

JAMAICA

IN THE COURT OF APPEAL

APPLICATION NO 65/2018

**BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE EDWARDS JA**

**BETWEEN DERRICK WOODBURN GENTLES APPELLANT
(Executor of the Estate of Beverly Carr)**

AND KENNETH CARR RESPONDENT

**Mr Andre Earle and Miss Coleasia Edmondson instructed by Lawrence
Phillpotts- Brown of Lawrence Phillpotts-Brown & Co for appellant**

**Mrs Judith Cooper-Batchelor instructed by Chambers, Bunny & Steer for the
respondent**

7, 11 and 18 October 2019

MORRISON P

[1] I have read in draft the reasons for judgment of Edwards JA, I agree and I have nothing further to add.

F WILLIAMS JA

[2] I too have read in draft the reasons for judgment of Edwards JA and I agree.

EDWARDS JA

Introduction

[3] This matter came to us as a re-listed notice of application for court orders for leave to appeal filed on 10 September 2019. When the matter came on for hearing on 7 October 2019, with the parties' consent, we treated the hearing of the application for leave to appeal as the hearing of the appeal, and having heard the parties, we reserved our decision to 11 October 2019. On that day, we made the following orders:

- (1) The application for leave to appeal is granted.
- (2) The hearing of the application for leave to appeal is treated as the hearing of the appeal, with the consent of the parties.
- (3) The appeal is allowed.
- (4) The matter is remitted to the Supreme Court for a Case Management Conference and for a trial date to be set for trial of the matter at common law.
- (5) No order as to costs.

[4] We promised then to give our written reasons and we do so now.

Background

[5] The appellant challenged the decision of Wolfe-Reece J (the judge) made on 19 March 2018 granting the respondent an extension of time to file a claim under The Property (Rights of Spouses) Act (PROSA) for a half share in the house owned by his

deceased wife Beverly Carr, claiming it was the family home. The appellant also challenged the decision of the judge to appoint Delroy King as representative of the estate of the respondent, who having filed the claim, had by that time, died. The appellant had also applied for a stay of the judge's decision but that application was abandoned at the hearing.

[6] The respondent Kenneth Carr and Beverly Carr were married on 22 January 2000 in the United States of America. Beverly Carr had previously been married to Winston Bogle. During her previous marriage to Winston Bogle, they jointly owned property, part of Fairy Hill Estate in the parish of Portland, being Lot 47, registered at Volume 1129 Folio 420 of Register Book of Titles, as tenants in common. On 12 July 2001, the interest of Winston Bogle in the said property was transferred, by way of gift, to Beverly Carr. This is the said property which is the subject of the respondent's claim.

[7] Beverly Carr died 1 November 2014, testate. In her Will, she left a life interest in the property to her widower, the respondent. On 7 March 2016, the respondent filed a fixed date claim form claiming that he was entitled to a 50% interest in the property at Fairy Hill Estate (mentioned in paragraph [6] above) as the family home. This fixed date claim form was, arguably, not filed pursuant to PROSA as it made no mention of PROSA. Claims made pursuant to PROSA must be made within 12 months of the trigger events, set out in section 13 of PROSA, occurring.

[8] An amended fixed date claim form was filed on 9 February 2017 citing PROSA, after objections were made by the appellant on 31 January 2017 to the court's jurisdiction

to hear the matter. The claim was made approximately 16 months after the termination of the marriage by death. This raised the issue of whether the claim had, therefore, in any event, run afoul of section 13 of PROSA, which provide for limitations on the time within which certain categories of persons shall be entitled to apply to the court for division of property on the occurrence of certain events.

[9] The respondent subsequently died. On 22 May 2017, the respondent's attorney filed a notice of application for court orders seeking an extension of time to file action under PROSA and for Delroy King to be appointed to represent the estate of Kenneth Carr. That application was granted by the judge, and the orders made then, as I said before, are the subject of this appeal.

The arguments in this court

[10] Counsel, Mr Earle, on behalf of the appellant, based his challenge to the judge's orders on two grounds. The first, was the question of the jurisdiction of the judge, based on section 3(1) of PROSA, to make the order and the second questioned whether the judge properly exercised her discretion to extend time, in any event. I considered the jurisdiction question first.

Submissions on the jurisdiction question

[11] Mr Earle relied on section 3(1) of PROSA which states in part that:

“3(1) Except as otherwise provided in this Act and subject to subsections (2) and (3) and section 6, the provisions of this Act shall not apply after the death of either spouse ...”

[12] Counsel submitted that based on section 3(1), once Beverly Carr died before the commencement of this action under PROSA, there was no jurisdiction to hear and determine this matter under PROSA. Counsel pointed out that Beverly Carr had died in 2014 and the fixed date claim form was filed in 2016, with an amended fixed date claim form filed in 2017. Counsel submitted that the true interpretation of section 3(1) is that once Mrs Carr died before the commencement of the action by the respondent, it acted as a bar to any claim being filed under PROSA. He further argued that a claim could only be initiated under PROSA when both parties to the marriage were alive. Counsel noted that by virtue of sub-sections (2) and (3), if proceedings had commenced before Beverly Carr's death, they could lawfully be completed. Counsel also noted that although section 3(1) was subject to section 6, his interpretation of section 6(2) is that the surviving spouse was entitled to a one-half share on the termination of marriage caused by death, but that the provisions of PROSA would only be applicable to vest that entitlement if death occurred after the claim had commenced. He said any other interpretation would render section 3(1) useless. Counsel also pointed to section 13 of PROSA and submitted that the combined effect of sections 3(1), 6 and 13 is as follows:

1. Where a spouse died prior to the institution of proceedings under PROSA, there was no jurisdiction for the court to hear and determine the case under the provisions of PROSA by a subsequent filing.
2. Where one or both spouses died after the commencement of proceedings, the matter may proceed to completion.

The death of Beverly Carr, he submitted, was an absolute bar to proceedings being initiated under PROSA, subsequently.

[13] Counsel submitted that, in the light of section 3(1), Beverly Carr having died 16 months before the claim was filed and 30 months before the extension of time was granted, the judge erred in granting the extension of time within which to file the claim under PROSA, and also erred in appointing Delroy King as representative of the estate of the respondent.

[14] Mrs Cooper-Batchelor, counsel for the respondent, however, pointed out that section 3(1) was subject to section 6, which dealt with the family home. Counsel also pointed to section 6(2) which gives an entitlement of one-half share to a surviving spouse after death of a spouse. She said that if the interpretation that counsel Mr Earle placed on section 3(1) was accepted, then section 6(2) would be meaningless.

Decision on the jurisdiction point

[15] Both sides raised novel and interesting points. There was no decision, to my knowledge at least, in this court or in the court below, on this point. It is an important and far reaching issue. To my mind, the live issue was not whether the provisions of PROSA became inapplicable if one spouse died before the commencement of an action; I found that to be clear on the unambiguous words of section 3(1), in combination with section 3 subsections (2) and (3). The real issue, to my mind, was whether section 6, and more specifically section 6(2), provided an exception to section 3(1) and, therefore, where the claim was for a share of the family home under section 6, it mattered not

whether one spouse died before the commencement of the action for division of the family home. Counsel Mr Earle submitted that it did matter, counsel Mrs Cooper-Batchelor said it did not.

[16] To find the answer, I examined the sections themselves, and applied the usual rules and canons of interpretation applicable to the interpretation of statutes. Section 3 of PROSA states in full that:

“3. — (1) Except as otherwise provided in this Act and subject to subsections (2) and (3) of this section and section 6, the provisions of this Act shall not apply after the death of either spouse and every enactment and rule of law or of equity shall continue to operate and apply in such case as if this Act had not been enacted.”

(2) The death of either spouse shall not affect the validity or effect of anything done or suffered in pursuance of the provisions of this Act.

(3) If, while any proceedings under this Act are pending one of the spouses dies, the proceedings may be continued and be completed; and any appeal may be heard and determined and the Court may make such order as it thinks fit in the circumstances of the case as if the spouse had not died.” (Emphasis added)

[17] Section 6 states that:

“6. — (1) Subject to subsection (2) of this section and section sections 7 and 10 each spouse shall be entitled to one-half share of the family home —

- (a) on the grant of a decree of dissolution of a marriage or the termination of cohabitation;
- (b) on the grant of a decree of nullity of marriage;

(c) where a husband and wife have separated and there is no likelihood of reconciliation.

(2) Except where the family home is held by the spouses as joint tenants, **on the termination of marriage or cohabitation caused by death, the surviving spouse shall be entitled to one-half share of the family home.**"
(Emphasis added)

[18] It is clear that section 3(1) provides for a general rule that the provisions of PROSA do not apply upon death of either spouse. It also provides that death does not affect the validity or effect of anything done or suffered in pursuance of PROSA. It was generally agreed that subsection 2, assumes the action had commenced under PROSA, prior to death. Subsection (3) provides for circumstances where after commencing proceedings, one spouse died. In such a case the proceedings may continue to completion. Therefore, as a general rule, where a surviving spouse had not made an application under PROSA before the death of the other spouse, no application may be brought under the provisions of PROSA, but any action commenced before death of a spouse may validly continue to completion.

[19] Section 3(1) is also subject to section 6, which deals with the family home. Section 6 states the entitlement of spouses to the family home upon divorce or termination of cohabitation, nullity and separation, and upon the death of a spouse who is not a joint tenant with another person. It establishes, therefore, what is sometimes referred to as the equality rule. Although the entitlement of one spouse to share equally in the family home after the death of the other spouse is placed separately in subsection 2 of section 6, to my mind, it is simply a matter of convenience to provide for the exception of the

situation of joint tenancy. It creates no protected category of entitlement in such a person. Section 6(2), therefore, when read with section 6(1)(a), (b), and (c), simply provides for a fourth circumstance of entitlement to the family home and that is where the marriage or cohabitation is terminated by death.

[20] In **Powys v Powys** [1971] 3 All ER 116 at 124, Brandon J, speaking of the general rules of statutory interpretation, said this:

“The true principles to apply are, in my view, these: that the first and most important consideration in construing an Act is the ordinary and natural meaning of the words used; that if such meaning is plain, effect should be given to it; and that is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it.”

This statement has been approved by this court in **Sadler v Saddler; Hoilette v Hoilette** [2013] JMCA Civ 11, at paragraph [40] of the judgment of Phillips JA.

[21] Section 3(1) acknowledges that there may be exceptions to the general rule. However, section 6 does not state that it is an exception to section 3(1) and in actual fact, I found no clear exception to section 3(1) provided for anywhere in any of the provisions of PROSA. However, section 3(1) is to be read subject to other provisions including section 6. I took the view that, where the general rule in section 3(1) ousting the jurisdiction to bring a claim under PROSA states that it is subject to the provisions of section 6, it is really a reference to section 6(2) which establishes an entitlement to claim one-half of the family home upon the death of a spouse. Did it mean that, in cases involving the family home and, specifically, where the application for the family home is

not made prior to the death of one of the spouses, the general rule in section 3(1) would not apply? When consideration was given to the provisions of PROSA, read as a whole, the answer had to be in the negative.

[22] The provisions of any statute, PROSA not excepted, must be read as a whole. The clear and unambiguous language of the statute should always serve as the starting point of any enquiry as to its meaning. In this case, there is no language declaring section 6 to be an exception to the general rule. There is also no language which exempts entitlement to the family home from the general rule in section 3(1). There is also no language in PROSA which places the person entitled to a 50% share in the family home on death of a spouse in a different category from those entitled to such a share on divorce, separation or termination of cohabitation. Section 3(1) says firstly, "[e]xcept as otherwise provided", but section 6 does not state anywhere, and certainly not in subsection 2, that section 3(1) would not apply.

[23] That left us with the question of what is meant by "subject to ... section 6". That language is what is known, according to the canons of interpretation, as subordinating language. By framing the language of section 3(1) in that way, it shows that the scope of the provision must be read conditional on or subject to what is said in section 3 subsections (2) and (3) and section 6. As far as section 3 subsections (2) and (3) are concerned, we already know that although death is a bar to an action under PROSA, if the action is commenced before death occurs, after the death the action remains valid and can continue to completion. Section 3(1) being made subject to section 6, in my

view, simply means that the general rule does not affect the entitlement conferred by section 6 upon the death of one spouse. In the case of section 6, which establishes an entitlement to a 50% share if a spouse dies, the existence of the bar to claiming under PROSA, after the death of a spouse, cannot be construed as affecting or extinguishing the entitlement to one-half share in the family home at the death of one of the spouses. However, the claim under PROSA would still have to be brought before the death of that spouse, as section 6 only qualifies or controls the aspect of entitlement at death and does not otherwise provide an exception to the ousting of the jurisdiction after death.

[24] I was fortified in my reasoning by the provisions in section 13 which sets out the time limited within which an application may be made to the court for division of property. For although section 6 establishes the entitlement, the right to a share does not vest unless an application is made to the court. That application may be made under section 11 for declaration and orders to be made or under section 13 for division of property. By virtue of section 14, the court has the power, on an application under section 13, to make an order under section 6 or 7 for the division of the family home or for some other property.

[25] Section 13 of PROSA provides as follows:

“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.

(2) 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.

...”

[26] Section 13 of PROSA gives the right to a spouse to apply for division of property on the occurrence of certain events. By virtue of section 13(1)(a), (b) and (c), an application may be made:

- (a) on grant of a decree of dissolution of a marriage (meaning after divorce);
- (b) on termination of cohabitation (meaning common-law spouses who have stopped cohabiting);
- (c) where the marriage is annulled (void marriages); and
- (d) where the spouses have separated and are not reasonably likely to reconcile (where there is an irretrievable breakdown of the marriage).

[27] These four entitlements have a limitation of 12 months within which to apply but the court, at its discretion, may allow a longer period. There is a fifth occasion on which a spouse may apply, where the other spouse is endangering the property or seriously diminishing its value, inter alia, but there is no time limit to apply if this occurs. Conspicuous in its absence from the entitlement to apply in section 13, is any reference to any entitlement to apply at the termination of marriage by death.

[28] A full reading of section 13 shows that PROSA does not recognise any entitlement to apply for division of property after the termination of a marriage by the death of one spouse. It also cannot be said that the absence of any reference to death of a spouse in section 13 means that a surviving spouse, being entitled to a one-half share by virtue of section 6, need not apply for that share because, how then would he get it?

[29] Section 14 is also instructive. It states that:

“14. — (1) Where under section 13 a spouse applies to the Court for a division of property the Court may—

- (a) make an order for the division of the family home in accordance with section 6 or 7, as the case may require; or
- (b) subject to section 17(2), divide such property, other than the family home, as it thinks fit, taking into account the factors specified in subsection (2),

or, where the circumstances so warrant, take action under both paragraphs (a) and (b).

...”

[30] It seemed clear therefore, that despite any entitlement under section 6(2) to the half share in the family home after the death of a spouse, the vesting of that entitlement in the surviving spouse, if no application had been made previous to death, as for example by a divorcee or a person separated from his spouse, such an application must necessarily be dealt with under some other relevant provision of PROSA, since section 3 does not recognise that category. Therefore, a person who is entitled upon death of a spouse but did not commence a claim before the death of that spouse, must be able to make an application under section 13 and have an order made by the court under section 14, in accordance with section 6 and 7, or by some other provision in PROSA. Unfortunately, there is no provision in PROSA which allows an application for property to be vested in a surviving spouse after the death.

[31] With respect to an application under section 11 of PROSA, this must be brought during the marriage or cohabitation, and an application cannot be brought where the marriage is terminated by death. Section 12 of PROSA deals with the time at which the value of the share in property is determined. Section 12(2) provides that each spouse's share in the property shall be determined, subject to section 9, at the date of separation or, if they have not ceased to live together, then at the date of the application. There is no provision for value to be determined at the date of death. Section 12(3) provides that the spouses are to agree on the valuator and if they cannot agree, the court will make an order. No agreement can be made with a deceased spouse.

[32] There is, therefore, no provision in PROSA which contemplates or accommodates an application by a surviving spouse after termination of marriage by death. It is clear, therefore, that section 6(2), which merely declares the entitlements to the family home, provides no exception to the general rule in section 3(1). It creates no special category of spouse to whom no other provision of PROSA need apply, once the entitlement is stated in section 6(2). Section 6 merely acts to preserve the entitlement of a surviving spouse who may have brought a claim and death of his spouse intervened. Any other interpretation would make nonsense of the provisions of PROSA and place the widow or widower in a better position than those equally entitled to a half share in the family home. Those persons (affected by section 6(a), (b) and (c)) have to apply to vest their entitlement and have to do so within a time limited by sections 11 and 13. If section 6(2) creates a special exceptional category, then the widow or widower's entitlement would become vested by section 6, without need for an application at any time or they could apply for vesting at any time without being controlled by any particular provision of the statute. Clearly this could not have been the intention of Parliament and clear words would be necessary to give effect to that position.

[33] Clear words are needed in the relevant provisions to grant a right to make a claim on a deceased's estate by the surviving spouse, as it affects the right of the deceased to dispose of property by Will and also affects the complicated application of the laws of intestacy. To hold that such a right exists without clear and unambiguous words can have serious repercussions for beneficiaries under the Will of a deceased spouse and on intestacy rules, and may have unforeseen consequences. For example, if Mrs Cooper-

Bachelor is correct, a surviving spouse with no limitations in the statute as to time to do so, could seek to bring an action after death of his spouse and after the matrimonial home had been sold and distributed to beneficiaries. Under section 8(4) of PROSA, those beneficiaries or trustees or executors, would have to account for the value of the surviving spouse's share, out of the proceeds of the estate, which may have long been dissipated.

[34] Counsel for the appellant relied on the Australian case of **In the Marriage of Sims** [1981] FLC 91-072, a decision made under the Australian Family Law Act 1975. The provisions of that Act are not similar to PROSA, so the application of this case is of limited value. What this court took away from it and found instructive, however, was the fact that the Australian Family Law Act of 1975, before the amendment in 1983, had no legislative provision for proceedings to continue after death of one of the parties, as we do in section 3(3) of PROSA. Therefore, in that case, where the husband died before judgment, although the claim had been commenced prior to death, it was held that without specific legislation to the effect, proceedings could not continue where the spouse had died.

[35] The Australian Family Law Act 1975 did not provide for proceedings to be instituted after the death of a spouse. It was amended in 1983 in section 79(8) to provide for the continuation of proceedings after death of one of the parties, where such proceedings had begun before death. There is still no provision in that Act for an application to be made after the death of one of the spouses.

[36] I should also mention, as a matter of interest, that in the Property (Relationships) Act 1976 of New Zealand, in a 2001 amendment, it was inserted under Part 8, provisions to deal with relationships ending on death. In those provisions, the surviving spouse is given two options, the first, to make a claim under the Act but relinquish all rights under the Will or intestacy of the deceased spouse and the second option is to eschew the Act and take the provisions under the Will or intestacy. These provisions ameliorate the possible displacement and prejudice which may be caused by a clash between the complex rules of succession and the provisions of the Property (Relationships) Act 1976.

[37] In this case, I found, that without a specific provision in section 6 of PROSA, exempting that section from the general rule, then the general rule applied. Section 13 provides when parties may apply. There is no provision there for application after termination by death. This gives lie to any notion that section 6(2) creates a special exception to section 3(1), or else section 13 would recognise that additional category, even if no time limit is placed on when that category can apply. That category however does not exist in section 13 and no procedure is provided for an applicant to apply for division of property after marriage is terminated by death. If the category is not provided for in section 13, which is a procedural section, then it is back to section 3(1) which states that PROSA does not apply to that category.

Did the judge wrongly apply her discretion to extend time and appoint a representative of the estate?

Submissions on the discretion to extend time point

[38] Counsel for the appellant submitted that the judge ought not to have granted the application to extend time, as there was no jurisdiction to bring a claim after death of a spouse. Counsel also pointed out that section 13 of PROSA provided a time limit within which to apply for division of property, being 12 months after the occurrence of certain events. Section 13(2), he says, gives the court the discretion to extend time but each case, he says, ought to be determined on its own facts. Counsel submitted, that based on the authorities, the factors the court ought to consider in extending time included:

- (a) the length of the delay;
- (b) the reason for the delay;
- (c) whether there is an arguable case for an appeal; and
- (d) the degree of prejudice to the other party if the time is extended.

[39] Counsel submitted that, in the instant case, the fixed date claim form was filed in 2016 (although not originally under PROSA) and was amended in February 2017. The application to extend time was filed May 2017. Beverly Carr died in 2014. Counsel argued that the delay approximated to 31 months, if the marriage was taken to have been terminated by the death of Beverly Carr. This, he said, based on the authority of **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36, was inordinate and excessive.

[40] Counsel also argued that no reason for the delay was placed before the judge, as Kenneth Carr had died and the affidavit of Delroy King provided no good reason for the

delay. Counsel submitted further, that the respondent did not have a case, in any event, as the claim was ousted by section 3(1).

[41] Counsel also maintained that the order would cause substantial hardship to the estate of Beverly Carr, as she would not be present at a hearing to respond to the allegations of the respondent and could not rebut the allegations made as required by section 7 of PROSA. The respondent was also deceased and could not be cross-examined. This likely prejudice to the beneficiaries of a deceased spouse's estate, he submitted, was clearly in the contemplation of the framers of section 3(1). Counsel submitted that in those circumstances, the judge was wrong in the exercise of her discretion to extend time.

[42] Mrs Cooper-Batchelor, for the respondent, submitted that the period of the delay should be counted from the date of filing of the fixed date claim form and not the date of filing of the application to extend time. She noted that the fixed date claim form was filed on 7 March 2016 and, therefore, the delay over and above the requisite 12 month period was not inordinate or excessive, as it approximated to just four months. With regard to the information before the court below, Mrs Cooper-Batchelor maintained that the affidavit of Delroy King, who was the nephew of Kenneth Carr, provided sufficient information, in her view, on which the court could act. Pressed on the issue of prejudice, counsel maintained that there was no possible prejudice to the estate of Beverly Carr because the respondent had a life interest in the property, in any event. Counsel did not indicate any possible prejudice to the estate of the respondent if time was not extended.

With regard to any possible dispute of facts which the court could not determine without the presence and cross examination of the parties, counsel maintained that the court could rely on documentary evidence. Pressed as to what those documents could possibly be, counsel indicated that they had sought discovery of Beverly Carr's passport as the allegation was that the spouses travelled together extensively.

Decision on the extension of time point

[43] As said previously, section 13(1) of PROSA entitles a spouse, as defined in the Act, to apply for division of property. In section 13(2), it sets out the time limited within which to do so, in certain circumstances. As said earlier also, the section does not recognise the event of termination of marriage as a trigger for the time limitation to apply. The time limited for those trigger events provided for in the section is 12 months.

[44] Although the court has a discretion under the section to extend time, PROSA does not set out any factors the court ought to consider in doing so. In such a case, the court may take into account the factors which would generally be considered when a court is exercising its discretion to extend time to do any act or to comply with any rule of law. These factors, authorities have shown, usually include, but is not limited to the length of the delay; the reasons for the delay; whether the claim is a worthy claim and the likely prejudice to either of the parties.

[45] In taking into account whether such factors exist, it is to the affidavits in support of the application to extend time that the court must look. At paragraph [19] of **Allen v Mesquita**, Harris JA said this:

“... 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.”

[46] That case also shows that the respondent is obliged to show hardship if the application is not granted. The court ought not to grant an extension of time where to do so would cause severe prejudice to the respondent to the application. The onus is on the applicant to show reasons why a respondent to the application should be deprived of a statutory limit. See **Saddler v Saddler; Hoilette v Hoilette**. If there is no information forthcoming from the applicant in the affidavits in support, the extension ought not to succeed. See **Allen v Mesquita**.

[47] The situation, therefore, is that once one of the events in section 13 of PROSA has occurred, a spouse is entitled to apply for division of property. There is however, no entitlement, in that section, to apply after the termination of marriage by death of a spouse and there is no limitation in that respect. In respect of the other events limited by time of 12 months, if that time has passed, the claim may be filed and an application for extension made in the claim or subsequently. An order for extension of time may be made, in which case the fixed date claim form would operate as if it had been filed in time. However, no order should be made if the applicant failed to provide the necessary information.

[48] Counsel for the appellant was indeed correct that the respondent was barred from making any application under PROSA by virtue of section 3(1), as his application was being commenced after the death of his spouse. That this was the correct interpretation of the provisions in PROSA was made abundantly clear by the fact that termination of marriage by death is not a trigger event under section 13, to apply for division of property, which includes the family home.

[49] However, although, to my mind, the issue became moot based on this court's decision above, since submissions were made on the issue of the extension of time to apply, on the assumption that jurisdiction of PROSA was not ousted and the time limit of 12 months laid down in section 13 was applicable, I considered whether the discretion was properly exercised to extend that time, in any event. In the grand scheme of things, the delay of four months from the expiry of the time limited, was not inordinate. Although the fixed date claim form was only amended in February 2017 to reflect a claim under PROSA, and the application to extend time was another three months, thereafter, in May, by which time the respondent had died, the question whether, in the circumstances of this case, an extension of time ought to have been granted was one for the judge to determine. However, counsel for the appellant maintained that no reason had been given for the delay, as the respondent is dead and the affidavit of Delroy King provided no adequate reason for the delay, therefore the judge had no information on which to make a proper determination that an extension of time ought to be granted to the respondent. Counsel for the respondent, on the other hand, relied on the affidavit of Delroy King as providing a good explanation, to the court, for the delay.

The affidavits before the judge

[50] In the application for extension of time, the respondent relied on the affidavit of Kashif Buckley, the presumed executor of the estate of Kenneth Carr and Delroy King, the nephew of Kenneth Carr. In his affidavit filed 22 May 2017, Delroy King deponed that he was the nephew of Kenneth Carr and was close to him and discussed at length these proceedings with him. At paragraph 5 he stated as follows:

“5. My uncle was of the belief that the executor would recognize that he had a right to remain on the property and as such made no move to do anything but wait for the probate to be granted. It was after probate was granted that my uncle and I realized that the executor did not want him to remain on the property and was doing all in his power to exclude him from the property.”

[51] It is clear to me, that paragraph 5 cannot provide a proper basis for a reason for the delay to file the claim for two reasons. The first is that Delroy King cannot properly depone to the state of mind of the respondent. The second reason is that, even if the averments in paragraph 5 were proper, it still did not provide a basis for a court to say there was a good reason for the delay in filing a claim under PROSA. It merely indicates that the respondent had accepted a life tenancy under the Will. In paragraph 6, Delroy King indicates that it was based on legal advice, after probate was granted, that his uncle filed action against the estate. Probate in Beverly Carr’s Will was granted in July 2015. The fixed date claim form was filed March 2016 and was not originally filed as a claim in PROSA. It seemed to me that the evidence of Delroy King is mostly speculative and contrived to fit the circumstances facing the claim.

[52] On the issue of prejudice caused by the delay, Delroy King claimed that there was no prejudice to the estate because Kenneth Carr had a life interest. He did not indicate any possible prejudice to the estate of Kenneth Carr, if the application was not granted. The judge, in my view, was wrong to rely, if she did so, on the affidavit of Delroy King. The affidavit of Kashif Buckley was only in support of the application to substitute Delroy King as the representative of the respondent and provided no evidence regarding the reasons for delay or any prejudice or lack thereof.

[53] On the question of prejudice to the estate of Beverly Carr, the fact that the respondent took a benefit under her Will as a life tenant, and now claims under PROSA, is, in and of itself, prejudicial to the estate of Beverly Carr. The beneficiaries of the estate were entitled to believe that after the life interest expired, the estate would be divided according to the testator's wishes. No claim having been filed during the life of the testator, she was entitled to assume that she was free to devise the property as she so desired. I believe that it is this kind of prejudice that the Property (Relationships) Act of New Zealand sought to avoid in Part 8 by giving the claimant only an option to choose whether, in a claim after death, to opt out of the provisions of the law and take under succession law, or claim under the Property (Relationships) Act and forego the laws of succession, but such a claimant was not allowed to claim both.

[54] The respondent having taken a life interest in the entire property and now being himself deceased, no indication has been given to this court and none appears to have been given in the court below, of any hardship his estate would suffer, if extension of

time to bring the claim was not granted. The evidence is that the respondent owned and occupied from time to time a substantial house, also situated in in Portland. This house he devised to his daughter in his Will. That daughter, is not the child of Beverly Carr. He also devised his portion of the estate of Beverly Carr and his share in the family home to the same daughter. No allegation has been made that the daughter will suffer if she is not made to take the benefit of a half share in the disputed house forming part of Beverly Carr's estate. On the other hand, whilst the respondent was alive he enjoyed the benefit of his life interest, but the beneficiaries, the remainder men under Beverly Carr's Will, would not be able to benefit, having waited for the estate to be distributed amongst them after the life interest expired. They would also not be in a position to dispute any claim made by the respondent, and may very well, in those circumstances, not be able to make use of the provisions of section 7 of PROSA, which Beverly Carr could have done if the claim had been made in her lifetime. To say the court could rely on documents is also a potential for prejudice because after death, documents may have been destroyed or lost in the interval.

Disposition

[55] I took the view that the appeal had merit and should be allowed with no order as to costs. I also took the view that, it should not result in the cessation of the claim. Section 3(1) of PROSA clearly states that the provisions of the Act do not apply after the death of a spouse but in such a case, after the death of a spouse, the rules of law and equity would operate. I was of the view that there being a fixed date claim before the court, although it may not proceed under the provisions of PROSA, there is no rule of law

known to me, to prevent it proceeding as an ordinary common law action. For that reason, I recommended, and the court made the orders set out in paragraph [3] above, inclusive of an order that the claim be remitted to the Supreme Court for a trial under the common law.