IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV02257

IN THE MATTER of **ALL THAT** parcel of land formerly known as **IDE COTTAGE** part of **PUMPKIN GROUND** now known as BELMORE in the Parish of Saint Catherine being the Lot numbered **TWO HUNDRED AND SIXTY-FOUR** on the Plan of parts of Watson Grove, Belmore and Cedar Grove of the shape and dimensions and butting as appears by the said Plan and being the all of the land comprised in Certificate of Title registered at Volume 1320 Folio 476 of the Register Book of Titles and known as Lot 264 Cedar Grove Estate, Gregory Park, Portmore in the parish Saint Catherine

AND

IN THE MATTER of an application under the Property (Rights of Spouses) Act

AND

IN THE MATTER of the Partition Act.

BETWEEN	**JANE DENNIS**	**APPLICANT**
AND	**PHILL DENNIS**	**RESPONDENT**

IN CHAMBERS (VIA ZOOM)

Mrs. Kayann Anderson-Balli instructed by Norman Manley Legal Aid Clinic, appearing for the applicant.

Mrs. Denise Senior-Smith instructed by Oswest Senior-Smith and Company, appearing for the respondent.

Property Rights of Spouses Act - application for extension of time to file claim – factors to be considered - Limitation of Actions Act.

Heard: February 2, 2023 and March 9, 2023

PETTIGREW-COLLINS J

BACKGROUND

[1] The claimant filed her Fixed Date Claim Form pursuant to the Property Rights of Spouses Act (PROSA), 17 years after the decree absolute dissolving the marriage between herself and the defendant was granted. The claimant is seeking a declaration as to her interest in the matrimonial property.

[2] Among the reliefs sought in the Fixed Date Claim Form filed on May 7, 2021 are the following order and declaration:

I. An order extending the time to bring a claim under the Property (Rights of Spouses) Act and allowing the Fixed Date Claim Form filed herein to stand;

II. The property located at Lot 264 Cedar Grove Estate, Gregory Park, Portmore, in the parish of Saint Catherine and registered at Volume 1320 Folio 476 of the Registrar Book of Titles is the family home. The

claimant and the defendant are each entitled to one half interest in the said property;

A number of consequential orders were also sought.

THE APPLICATION

[3] The claimant subsequently decided to first seek the extension of time to bring her claim under the PROSA, hence she filed a Notice of Application for Court Orders on July 12, 2021. That is the application presently before the Court. The applicant and respondent in this application will also be referred to as the claimant and the defendant.

[4] The applicant is seeking the following orders:

1. Time for filing a claim for division of property under the Property (Rights of Spouses) Act be extended to the date of filing of the FDCF herein;
2. Costs of this application to be costs in the claim;
3. Such further and other relief as the Court may deem just in the circumstances.

[5] The grounds on which the orders were sought are:

1. Pursuant to section 13 of the Property (Rights of Spouses) Act the court has the discretion to extend time within which to pursue a claim for division of property
2. Granting the orders herein would be in accordance with the overriding objectives of the Court and would enable the matter to be disposed of fairly
3. There is a good explanation for the delay in making the Claim and the claimant stands to be severely prejudiced if not allowed to commence and proceed with her claim

4. The defendant will not be seriously prejudiced as both he and the claimant are joint holders of the title to the property.

[6] The application is supported by the affidavit of Jane Dennis filed July 13, 2021. I do not propose to set out in detail the contents of the affidavit but will refer to relevant aspects of same as is necessary. Neither do I intend to set out all the submissions in their entirety. I have however taken into consideration all written as well as oral submissions made in the matter and will only reference same to the extent that I find that there is need to do so.

ISSUE

[7] The sole issue in this application is whether the applicant should be granted an extension of time within which to bring her claim under the PROSA. That single issue raises a number of sub issues which will be addressed under the headings: the length of the delay, the reason for the delay, the prejudice to the parties, and whether the applicant has a meritorious claim. This latter point requires a discussion of whether the applicant can overcome the respondent's contention that her title has been extinguished by the operation of the Limitation of Actions Act.

DECISION

[8] The length of the delay was inordinate and the claimant has not provided any cogent reason for the delay. She has also not established that she has a meritorious claim, to the extent that she has failed to establish that she would be able to overcome the respondent's defence under the Limitation of Actions Act.

THE LAW

[9] Section 13 of the Property Rights of Spouses Act provides that:

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 marriage or the 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 willful or reckless dissipation of property or earnings.

2.An application under subsection (1)(a),(b) or (c) shall be made within 12 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****. (my emphasis)*

3. For the purposes of subsection (1) (a) or (b) and section 14 the definition of a "spouse" includes a former spouse."

[10] In instances where the claim was not brought within the time stipulated by section 13(2) of the Act, it is a matter left to the discretion of the court whether an extension of time will be granted when an application under the Act is made out of time.

[11] At paragraph 77 of **Brown v Brown** [2010] JMCA, Morrison J.A. (as he was then), in addressing the question of an extension of time to file a claim under the PROSA, opined that the court is required to

"consider whether it would be fair to allow the application to be made out of time taking into account the usual factors relevant to the exercise 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."

[12] Before I embark upon a consideration of the factors enumerated by Morrison JA, it is important that the matters adverted to by Phillips JA as she then was, in the Court of Appeal decision of **Angela Bryant-Saddler v Samuel Oliver Saddler and Fitzgerald Hoilette v Valda Hoilette** [2013] JMCA Civ 11, (which were heard together), are kept in the forefront when one considers an application of this kind. at paragraph 86 of the judgment Phillips JA concluded that:

"*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."

Further that:

"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, 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."

And also that:

"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."

I now move to a consideration of the factors which will guide the court's exercise of the discretion.

THE LENGTH OF THE DELAY

[13] In this instance, based on the provisions of the PROSA, the claim should have been brought within 12 months of the dissolution of the marriage which was the trigger event. It took the applicant 17 years after the grant of the decree absolute, to bring the claim. The applicant, through her attorney-at-law, conceded that the delay is inordinate.

THE REASONS FOR THE DELAY

[14] Mrs Balli urged the court to say that cogent reasons have been given for the delay in filing the application. The claimant has sought to explain the delay by alluding to alleged abusive and controlling behaviour on the part of the defendant which she said persisted throughout the marriage and continued after the divorce. She said she did not seek to realize her interest in the house because her minor children continued to reside with her husband and her focus was on being able to maintain a relationship with them, although the defendant was trying to prevent her from

doing so. She also explained that her son had been adversely affected by the break-down of the marriage and she did not wish to take any steps that would have disrupted his stability. She went on to say nevertheless that the son had a breakdown in 2016.

[15] The claimant also stated that at one stage, she engaged the services of an attorney-at-law but the focus was on getting access to her daughter. She thereafter said that between 2006 and 2008 she was unemployed and could not afford the services of an attorney-at-law. She said, however, that in 2011, she obtained the services of an attorney with a view to recovering her interest in the property but thereafter she was unable to afford the attorney's fees. She claimed that she was not then aware of the availability of legal aid and did not become aware until 2019.

[16] Mrs Senior Smith urged the court to consider that on the claimant's own evidence, she had access to legal advice since 2003 and that she did on more than one occasion. She alerted the court to the various aspects of the claimant's evidence in this regard and observed that by the time the applicant said she was advised by personnel at the NHT to obtain counsel in the matter, that was the fifth occasion on which she had received, albeit on this latter occasion, it may not have been legal advice.

[17] She asked the court to have regard to the letter of Attorney-at-law Mr Donovan Williams written on behalf of the applicant and directed to the respondent. The claimant she observed, by her own evidence, had access to legal services.

[18] What is evident from that letter penned by Mr Williams, is that counsel had threatened legal action against the respondent if he did not respondent to the letter written by him on behalf of the applicant in this matter. That letter outlined the applicant's asserted claim to a 70% interest in the house.

[19] There are decisions which indicate that impecuniosity may be an acceptable reason for not being able to pursue legal action. (see **Leymon Strachan v Gleaner Company Ltd and Dudley Stokes** (Motion No 12/1999 – judgment delivered 6

December 1999). However, there should be cogent evidence to support such an assertion. It would be difficult for this court to accept that impecuniosity was the reason why the claimant did not pursue a claim for division of property over a period of 17 years. This court accepts that it might have been difficult for the claimant to pursue the matter of division of property through the courts without the services of counsel but the issue of access to her child could have been addressed in court without the assistance of counsel. It is apparent that the claimant had secured the services of counsel in order to address the question of access to her child. It was clearly a question of priority. This court is hard pressed to accept that the claimant was not aware of the facility of legal aid and therefore impecuniosity cannot avail the claimant in this instance.

[20] I am very firmly of the view that the applicant has given no good reason as to why she failed to bring a claim earlier than the 17 years it took her to do so. That finding however, will not define the outcome of this application.

THE PREJUDICE TO THE PARTIES

[21] The court is concerned with prejudice to both parties. It has to weigh in the balance the prejudice that will result to the applicant if the application for an extension of time is not granted. It also has to be cognizant of any prejudice to the respondent, if the application were to be granted. Case law seem to suggest that some emphasis has to be placed on the likely prejudice to the respondent if the application is granted.

[22] In **Allen v Mesquita** [2011] JMCA Civ 36, Harris JA at paragraph 30 stated,

> *"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." (emphasis in the original)*

[23] Delay in and of itself may amount to prejudice. It certainly can result in prejudice. The court considers that the respondent would be required to face this claim many years after the applicant ceased to occupy the disputed property or to have been able to exercise any control over the property and the respondent was able on the claimant's own evidence, to treat it as his own. This is not however, a case where it can be said that because of the delay in bringing the claim, evidence may have been lost to the respondent. He is still able to put forward his defence.

[24] It is manifest that the greater prejudice would be to the claimant if she is not permitted to pursue her claim. This is especially so where the parties are joint registered holders of the legal title to the property. Further, the claimant's evidence is that she has been making mortgage payments in relation to the property, that she did so in order that the property would not be lost and that even her NHT refunds have been applied to the outstanding mortgage.

THE OVERRIDING OBJECTIVE

The overriding objective requires the court to deal with cases justly. Dealing with a case justly includes ensuring that a case is dealt with expeditiously and fairly. This means stopping the case at the earliest so that neither party unnecessarily incurs costs and expense in pursuing a claim that is unlikely to succeed.

WHETHER THE APPLICANT HAS A MERITORIOUS CLAIM

[25] In the case of **Diedre Anne Hart Chang v Leslie Chang**, Claim No. 2010/HCV 03675, Edwards J (as she was then) explained that the learning from a noted text A Practical Approach to Civil Procedure, 12th edition by Stuart Sime is that a claim issued after the expiry of a limitation period may be struck out as an abuse of process. She went on to explain however that the basis would not be that there was no reasonable grounds for bringing the claim. She went on to say that the

reason given for this by Sime, is that the limitation period is a procedural defence and does not affect existence of the claimant's cause of action.

[26] Thereafter she said at paragraphs 74 to 75

> *"74. The implication of this is that it is always open to a claimant to file a claim showing the existence of a cause of action. But a limitation defence may be a bar to proceeding with that cause of action. Where the limitation period may be extended at the discretion of the court, if no extension is given, then again a limitation defence will be a bar to proceeding with the claim."*
>
> *"75. At page 89, Sime indicates that a limitation period provides a defendant with a complete defence to a claim. It is a procedural defence which will not be taken by the court of its own motion but must be specifically set out in the defence. This means that a stale claim could proceed to trial if the defendant fails to plead it in his defence. Where it has been pleaded as a defence the claimant can either discontinue the claim or the defendant can apply to have it struck out as an abuse of process. Sime notes that the claimant will still have a claim of action but it cannot be enforced." (Emphasis my own)*

[27] The critical question to answer is that of whether the applicant has a meritorious claim. There is no question that the court is empowered to, and has demonstrated a willingness to grant an extension of time to make an application under the PROSA when the time delimited by section 13(1) to make the claim has passed. See **Chang v Chang** (supra), **Angela Bryant-Saddler v Samuel Oliver Saddler and Fitzgerald Hoilette v Valda Hoilette** (supra). In fact, there is no dearth of authority on the matter. The courts have taken a decidedly liberal approach to the granting of extension of time. This is especially so when the property in question is registered in the joint names of the applicant and respondent and where the disputed property is the matrimonial home.

[28] In **Sharon Smith v Vincent Service [2013]** JMSC Civ 78, (a case relied on by the applicant), the parties met in 1993 and developed an intimate relationship. Two children were born to them. In 2000, they bought property to be used as the family home for themselves and their 2 children to which their joint names were registered. They separated in 2007.

[29] The claimant had filed a claim in 2009 but abandoned it due to financial reasons and again filed a claim under PROSA in 2011. She was met with the reply that she was out of time. The court determined that the claimant had successfully established a case for the grant of an extension of time within which to file a claim under PROSA. She was granted permission to file a claim and the claim filed prior to this order was allowed to stand. The decisive factor was that she had, prima facie, a claim under normal principles of equity and therefore, the limitation defence under PROSA would not prevent a claim in equity. The Court also weighed other factors such as the fact that the parties had been negotiating during the years after the breakdown and that they were attempting to settle the matter without litigation.

[30] The court is known to have granted extensions even when extended periods have passed after the expiry of the 12 months limitation period under the PROSA. See for example, **Tenn v Wiltshire** [2020] JMSC Civ 246.

[31] It is not disputed that the applicant as well as the respondent are the joint legal owners of the property. It is also not disputed that the property was the matrimonial home. On that foundation, the applicant may well on a purely prima facie basis, have a meritorious claim. The fact that the claimant may have a valid cause of action based on the provisions of the PROSA and could be a beneficiary of an extension of time based on those provisions, may well be overtaken by other considerations. The court cannot consider the undisputed facts that the legal title to the property is held jointly between the parties and that the disputed property was the matrimonial home in isolation. The respondent has asserted his right to put forward a limitation defence based on the provisions of the Limitation of Actions Act.

[32] The learning as expounded in the case of **Diedre Anne Hart Chang v Leslie Chang**, as it relates to the nature of a limitation defence shows that if the limitation defence is not taken, then there is a valid claim. However, the difference between the two pieces of legislation is that where the limitation period passes under the PROSA there can be an extension. There is no question of an extension under the

Limitation of Actions Act; the claimant's right to bring a claim is permanently obliterated. It therefore appears, that a limitation defence which arises by virtue of the provisions of the Limitation of Actions Act affects the existence of a claimant's cause of action, quite unlike that which arises under section 13(2) of the PROSA.

THE LIMITATION DEFENCE OF THE RESPONDENT

The Law

[33] Without setting out in full the provisions of the Limitations of Actions Act, it is by now trite law that the provisions of sections 3, 4 and 30 of that act together operate to bar a proprietor of land, whether registered or unregistered, from recovering possession of the land if an individual who has no title to the land, has been in exclusive open and undisturbed possession for a period of twelve years or more to the exclusion of the title owner. For example, see the cases of **Pottinger v Raffone** [2007] UKPC 22 and **Recreational Holdings 1 (Jamaica Limited (Appellant) v Lazarus (respondent)** (Jamaica-2016 UKPC)

[34] The worrisome, but by now well - known effect of section 14 of the Limitation of Actions Act is that one joint tenant may dispossess another. See **Wills v Wills,** Privy Council 50/2002. In **Estate of William Walter Hawkins, Deceased Intestate) v Linette Hawkins McInnis** [2016] JMSC Civ 14) Sykes J (as he then was) gave a very helpful summary of the law relating to the acquisition of a possessory title and particularly in a scenario where co owners are concerned. He listed the principles which emerged from the judgment of McDonald Bishop JA in the case of **Fullwood v Curchar** [2015] JMCA Civ 37 as follows:

> *(i) the fact that a person's name is on a title is not conclusive evidence such that such a person cannot be dispossessed by another including a co-owner;*
>
> *(ii) the fact of co-ownership does not prevent one co-owner from dispossessing another;*

(iii) sections 3 and 30 of the Limitation of Actions Act operate together to bar a registered owner from making any entry on or bringing any action to recover property after 12 years if certain circumstances exist;

(iv) in the normal course of things where the property is jointly owned under a joint tenancy and one joint tenant dies, the normal rule of survivorship would apply and the co-owner takes the whole;

(v) however, section 14 of the Limitation of Actions Act makes the possession of each co-tenant separate possessions as of the time they first become joint tenants with the result that one co-tenant can obtain the whole title by extinguishing the title of the other co-tenant;

(vi) the result of sections 3, 14 and 30 of the Limitation of Actions Act is that a registered co-owner can lose the right to recover possession on the basis of the operation of the statute against him or her with the consequence that if one co-owner dies the normal rule of survivorship may be displaced and a person can rely on the deceased co-owner's dispossession of the other co-owner to resist any claim for possession;

(vii) when a person brings an action for recovery of possession then that person must prove their title that enables them to bring the recovery action and thus where extinction of title is raised by the person sought to be ejected, the burden is on the person bringing the recovery action to prove that his or her title has not been extinguished thereby proving good standing to bring the claim;

(viii) the reason for (vii) above is that the extinction of title claim does not simply bar the remedy but erodes the very legal foundation to bring the recovery action in the first place;

(ix) dispossession arises where the dispossessor has a sufficient degree of physical custody and control over the property in question and an intention to exercise such custody and control over the property for his or her benefit;

(x) the relevant intention is that of the dispossessor and not that of the dispossessed;

(xi) in determining whether there is dispossession there is no need to look for any hostile act or act of confrontation or even an ouster from the property. If such act exists, it makes the extinction of title claim stronger but it is not a legal requirement;

(xii) the question in every case is whether the acts relied on to prove dispossession are sufficient.

[35] The learned judge further stated at paragraph 13:

*"**[13]** It is fair to say that in this area of law the analysis of and interpretation of the evidence is influenced by whether the person claiming to extinguish*

the title is a co-owner or a trespasser. The law seems to require more of a trespasser than a co-owner. The difficulty in co-owner cases, where the dispossessing co-owner has been in possession, is in identifying the point in time when the relevant intention was formed. The difficulty arise because more often than not the intention is an inference from the act of possession."

[36] The learned judge also referred to the judgement of Slade J in **Powell v McFarlane and another** (1979) 38 & CR 452, where it was said that:

> *"The question of animus possidendi is, in my judgment, one of crucial importance in the present case. An owner or other person with the right to possession of land will be readily assumed to have the requisite intention to possess, unless the contrary is clearly proved. This, in my judgment, is why the slightest acts done by or on behalf of an owner in possession will be found to negative discontinuance of possession. The position, however, is quite different from a case where the question is whether a trespasser has acquired possession. In such a situation the courts will, in my judgment, require clear and affirmative evidence that the trespasser, claiming that he has acquired possession, not only had the requisite intention to possess, but made such intention clear to the world.*
>
> *If his acts are open to more than one interpretation and he has not made it perfectly plain to the world at large by his actions or words that he has intended to exclude the owner as best he can, the courts will treat him as not having had the requisite animus possidendi and consequently as not having dispossessed the owner. (emphasis added)"*

[37] Much of the further discourse by his lordship is not of great relevance to the circumstances of this case but that which appears at paragraphs 23, 24 and 25 of the judgment I believe is of relevance. He stated as follows:

> *"[23] Thus the nature of the acts being relied on for the inference of the intention to possess is important. That Lord Browne-Wilkinson understood this is shown in paragraph 41 where his Lordship expressly cited and approved this passage from Slade J found at pages 470 and 471 of Slade J's judgment:*
>
> > *(3) Factual possession signifies an appropriate degree of physical control. It must be a single and [exclusive] possession, though there can be a single possession exercised by or on behalf of several persons jointly. Thus an owner of land and a person intruding on that land without his consent cannot both be in possession of the land at the same time. The question what acts constitute a sufficient degree of exclusive physical control must depend on the circumstances, in particular the nature of the land and the manner in which land of that nature is commonly used or enjoyed ... Everything must depend on the particular*

> *circumstances, but broadly, I think what must be shown as constituting factual possession is that the alleged possessor has been dealing with the land in question as an occupying owner might have been expected to deal with it and that no-one else has done so.*
>
> *[24] The nature of the factual possession, the type of property in question, the common use of the property and the like are important factors in the analytical process because, as Lord Browne-Wilkinson pointed out, the intention to possess in more often than not inferred from the fact of possession. This means that the more unequivocal the nature of the physical possession the easier it will be to infer the intention to possess and conversely, the more equivocal the nature of the physical possession the more difficult or the less easy it is to infer the intention to possess.*
>
> [*25] Thus, the ability of the dispossessor to prove his or her 'intention, in one's own name and on one's own behalf, to exclude the world at large, including the owner with the paper title if he be not himself the possessor, so far as is reasonably practicable and so far as the processes of the law will allow' (expressly approved by Lord Browne-Wilkinson at para 43) is influenced by the nature of the physical acts of possession being relied on."*

Applicant's submissions on the application of the Limitation of Actions Act

[38] The applicant argued that there are instances where claims were brought under the PROSA after the expiration of 12 years and were still entertained by the court. She cited the case of **Tenn v Wiltshire**. Counsel argued that there is clear proof that the claimant did not abandon her interest in the property and that the fact that she continued to make mortgage payments is proof of that fact. According to counsel, for the claimant's interest to be extinguished, there must be evidence that she has abandoned her interest in the property. Thus, the argument continued, the court must identify the point in time when the claimant could be said to have abandoned her interest in the property, because it is only then that time begins to run for the purposes of the Limitation of Actions Act. She asserted further that the first time that the defendant did anything to indicate that he was seeking to exclude the claimant from the property, was 2010 and that if 2010 is taken as the date when time began to run, then a period of 12 years did not pass before the applicant brought this claim seeking a declaration of her interest, the claim having been filed

on May 7, 2021. She cited the case of **Garnet Hall v Joyce Campbell** [2020] JMSC Civ 243.

[39] Counsel argued further that there must be compelling evidence to rebut the presumption of joint retention of her interest in the property in circumstances where the applicant's name appears on the certificate of title as joint owner. Counsel cited the cases of **Raymond Johnson v Angela Johnson** [2015 JMSC Civ 112, and **Gillian Baumgartner-Marik v Agnes Elliot**. She also relied on **Hawkins v Hawkins McInnis** [2016] JMSC Civ 14 in making the point that payment of mortgage is evidence which goes against the presumption of abandonment arising from a claimant not being in occupation of property.

[40] During her oral submissions, counsel correctly abandoned her initial position taken in written submissions which was that where a specific piece of legislation establishes a regime for bringing claims falling within that piece of legislation, then it is that legislation only which governs the question of expiry of the time frame within which that claim can be brought. In other words, the argument was that the Limitation of Action Act does not apply to a claim brought under the PROSA.

Respondent's submissions on the application of the Limitation of Actions Act

[41] Mrs Senior Smith began her submissions by directing the court's attention to the applicant's affidavit evidence in support of her Fixed Date Claim Form. At paragraphs 6 and 7 of her affidavit, the applicant explained that herself and the defendant had frequent disagreements and that she endured verbal abuse from the defendant. She stated further that the defendant was not supporting her in raising the children and she was forced to leave the property in or about March 2003. She continued at paragraph 7 that shortly after, she returned to retrieve her personal belongings and that she discovered that the defendant had changed the locks. Further, that she sought the assistance of the police, but was still denied access. She furthered that although both her children continued to reside with the

defendant, she was barred from the home since March 2003. She continued that since then, the defendant has remained in possession whilst she has been excluded.

[42] Regarding the payments that the claimant is asserting that she made, Mrs Senior Smith observed that there is no evidence that she in fact made those payments, as she has not exhibited one single receipt in proof of payment. In any event she pointed out, the transaction details in the loan statement exhibited by the applicant (page 46 of the defendant's bundle), shows a payment made in January 2021, and allotment of her contribution refund to the mortgage, and another (at page 47), is reflective of contributions refund allotted to the mortgage as at January 1, 2020.

[43] It was also Mrs Senior Smith's submission that the claimant has not put forward any evidence in support of payments made by her for the period between 2004 and 2016. It was also the submission that the applicant has not shown that the refunds applied to the mortgage was hers alone, as that is not disclosed on the face of the statements.

DISCUSSION

[44] It is against the background of the relevant law and the claimant's evidence in her affidavit in support of this application as well as that in support of the Fixed Date Claim Form that the respondent's assertion of his limitation defence must be examined. This court makes it clear that it is not permissible at this stage to make findings of fact on matters that are disputed and particularly so in this instance where there is no evidence to the contrary. This court can only come to conclusions based on undisputed evidence. Indeed, the court can only look to the evidence of the claimant in order to decide if the respondent's position that the claimant's claim is barred by the provisions of the Limitations of Actions Act is correct. This is so because there is no evidence from the defendant. He did indicate in his acknowledgement of service that he intended to defend the claim. The defendant

has in essence only signalled via submissions his intention to rely on the limitation defence.

Claims brought under the PROSA after the expiration of 12 years

[45] In light of the claimant's submission that there have been instances where claims were brought under the PROSA after the expiration of 12 years and were still entertained by the court, it is important to look carefully at the circumstances of cases where the claims were permitted to proceed after 12 years from the date of the trigger event; in this case, the dissolution of marriage. The passage of 12 years after the trigger event under the PROSA does not necessarily bear any relationship with the passage of 12 years after a cause of action under the Limitation of Actions Act arises. Under the Limitation of Actions Act, one critical question is always going to be, when did time begin to run for the purposes of bringing the claim. Under the PROSA, if there is no assertion of a limitation defence, it is purely a question of whether the court will take the view that in light of the evidence put forward, the time should be extended. The length of time is relevant only in so far as the court takes it into account and decides whether there has been undue delay, or whether a reasonable explanation has been offered, which are factors to be considered when deciding if time should be extended.

[46] For purposes of the Limitation of Actions Act, time will not necessarily begin to run when a co-owner ceases to reside in the disputed property or a wife ceases to live in the matrimonial home, nor for that matter, when a marriage is finally dissolved. It is a question of when can it be said that factual dispossession accompanied by the necessary intent began. If it is remembered that dispossession arises where the dispossessor, assumes a sufficient degree of physical custody and control over the property and formed the necessary intention to exercise that custody and control over the property for his benefit to the exclusion of the applicant, then it becomes clear that there will be instances where any number of years in excess of 12 years may pass and yet time has not run or even begun to run for the purposes of the Limitation of Actions Act. Indeed, that was the scenario in the case

of **Gillian Baumgartner- Marik v Agnes Elliot** [2017] JMSC Civ 58, where court found that although the estranged wife of the deceased Mr Elliot had left the property over forty - five years, the deceased had not acquired a possessory title. The court found that the claimant was unable to give evidence as to precise time periods and as to continuous unequivocal acts of Mr. Elliott over a period of at least twelve years between 1968 and 2013 which resulted in dispossession.

[47] In the case of **Tenn v Wiltshire** [2020] JMSC Civ 246, the claimant and the defendant were the registered joint tenants of the disputed property. The claimant brought a notice of application seeking an extension of time to bring a claim under the PROSA in respect of the disputed property. The learned judge in the exercise of her discretion granted the extension of time although 15 years had elapsed since the dissolution of the marriage of the parties. She found that there was no satisfactory reason for the long delay in making the claim, but that the parties admitted that the property was the family home. And that the claimant being a registered joint tenant, she had a prima facie meritorious claim to a share in the property. Further, that there would be no significant prejudice to the respondent if the claim was allowed to be made and that the court would be able to deal justly with the issues joined between the parties and those issues included any as to possessory acquisition of the applicant's share in the property since the dissolution of the marriage.

[48] In **Raymond Johnson v Angela Johnson** [2015] JMSC Civ 112, the claimant and the defendant held the property as registered joint tenants. The parties were divorced in 2003 and the claimant made an application under the PROSA in 2006 without applying for an extension of time within which to bring the claim. The defendant filed a Notice of Application for Court Orders seeking a declaration that she had acquired title by possession. The court declined to consider the claim under the PROSA but did so under the Partition Act.

[49] The court summed up the critical aspects of the case so far as is relevant to the issue in this case at paragraphs 18, 19 and 20 of the judgment:

> *[18] The relationship of Mr. and Mrs. Johnson broke down sometime in 1999. According to Mrs. Johnson this was when Mr. Johnson moved out all his personal belongings. Mr. Johnson has also noted that they maintained regular communication and close interaction with each other until 1999.*
>
> *[19] The evidence is that since 1999 Mr. Johnson has not lived at the property and Mrs. Johnson has retained possession of the property. In fact, Mrs. Johnson gave affidavit evidence which I accept that she has also during that time lived at the premises with her children and extended family and has also rented the property. From the above it is clear that Mrs. Johnson has been in occupation of the property and has exercised control over it since 1999.*
>
> *[20] However having looked at the evidence adduced by Mrs. Johnson in this case, it is not clear that she had the intention to possess the property in her own right and in her own name to the exclusion of her former husband or the world at large. …*

[50] The court also observed at paragraph 21 that Mrs. Johnson had not sufficiently demonstrated that she had dispossessed Mr. Johnson, nor that she had the necessary intention to dispossess him. The learned judge drew that inference from the defendant's repeated reference to the claimant's failure to contribute to the property which she said implied that she acknowledged that he had an obligation to maintain the property, hence, that he had a right in the property.

[51] **Johnson v Johnson** therefore turned on the court's finding that Mrs Johnson did not possess the requisite intention to exclude Mr Johnson from the premises. The scenario in this case is not akin to those with which the court was presented in **Johnson v Johnson** and **Tenn v Wiltshire**. That that is not the scenario, is demonstrated by the applicant's own evidence which will be examined at a later juncture.

[52] **In Garnett Hall v Joyce Campbell** [2020] JMSC Civ 243, the claimant, Mr. Hall and defendant, Ms. Campbell, were married and some years after the marriage, bought land and began to construct a dwelling house. That was the property in dispute. After the couple's relationship broke down, Mr. Hall moved out of the matrimonial home and into the unfinished structure at the property in dispute. He eventually migrated and Ms. Campbell moved into the said property. The claimant had migrated in November 1992, however, his return to the island and to the said property in 2004, along with his payment of property taxes and enquiring about rent monies garnered from renting a part of the property, broke the 12 years' undisputed and undisturbed occupation of the property by the defendant. The statutory minimum period of 12 years was not met by the defendant. The court found that the claimant did not abandon his interest, nor was he dispossessed of his interest in the property. The property was registered to both parties in 2017. The court determined that if the defendant had wished to dispute the claimant's interest in the property, she should not have signed the Instrument of Transfer but should have sought a declaration from the courts stating her sole entitlement to the property.

[53] Importantly, the question of whether time had run was one that fell to be decided by the court as evidently there was a dispute as to whether the claimant had been dispossessed.

Mortgage payments

[54] The court now turns to a consideration of the claimant's evidence that she continued to make mortgage payments after she ceased to reside at the disputed property.

[55] The court cannot in these proceedings seek to resolve any disputed matter. It is important to note in any event, that the defendant has not put forward any evidence. Thus it is a matter of scrutinizing the claimant's evidence, in this instance as it relates to mortgage payments and deciding if that evidence is sufficient to establish what it is that the claimant seeks to prove.

[56] It is not open to the court to make a finding one way or the other as to who was in fact responsible for making the payments based on the available documentary evidence. It is observed that the names of the claimant and the defendant appear on the statements exhibited to the claimant's affidavit; the claimant as mortgagor and the defendant as co–applicant. There is no indication of whose refund was allotted to the mortgage or who made the payments indicated.

[57] The court makes the observation that where an application is made to extend time, there must be cogent evidence before the court in support of the position that the applicant has a case that is worthy of a grant.

[58] Mrs Senior Smith alerted the court to the case of, **the Administrator General for Jamaica (Administrator for the Estate of Andrew Wayne Lawrence deceased v Gary Whittaker** [2002] JMCA App 34, where this very observation regarding the requirement for cogent evidence was made. In that case, the court examined the question of whether the applicant had demonstrated that she had an arguable claim against the respondent under the Fatal Accident Act so that the Master ought to have exercised her discretion by extending time for the claim to be brought.

[59] The applicant had relied on the contents of a police report in seeking to establish that she had an arguable case. The name of the maker of the report was not indicated therein. The applicant, it was observed, only placed before the court hearsay evidence. She did not provide any affidavit evidence from anyone who had seen the accident. The Court of Appeal made the observation that *"the applicant could not overcome the hurdle presented by the lack of admissible and cogent evidence before the learned Master. The learned Master would have been justified to find that the evidence did not disclose a proposed claim with some prospect of success. Therefore, she could not be faulted for refusing the applicant's application for an extension of time to file a claim under the FAA in those circumstances, even if the delay could have been excused"*

[60] Even if the court was minded to consider granting an extension based on the discretion it could exercise under the relevant provisions of the PROSA, the

defendant has resisted the application on the basis that the claim is barred by the Limitation of Actions Act, therefore the court must have regard to whether his contention has been made out.

[61] The instant claimant stated that the mortgage fell into arrears after she left the property in 2003. She did not state specifically in her affidavit the period during which she made payments towards the mortgage. She asserted at paragraph 6 of her affidavit that over the years since the separation, the only payments on the loan account was from her NHT contributions refunds being applied and that in more recent years, she has made sporadic payments. The court has to consider at what point were these payments made; whether they were made at a point in time after her right to bring the claim had already been extinguished. If we assume for a moment that the payment of mortgage was made by the claimant and that the making of the payments can avail her, but she does not demonstrate by admissible evidence that those payments were made before her right to bring the claim has been extinguished, there would be no basis to say that the extension should be granted and the case proceed to trial.

[62] The court notes the absence of evidence on the part of the defendant, and particularly as it relates to his limitation defence. In my view, it might have been simpler if he had done so, but counsel took the view that there was no need for him to have done so, since the claimant made it quite clear in her evidence what the defendant's stance was from as far back as 2003 when the claimant ceased to reside at the property.

[63] It could be said that the claimant in fact provided the evidential base for that defence in her own affidavit. The claimant's documentary evidence did not demonstrate that she made payments between the period 2004 and 2016. The documents establish that the NHT returns allotted to the mortgage was done as at January 2020. In essence, the claimant is asserting that she made payments at a time that was evidently after the expiration of 12 years from when it could be said that time began to run in the defendant's favour. Thus even on the assumption that

she was responsible for those payments and that the payment of mortgage has the effect Mrs Balli contends for, those payments will not necessarily assist her case if it is determined that the defendant had formed the necessary intention to exclude her.

[64] Notwithstanding the finding that the payment of mortgage was not made at a time that would have prevented time from running for the purposes of the Limitation of Actions Act, I will go on to consider the claimant's assertion that her payment of the mortgage showed that she had not abandoned her interest in the property. It is important to note the observation of Sykes J in **Hawkins v Hawkins McInnis** not only as to when and how dispossession arises but that "the relevant intention is that of the dispossessor and not that of the dispossessed" in cases where a defence of limitation has been raised.

[65] Thus, in this instance where the defendant resists the application for an extension of time, on that ground, the court is bound to consider the evidence in support of the position that the defendant had physical custody and control over the property and has demonstrated the intention to exercise that control to the exclusion of the claimant regardless of whether that evidence comes from the claimant or the defendant. In circumstances where there is a dispute as to whether the defendant exercised such custody and control to the exclusion of the claimant, then it becomes a triable issue. In this case, there is really no dispute in this regard and so there can be no triable issue when it is the claimant who makes the assertion that the defendant has exercised control to her exclusion and that he expressly told her he was excluding her. What is alarming is that despite the defendant's conduct, the claimant did not take heed and act in a timely way.

[66] The question of the effect of mortgage payments in providing proof of a party's intention to maintain his/her interest in property, was discussed in the case of **Gillian Baumgartner- Marik v Agnes Elliot.** The issue of mortgage payment arose in a context where the claimant daughter of the deceased Mr Elliot asserted that the payments by her father over a two years' period from 1960 to 1970

provided proof that her father had formed the necessary intention to dispossess the defendant. The court found that the payment of mortgage from 1968 to 1970 and the property taxes from 2008 to 2012 were not unequivocal acts which indicate that from 1968 to 2012, Mr. Elliot formed the intention to treat the disputed property as his own. By contrast, the Court found that the rental of part of the property, collection of rent and attempts to dispose of said property, were far more unequivocal. The court also found that the claimant was only able to produce evidence to show that Mr. Ellis had been in factual possession with the intention to possess the disputed property for approximately 8 years between 2004 to 2012, but not 12 years. It was reiterated in that case that it is the dispossessor's intention that mattered and not that of the person seeking to say she was not disposed.

[67] Although the assertion of the payment of mortgage by her deceased father did not assist the claimant in that case, the court made it clear that it was not saying that such payments could not have the effect contended for. The court found that it had not been demonstrated that there was continuous dispossession over a 12 years' period. It is critical to note however, that it was payments by the would be dispossessor that was being relied on in that case. That decision demonstrates that it is the intention of the dispossessor that is relevant and not that of the person who is dispossessed. There is nothing that the court decided in that case which could avail the claimant.

[68] The law is clear, based on the decision of **Winnifred Fullwood v Paulette Curchar** [2015] JMCA Civ 37 that it is the claimant in this case who must satisfy the court as to the validity of her title and as to her *locus standi* to bring the claim. If there is sufficient uncontroverted evidence to establish that the claimant's title has been extinguished by virtue of the provisions of the Limitation of Actions Act, then it would mean that she has no locus standi to bring the claim and a fortiori, no locus standi to seek that extension under the PROSA.

[69] The circumstances of this case present no difficulty in being able to identify the point in time when the relevant intention was formed by the defendant, the

dispossessing co - owner. The evidence is that he made his position clear to the claimant that he was excluding her as far back as March of 2003 when she ceased to reside at the property. Therefore, there is no need in this instance for the necessary intention to be inferred simply from the act of possession. The claimant's evidence from her earlier affidavit that the defendant excluded her from the premises since March 2003, contradicts her later assertion in the second affidavit that it was only in 2010 when she contacted the defendant about the mortgage arrears and he said that she had nothing in the house was the first time he indicated that he intended to exclude her from the property. This assertion can only be seen as an attempt to negate her damning evidence when the real impact of it became apparent to her.

CONCLUSION

[70] The delay in making the application for an extension of time under the PROSA is inordinate. The claimant has not offered any reasonable explanation or excuse for the delay. It is evident that a failure to grant an extension will result in greater prejudice to the applicant. Those were not however, the determinative factors. She has demonstrated the existence of facts from which the court, but for the resistance from the defendant, could have inferred that she has a claim with merit. For example, it is not disputed that she is a joint registered legal owner and that the property was the family home.

[71] But in the light of the claimant's own evidence, there is material from which this court can say that the defendant would be able to establish that he has been in sole, open continuous and undisturbed possession of the disputed property for 12 years and more. It is evident in the context of co –ownership that the respondent demonstrated to the dispossessed co - owner that he intended to exercise complete control over the property to her exclusion. If an extension should be granted, he will be able to successfully establish his defence that he has acquired the right to a possessory title to her share in the disputed property. It would be

pointless in those circumstances to grant an extension of time, for in essence, the respondent has successfully eroded the claimant's basis for saying she has a claim with merit.

[72] The application is refused with costs to the respondent to be taxed if not sooner agreed.

……
Andrea Pettigrew-Collins
Puisne Judge