[2011] JMCA Civ 36

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 8/2011

BEFORE: **THE HON MRS JUSTICE HARRIS JA**
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE HIBBERT JA (Ag)

BETWEEN **DELKIE ALLEN** **APPELLANT**

AND **TREVOR MESQUITA** **RESPONDENT**

Maurice Manning and Miss Deborah Dowding instructed by Messrs Nunes Scholefield DeLeon & Co for the appellant

John Graham and Miss Peta-Gaye Mandison instructed by Messrs John G Graham & Co for the respondent

11 April and 7 October 2011

HARRIS JA

[1] This is an appeal in which the appellant challenges the order of Mangatal J in which she ordered that an application made by the respondent to bring a claim outside of the time prescribed under the Property (Rights of Spouses) Act (PRSA) should stand.

On 11 April 2011, we allowed the appeal, at which time costs to the appellant were agreed at $120,000.00.

[2] The appellant and the respondent lived in a common law union. There is a dispute as to when the relationship commenced and when it ended. On 3 October 2008, the appellant, the registered proprietor of property known as Lot 17 Tanglewood, Priory, Saint Ann, registered at Volume 994 Folio 150, brought an action (HCV 4827 of 2008) against the respondent, for recovery of possession of the property, the recovery of rental and mesne profits. On 22 June 2009, the respondent filed a fixed date claim form (HCV 03221 of 2009) under the PRSA seeking the following:

1. A declaration that he is beneficially entitled to a 50% share of the property.
2. An order for the sale of the property; and
3. An injunction restraining the appellant from selling, disposing of or further encumbering the property.

The claim was filed outside of the time prescribed by the Act.

[3] On 14 July 2009, the respondent filed an application for court orders seeking an order "that the Fixed Date Claim Form filed on the 22nd June 2009 be permitted to stand". After considering affidavits filed by the parties and submissions by their attorneys-at-law, the learned judge, having found that the application should be treated as one for an extension of time to regularize the late filing of the fixed date claim form,

ordered that the fixed date claim form should stand. This order of the learned judge gives rise to some disquiet.

[4] On 3 November 2009, pursuant to an application by the respondent, with the consent of the parties, it was ordered that the fixed date claim form be heard with claim HCV 4827 of 2008. At the pre-trial review, the following order was made:

> "The issue of whether the Claimant in Claim No. 2009 HCV 03221 is entitled to an extension of time within which to bring his claim pursuant to the [PRSA] is to be dealt with as a preliminary issue at trial."

[5] By his application, the respondent, having filed the fixed date claim form out of time, sought to invoke the court's jurisdiction under the PRSA for an extension of time. The principal object of the Act is to permit a spouse to bring a claim within a specified period. Section 2(1) of the Act defines a spouse in the following terms:

> "'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 or the termination of cohabitation, as the case may be."

[6] Section 13(1) of the PRSA confers upon a spouse a right to apply to the court for division of property. It reads:

> "13 (1) A spouse shall be entitled to apply to the Court for a division of property –
>
> (a) on the grant of a decree of dissolution of a marriage or termination of cohabitation; or
>
> (b) on the grant of a decree of nullity of marriage; or
>
> (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
>
> (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings."

[7] Under section 13(2), an application must be made within a year of the dissolution of the marriage or of the termination of the cohabitation of the parties. It 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 applicant."

[8] The following grounds of appeal were filed:

"a) The learned judge failed to give adequate regard to the fact that the evidence clearly showed that the Respondent had no reason for the delay in bringing his claim under the PRSA.

b) The learned Judge failed to attach any or any adequate weight to the fact that the Respondent was represented by Counsel from as early as January 2007, as demonstrated in the correspondence referred to in the List of Documents filed in Claim No. 2008 HCV 4827, the fact and significance of the Respondent's participation in the application for occupation and protection orders in the Resident Magistrate's Court or the fact that the Respondent lodged a caveat to protect the interest which he claims to have in the Appellant's property.

c) The learned Judge failed to make any finding of fact as to the date of separation in order to properly exercise her discretion in relation to the period of delay.

d) The learned Judge failed to attach any or any adequate weight to the fact that the Respondent's application to bring proceedings under the PRSA was at least **one year** outside the time limited for him to make any such application (on the Respondent's case).

e) The learned Judge fell into error by attaching too little weight to the absence of any explanation by the Respondent as to the reason for delay in bringing a claim under the PRSA.

f) By attaching more substantial weight to the relative prejudice between the parties, while suggesting that the (sic) "the application for an

extension of time need not involve the Respondent too actively", the learned Judge failed to give adequate regard to the fact that the application for extension of time was not merely procedural, but substantive, and involved interference with vested property rights.

g) The learned Judge failed to give any adequate regard to the Appellant's accrued right to a limitation of actions defence by treated (sic) the interaction between the parties as being an informal one, even in the face of evidence that the parties were engaged in legal actions before the Court from as far back as March 2007.

h) The learned Judge failed to give any adequate regard to the Appellant's accrued right to a limitation of actions defence by not properly applying the principles outlined in the cases of **Re Kashmir** and **Re The James Westoll**."

[9] Before the hearing of the appeal commenced, Mr Manning raised a point in limine as to the validity of the fixed date claim form. Although this is a preliminary point of law as to jurisdiction, which in this case is decisive of the appeal, in good form, it would have been preferable for the appellant to have raised it as a ground of appeal rather than as a preliminary point.

[10] Mr Manning submitted that the respondent's claim was brought under section 13(2) of the PRSA and the learned judge ruled that she allowed the respondent an extension of time and ordered that his fixed date claim form should stand. The fixed date claim form, he argued, was filed outside of the time prescribed by the Act and until

the court has granted leave to an applicant to bring his claim, no valid claim can be brought, and as a matter of law, the validity of the claim filed in June 2009 could not have been corrected by a subsequent order of the court.

[11] Mr Graham conceded that there was nothing which he could usefully advance in respect of the jurisdictional point raised.

[12] Although section 13(1) of the PRSA permits a spouse to make an application for division of property, section 13(2) dictates that the requisite application shall be made within the prescribed 12 month period. The word "shall" is not mandatory in light of the concluding words of the section, namely, "or such longer period as the Court may allow after hearing the applicant". This shows that the legislature, in its wisdom, empowers the court to extend the period within which an application may be made under the Act.

[13] Admittedly, the Act does not outline the factors to be taken into account when considering an extension of time. This, however, would not preclude the court from giving consideration to Mr Manning's submissions, neither would the fact that there is some dispute as to the date on which the parties ceased cohabitation render the court incompetent to consider them. The respondent has acknowledged that the fixed date claim form is out of time. A party who seeks leave to bring an action in circumstances where leave is required, must satisfy the court that he is entitled to place himself under the umbrella of the court's jurisdiction.

[14] Where the factors governing an extension of time are not provided for by statute or the rules of court, a court of first instance or an appellate court may, in exercising its inherent jurisdiction, give consideration to the conditions which generally support an extension of time to do an act or to comply with any rule or law. It follows that, in determining whether an extension of time should be granted, a court ought to follow the general procedure underpinning an entitlement to such grant. Thus, in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court reasons to be evaluated by the court to justify his right to do so. Such reasons should explain the delay in filing the claim. The grant of leave is a precursor to the grant or refusal of an extension of time.

[15] In support of his application, the applicant filed an affidavit sworn to on 13 July 2009. Paragraphs 3 to 16 state:

> "3 That the Defendant and I had a relationship from 1986 to 2007 and we lived together as man and wife at Lot 17, Tanglewood, Priory P.O. in the parish of Saint Ann between 1996 and 2007 where we raised two (2) children, Shaun Mesquita, born on the 25th February 1993, of the union between the Claimant and I and Naji Eccleston born on the 9th December 1985 who was the Claimant's child from a previous union.
>
> 4. That when the Claimant and I began our relationship I was still married to my wife but I was separated and my wife resided in Canada. The Claimant was a single woman. I was divorced from my wife on the 20th day of November 2001.

5. That the Claimant and I lived in a house owned by my former wife and I at lot 60 Tanglewood in the parish of St. Ann between the period 1986 to 1996 and in fact Shaun Mesquita was born while we lived at that address.

6. That in or about June 2007 the relationship between the Defendant and I ended.

7. That the property at Lot 17, Tanglewood has two levels and when the relationship ended I moved into a self-contained apartment on the lower level of the house which we had previously rented out. The Defendant continues to occupy the upper level which we previously occupied together.

8. That in or about July 2007 I was served with a Notice to Vacate the premises however I did not leave.

9. That on the 3rd day of October 2008 the Defendant filed a claim against me for, among other things, recovery of possession of the property situated at Lot 17, Tanglewood in the parish of Saint Ann and registered at Volume 994 Folio 150 of the Register Book of Titles in which she states that I was a licensee on the said property and that the licence was terminated and I have remained at the property without her permission.

10. That I was served with the Claim Form for recovery of possession on or about the 13th February 2009 and I took the documents to my attorneys-at-law on the 7th March 2009.

11. That in my Affidavit filed on the 9th June 2009 in the claim for recovery of possession I denied that I was a mere licensee on the

property and stated that I was one of the persons who contributed to the purchase of the land and the construction of the house.

12. I also stated in my affidavit that I refused to leave the said premises because I am entitled to a 50% share in the premises and I have a right to live there.

13. That on the 22nd June 2009 my attorneys-at-Law filed a Fixed Date Claim Form on my behalf claiming 50% interest in the said property at Lot 17, Tanglewood in the parish of Saint Ann on the basis that the Defendant and I both contributed to the purchase and improvement of the said property and we lived there together as man and wife for more than ten (10) years.

14. That the issues which have been raised in my Affidavit filed in the claim for recovery of possession are connected with the issues that the court has to determine in this claim.

15. That even though the Defendant and I ceased living together as man and wife more than one (1) year ago, I continue to live in the same property.

16. That since our separation the Defendant has known that I was contending that I had an interest in one half (1/2) of the property as a spouse and as a person who contributed to the purchase and construction of the house."

[16] As can be observed, the affidavit is silent as to the respondent's reasons for making the late application. The learned judge acknowledged that no reasons were given for the delay but made a preliminary finding that the application was for an

extension of time for the filing of the claim under the PRSA. 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 respondent's failure to have made the application within the statutory period, she erred in treating the application as being one for an extension of time to file the claim and ordering that the fixed dated claim form should stand.

[17] Although the foregoing is sufficient to dispose of the matter, in the circumstances of this case we think it appropriate to consider the merits of the appeal. Grounds (a) to (d) effectively deal with the fact that no reasons were proffered for the delay. The learned judge, in treating with the absence of reasons, at paragraph 40 of her judgment, said:

> "In my judgment, though reasons ought to have been provided by Mr Mesquita as to the reasons for the delay, the fact that he has not done so is but a factor to be considered by the Court in assessing where the justice of the situation lies."

[18] 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 - see ***Haddad v Silvera*** SCCA No 31/2003 delivered on 31 July 2007. The respondent claimed that the relationship ended in or

about 2007. He filed the fixed date claim form on 22 June 2009, one year outside the time permitted by the PRSA. This being so, he was under a duty to supply reasons for his failure to act within the prescribed time. The failure to advance an excuse is not simply a factor which goes towards deciding the justice of the case, as the learned judge found. 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 timeously. 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. Indeed, the absence of good reasons is not in itself sufficient to justify a refusal of an application to extend time, however, some reason must be advanced - see ***Haddad v Silvera***.

[19] It is incumbent on the applicant, in seeking the extension of time, to have placed before the court a plausible explanation for the delay. There is little doubt that reasons for the delay have always been the catalysts for supporting an application for an extension of time. Even if the learned judge was clothed with jurisdiction to hear the matter, she had clearly adopted the wrong approach in dealing with the application. She ought not to have granted the application without ensuring that the respondent had put before the court the circumstances outlining his failure to file the claim within the statutory period. No reasons having been advanced, it must lead to the inevitable conclusion that there was no foundation upon which a finding in favour of the grant of an extension of time could have been anchored.

[20] Grounds (e) to (f) relate to prejudice. The learned judge relying on the Australian case of ***Neocleous v Neocleous*** [1993] Fam CA 42 noted that the question as to whether the respondent would be prejudiced if an extension of time was not granted is a highly relevant consideration. She then went on to treat the issue of hardship to the respondent as being determinative of the matter when at paragraph 42 she said:

> "In my judgment, as stated in **Neocleous,** paragraphs 9 and 23, the more important and pertinent consideration, is the question of whether the Respondent would suffer any prejudice by leave or an extension now being granted. On his case, Mr. Mesquita's relationship with Miss Allen ended in June 2007. Proceedings were commenced on June 22, 2009, so the application is therefore about one year outside the time set out in the PRSA. It seems quite clear to me that on (sic) balance, Miss Allen would not be seriously prejudiced by the delay which has occurred. I have not been able to trace any particular hardship outlined in Miss Allen's Affidavits. The main argument seems to have been that which I have rejected, regarding the alleged shifting of the burden of proof under the PRSA. Miss Allen seems quite prepared to treat with Mr. Mesquita's substantive application if permission is granted, based upon the contents of her Affidavits and of the Defence filed on her behalf. She has not spoken about any alteration of her position in the interim when the application should have been made. I note that although in his Affidavit, filed 14th July 2009, at paragraph 16, Mr. Mesquita asserts that since their separation Miss Allen has known that he was contending that he had a one-half interest in the property, and there is also the fact that the caveat was lodged in 2007, Miss Allen has not denied that she was aware that he was making such a claim. It would seem that it was Mr. Mesquita who has put before the Court in Claim No. 2008 HCV 4827 the evidence as to the personal relationship between the parties. This is clearly relevant evidence and in my judgment the issues in the two Claims are plainly connected."

[21] At paragraph 44 she said:

> "I am of the view that Miss Allen is not estopped from taking the point that the Fixed Date Claim Form has been filed Out of Time by virtue of the fact that she has filed an Acknowledgement of Service, Defence, and other documents that do not raise the point at all. I agree with Miss McGregor that such a point can be taken at any stage. However, in so far as the manner in which the history of the proceedings (sic) is a factor to be considered overall, and in relation to any hardship to Mr. Mesquita, I think that these are factors pointing more in the direction of granting the application rather than refusing it."

[22] We feel constrained to disagree with the learned judge's findings and conclusions that the appellant would not suffer serious prejudice if the application was granted. The case of ***Neocleous*** on which she relied is inapplicable to this case. In that case, the meaning of hardship was considered within the framework of section 44 (4) of the Australian Family Law Act 1975. That statutory provision cannot be applied in considering the question of hardship or prejudice in the case at bar. The PRSA does not contain a similar provision. The real question is whether the appellant would suffer hardship if the application is granted. A duty resides with the party who seeks an extension of time to show that he would suffer hardship if it is not granted. The learned judge advised herself that he had not stated any hardship which he would suffer if the application was refused. He was obliged to disclose such hardship as he would have encountered if his application was denied. Surely, it was for him to demonstrate the nature and extent of the prejudice suffered by him - see ***Gillings & Anor v Drew*** (1990) 27 JLR 189.

[23] There was no evidence from the respondent showing that he would be prejudiced or seriously prejudiced. The delay of one year was inexcusable. One year is indeed an inordinately long time. Inordinate delay in itself can show prejudice - see ***West Indies Sugar v Minnell*** (1993) 30 JLR 542. In his affidavit of 14 July 2009, the respondent asserted that since the time of separation the appellant was fully cognizant of the fact that he intended to bring the claim. It seems somewhat mystifying that, armed with this knowledge, he waited for approximately one year outside the prescribed time before making his application.

[24] The appellant, in her acknowledgment of service, clearly showed therein that she was disputing the respondent's claim. Her defence, as well as her affidavit in response to the respondent's application also demonstrate that she did not accept his averment that they cohabited for the requisite period. In these circumstances, it could not be said that the appellant appears willing to treat with the respondent's claim as found by the learned judge.

[25] It cannot be ignored that the appellant has been contending that she is the owner of the property, having acquired it prior to the cohabitation of the parties. She has a pending claim for recovery of possession of the property and recovery of rental therefrom. Under section 6 of the PRSA a spouse is entitled to one half of the family home. If the matter had proceeded to trial, to establish a claim under section 13 of the Act, it would only have been necessary for the respondent to show that he could be regarded as a spouse within the meaning of the Act, in that, he would only have to

adduce evidence which tended to show that the parties had cohabited on the property within the requisite statutory period of time. Logic dictates that the respondent's claim would be tried first. It appears that in light of section 7(1) of the Act a burden would be cast on the appellant to adduce evidence to prove that it would be unreasonable for the respondent to be assigned a one half share. As a consequence, there is a grave risk that her claim for recovery of possession of the property and rental might be rendered nugatory. We are of the view that the grant of the application by the learned judge would have caused the appellant to suffer substantial prejudice.

[26] We now turn our attention to grounds (g) and (h) which relate to the accrued limitation defence. The claim under the PRSA was statute barred. A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating. The learned judge found that the cases of ***The Kashmir*** [1923] Probate Division 85 and ***The James Westoll*** [1923] Probate Division 94, cited by the appellant's attorney at law, failed to provide any assistance as they fell within the purview of the English Maritime Convention Act. She was of the view that these cases related to matters of a commercial nature which are not relevant to spousal relationship and interaction. She found that the language of the Maritime Conventions Act differed from that of the PRSA and wrongly treated the accrued limitation defence as vesting the respondent with rights which were worthy of protection.

[27] It is perfectly true that the language used in each Act is not identical. However, both Acts essentially fix time limits for initiating proceedings. They both allow the court to extend time for doing so. The fact that the English Act relates to commercial matters does not mean that the learned judge could not have relied on the cases as guides to the approach to the question of extension of time for the failure to comply with a statutory command.

[28] In the ***Kashmir***, section 8 of the Maritime Conventions Act prohibited the commencement of any action for recovery of damages against any vessel or owner of a vessel for loss of life unless the action was commenced within two years of the cause of loss. A proviso under the section empowered the court to extend time. On 6 October 1918, a soldier drowned at sea as a result of a collision between the ship in which he was transported and the defendant's ship. In 1922, his mother brought an action against the defendant to recover damages. It was held that the reason for the delay was insufficient and an action was not maintainable.

[29] In ***The James Westoll,*** the charterers of a steamship appealed against the refusal of a judge to grant them an extension of time to institute proceedings against the owners of a steamship, James Westoll, to recover damages for the loss of freight. The judge refused the application under section 8 of the Maritime Convention Act. The judge's order was upheld on appeal. Lord Parker, at page 95, had this to say:

> "It appears to me that what the Court has to do is to consider the special circumstances of the case and see whether there is any real reason why the

> statutory limitation should not take effect. I have carefully read the affidavit which has been filed and really it only amounts to this, that it was not until a comparatively recent date, namely, April, 1913, that the amount of the claim could be ascertained. I think that it is not a sufficient reason. I think long before two years had elapsed the proposed plaintiff must have known he was in a position to make some claim and there was plenty of time during which the claim ought to have been made. It appears to me therefore that he suffers no injustice by reason of the section. On the other hand, it is quite possible that if we were to allow the action which is statute barred, to proceed, the defendants might suffer serious inconvenience and injustice."

[30] The common thread which runs through these cases is that a court will not grant an extension of time to file a claim, on the application of one party, where to do so may cause prejudice to the other party and that an applicant must show that there are substantial reasons why the other party should be deprived of the right to limitation given by the law. There is absolutely no reason why these principles could not be applied in the instant case.

[31] Section 13(2) of the Act places a limit on the time within which a party may initiate proceedings. This limitation is a benefit which the appellant is entitled to enjoy. Such entitlement should operate to her advantage after the expiration of the one year permitted for the respondent to file a claim. The respondent knew that since the separation, the appellant was aware of his contention that he was entitled to a one half interest in the property, yet he relaxed and permitted the statutory period to elapse. He has advanced no reasons for the failure to file his claim timeously, nor has he proffered

any reason to show why the appellant should be deprived of the accrual of her right. In the circumstances, to permit the action to proceed would amount to grave injustice to the appellant.

[32] In the circumstances of this case, it is unnecessary for us to consider the prospects of the respondent's case.

[33] The appeal was allowed for these foregoing reasons. The order of the learned judge is set aside.