabitation required by Section2 (1) (a) (b) of “not less than five years immediately preceding the institution of

proceedings" was not proved by the Claimant. On that basis the claim fails, it's only a "spouse" who is entitled to apply to the court for a division of matrimonial property pursuant to Section 13 of the Act. To satisfy the definition of spouse, the Claimant must prove that she cohabited with the Defendant for not less than five years and that during that period the Defendant was a divorcee, a single man or a widower, this she cannot do.

[18] The Claimant asserts that the date of separation was June 2010, when she obtained a Protection Order from the court in respect of her husband. The first of two Fixed Date Claim Forms was filed in July 2010 and discontinued in 2012. The present claim was filed on the 22nd August 2012, a period approximately fourteen months outside the period limited for filing claims pursuant to Section 13. On behalf of the Claimant it was submitted that Section 13(2) expressly allows for an application for the time abridged to be extended. It was further submitted that such an application could be made orally. **Boswell v Boswell** Claim No. HCV02453/2006SCCA12 [2010]JMCA Civ 12. Factors for consideration on an application for extension of time include the period of delay the hardship or prejudice the Claimant would suffer if the application is refused whether the claim was worthy of being pursued under the Act.

[19] On an application to bring a claim after the period of twelve months have elapsed, the Claimant must first seek leave of the court to proceed with the case. In **Brown v Brown**, Court of Appeal was considering the "subsidiary issue", whether the permission of a judge had been sought and obtained for the appellant to present her application under the Act out of time as provided for by section 13(2). Morrison JA said at paragraph 77, inter alia;

"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, 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)).”

[20] In **Boswell v Boswell**, at the trial of the issues, the Claimant whose application fell just outside of the twelve month period provided for by subsection 2 had sought to address that issue with an order that extended the prescribed date to the date of the application. The application was done in the absence of an affidavit indicating a basis for the grant of the extension, the court was of the view that oral submissions were permissible, and the application was held to be properly before the court. In **Allen Mequita** (2011) JMCA Civ 36, Counsel for the appellant argued that an order of Mangatal J, which purported to extend the time within which the Respondent could apply pursuant to Section 13(2) did not correct the defect of the claim that had been filed prior to the application to extend leave.

[21] The judgment of the Court of Appeal, in **Boswell v Boswell** said at paragraph 16;

“The learned judge failed to take into account that before a grant of an extension of time can be made, leave must be granted. No application was made for leave. Before making the order, the learned judge was under an obligation to satisfy herself that she was clothed with jurisdiction to hear and determine the application. There being no evidentiary material before her outlining the reasons for the respondents failure to have made the application within the statutory period, she erred in treating the application as being one for an extension of time to file the claim and ordering that the fixed date claim form should stand.”

[22] On the question of delay, the Court of Appeal held at paragraph 18;

“that the reasons for a tardy application are fundamental factors to be taken into account in determining whether an applicant had explained the delay in not acting timorously. In order to justify an extension of time to carry out a requisite step in any proceedings, there must be some material on which the court can exercise its discretion.”

[23] In **Chang v Chang** Claim No. 2010/HCV 03675 SC delivered 22nd November 2011, Counsel had argued that on the authority of **Allen v Mesquita (2011) JMCA Civ**

36, leave to apply out of time was required under section 13(2) of the Act. Therefore, leave to apply having not been granted and the judge having had no basis or material on which to grant such an extension; the Fixed Date Claim Form filed by the Claimant was invalid and a subsequent order of the court could not “revive the dead.” Ms. Justice Edwards rejected that submission holding that paragraphs 9 and 10 of the judgment in **Allen v Mesquita**, was a recitation of the counsel’s submission, on which no ruling had been made. Ms. Justice Edwards disagreed with Fraser J construction of Harris JA Judgment. I agree that the judgment of the learned judge of Appeal, Harris JA did not find on the question of the validity of a Fixed Date Claim Form, that such a claim is invalid and cannot be revived by granting an application for extension on a subsequent application. I respectfully adopt the views of Ms. Justice Edwards at paragraph 79 and 83.

[24] (79) a spouse will have an action under the Act which may not proceed if the application is made out of time, unless time is extended. But a claim filed prior to leave to file out of time and an extension of time within which to do so is not invalid. If leave to apply out of time is granted and time is extended then time has to be extended from the date of expiry to a determine date. If a claim has already been filed then the extension may be from the date of expiry to the date the claim was filed. If no claim was filed then the period would be longer. It would of necessity have to be from the date of expiry to a date given by the court limiting time when the claim ought to be filed.

[25] (83) it remains reasonable and plausible that the validity of the fixed date claim form remains undisturbed. It is quite possible for instance that a Claimant may be time barred from proceeding under section 13(1) but could validly proceed under section 11 for which there is no limitation period as long as the marriage subsists. A married spouse could also proceed under S13 (1) (d) for which there is also no limitation as to time. So a claim filed under the Act might not be able to proceed on an action for division of property, if the time has passed and no extension is given; but a Claimant may validly proceed (if applicable) under section 11 or 13 (1)(d) using the same claim form.

[26] I find that the wife did not adduce evidence to prove that the Defendant was a "spouse", and was therefore not entitled to apply pursuant to the provisions of the Act. That there was no application made for leave to apply out of time, and no material or basis provided on which such an order for leave to extend time within which to apply could be made. The applications are refused.