IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2010/HCV 03675

BETWEEN	**DIEDRE ANNE HART CHANG**	**CLAIMANT**
AND	**LESLIE CHANG**	**DEFENDANT**

Ms. Denise Kitson, Suzanne Risden-Foster & Terri-Ann Gibbs instructed by Livingston Alexander & Levy for the Claimant.

Mr. Gordon Steer instructed by Bunny & Steer for the Defendant.

HEARD: 21st and 22nd November, 2011

***Property (Rights of Spouses) Act – application made out of time – extension of time granted – leave to apply not granted – jurisdiction – effect of Brown v Brown – validity of the fixed date claim form filed before leave granted – effect of Allen v Mesquita*.**

IN CHAMBERS

COR: EDWARDS, J.

Reasons For Decision

Background

[1] This judgment is in respect of my decision in one of several applications which came before me and for which I promised to put my reason in writing. I do so now. I granted leave to apply under the Property (Rights of Spouses) Act (the Act) out of time and extended the time within which to do so. The remaining matters have been otherwise dealt with in orders made on the same day.

[2] This matter came before me at an adjourned case management conference by way of notice of application for court orders and was set down for hearing

over two days. There was before me a Further Amended Notice of Application for Court Orders filed October 7, 2011 requesting the consolidation of proceedings in Claim HCV 2010/03675, which was a claim for relief under the Act and Claim M/2009/01099, which was an application for relief under the Matrimonial Causes Act and the Maintenance Act for custody and maintenance of child and maintenance of wife. In that said notice of application were also applications for disclosure of assets, preservation of assets and extension of time.

[3] There was also properly before me a Notice of Application for Court Orders filed Friday November 17, 2011 which was an application for leave to apply out of time and for extension of time within which to file a claim under the Act.

[4] The claimant's attorneys indicated that they would be pursuing matters in the first application and would not be pursuing the latter "at this time." The reason for this, it would appear, was that there was an order extending time granted by the Honourable Mrs. Justice M. Cole-Smith on February 28, 2011. However, Counsel Mr. Steer indicated at the outset that the Court had no jurisdiction to hear the applications, as the claim was not properly before the Court. He indicated that no leave had been granted to file the claim out of time and that the order of the Honourable Mrs. Justice M. Cole-Smith, made on 28th February 2011, was invalid.

[5] Counsel Mr. Steer's complaint was based on the fact that the claim was filed under section 13.1(b) of the Act and was filed outside of the time limited by the Act. An extension of time was sought both in the Fixed Date Claim Form and by way of Notice of Application for Court Orders which was heard by the learned judge and granted. Both parties were ad idem however, that at the time the extension was granted there was no evidence in any of the affidavits filed, outlining the reasons for the delay.

[6] At the time the preliminary point was raised by Mr. Steer this court was of the view that the order for extension of time having been made by a court of concurrent jurisdiction, I could not go behind that order.

[7] Mr. Steer indicated that on the authority of **Brown v Brown** [2010] JMCA Civ 12 decided in the Court of Appeal on March 26, 2010 the issue of jurisdiction could be raised at any time. He further argued that on the authority of **Allen v Mesquita** [2011] JMCA Civ 36, leave to apply out of time was required under section 13 (2) of the Act; leave to apply having not been granted by the learned judge and the judge having had no basis on which to grant an extension; the Fixed Date Claim Form filed by the claimant was invalid and a subsequent order of the court could not "revive the dead." At the invitation of Counsel, the Court took time to advise itself of the decisions in the cases cited by him.

Chronology of Events

[8] This is the history of the matter as it appears on the record and as was submitted to me:

1. The parties are husband and wife having been married on February 25, 1995. The marriage produced one child born September 3, 1995.
2. The parties became separated in January of 2008.
3. The wife filed petition for dissolution of marriage on May 12, 2009.
4. A Fixed Date Claim form was filed July 26, 2010 in the Supreme Court seeking relief under the Property (Rights of Spouses) Act. At paragraph 14 the applicant sought orders and declaratory relief pursuant to the Act and at paragraph 14(Q) she sought an order for extension of time to apply to the court for the orders sought pursuant to section 13 (2) of the said Act.
5. A Notice of Application For Court Orders was also filed concurrently with the Fixed Date Claim Form on July 26, 2010 seeking orders for consolidation of proceedings; extension of time to apply for orders sought in the Fixed Date Claim Form; preservation of assets and for

disclosure. The parties were given a date for hearing on the 28th February 2011.

6. A Notice of Application For Court orders was also filed in M-01099/2009 for custody and maintenance of child on July 26, 2010.
7. On February 16, 2011 an Amended Notice of Application For Court Orders was filed and was set down for hearing on the 28 February, 2011. The orders sought was for consolidation of the action with that of the matrimonial proceedings filed by the petitioner in Claim No. 2009/M 01099 and for extension of time to apply to the court for the orders sought in her fixed date claim form filed herein pursuant to section 13 (2) of the Property (Rights of Spouses) Act, for disclosure and preservation of assets.
8. On February 28, 2011 the matter came before the Honourable Mrs. Justice M. Cole–Smith at case management conference where she made the following order:

   "The Time within which to file the Fixed Date Claim Form is extended to 26th July 2010."
9. The case management conference was adjourned to11th October 2011. A Further Amended Notice of Application For Court Orders was filed on October 7, 2011 now seeking an amendment to the Fixed date Claim form to rely on the Maintenance Act as an alternative to the order for consolidation. At this adjourned hearing before the Honourable Mr. Justice R. King, it was further adjourned for the applications to be heard on the 21st-22nd November 2011.

Jurisdiction

[9] In **Brown v Brown** the applicant filed a claim in January 2007. Her marriage had been dissolved in May 2005. In January 2007, subsequent to filing the claim she sought by notice of application for court orders, an order for "leave to present

the application for division of matrimonial (sic) home out of time." Leave was granted on 28th June, 2009.

[10] At the trial a preliminary issue was raised as to whether the court had jurisdiction to hear the claim. This issue of jurisdiction raised by Counsel had to do with whether the Act was retrospective in effect. The learned trial judge decided that the Act having come into effect on the 1st day of April 2006, it provided the court with powers under it as of that date and not before. Based on this reasoning the learned trial judge took the view that the Act would not cover marriages which were dissolved before April 2006. He therefore declined to exercise jurisdiction over the matter.

[11] On appeal the appellate court took the view that the Act was indeed retrospective. Most importantly for our purposes, the Court of Appeal agreed that the judge was entitled to entertain the jurisdictional point at trial, despite the applicant having obtained an order of the court for leave to present her application out of time pursuant to section13 (2) of the Act. It is this narrow point in the Court of Appeal's decision that Mr. Steer relies on in his submissions to this court.

[12] Cook J.A. in his judgment said at para.14;

> "**It would seem to me that at the application for the extension of time, no issue as to jurisdiction of the court was raised. Accordingly although the judge extended time, it cannot be said that she made any ruling in respect of jurisdiction. The affidavit opposing the application was at best perfunctory (see paragraph 2 above). It is therefore my view that Marsh J. was properly entitled to give audience to submissions pertaining to his jurisdiction."**

[13] In paragraph 77 of his judgment Morrison J.A. also addressed the issue of jurisdiction and declared that he was in full agreement with Cooke J.A's conclusions. He noted that the learned judge who heard and granted the

application was not invited to make and made no ruling on the issue of jurisdiction. He went on further to state:

> **"On an application under section 13 (2), it seems to me, all that the judge is required to consider is whether it would be fair (particularly to the proposed defendant, but also to the proposed claimant) to allow the application to be made out of time, taking into account the usual factors relevant to the exercise of a discretion of this sort, such as the merits of the case (on a purely prima facie basis), delay and prejudice, and also taking into account the overriding objective of the Civil Procedure Rules of "enabling the court to deal with matters justly" (rule 1.1 (1)).**

[14] The issue was dealt with succinctly by Phillips J.A. at paragraph 94. She noted the sparseness of the affidavit evidence and the fact that neither party had addressed the applicability of the Act at the hearing of the application for extension of time. Phillips J.A. decided that the issue of the applicability of the Act could therefore be dealt with by the trial judge as a matter of law. This issue of jurisdiction as a matter of law could be raised at any time.

[15] According to Mr. Steer, the issue of whether the court had the jurisdiction to hear the claim under the Act was still a live one. He argued that this resulted from the failure of the learned judge to grant leave prior to the grant of the extension of time. He said that based on the authority of **Allen v Mesquita**, the Court would have to grant leave before going on to consider extending time. According to him, since no leave had been granted, the question of the Court's jurisdiction to hear the case would now arise since the claim would not have been validly brought.

[16] In this case both parties agreed that the issue of jurisdiction was not one raised before the judge who granted the order. Indeed the order was granted before **Allen v Mesquita** was decided. There was no Notice of Application For Court Orders for leave to bring the application under (13 (2) of the Property (Rights of Spouses) Act out of time before the learned judge, although the Fixed Date Claim for and all subsequent applications did contain prayers for extension

of time to apply under the Act. There was no supporting affidavit for the grant of leave. What was before the Court was a paragraph in an affidavit of the applicant requesting time be extended. Accordingly, I agree that no leave had been applied for and none was granted prior to the extension of time as was held to be required in the case of **Allen v Mesquita**. No objection was taken and no issue of jurisdiction arose at that time.

[17] I, therefore, accept and agree that the issue of jurisdiction now arises to be settled and remains a matter which may be dealt with by this Court, with all the due respect and accord observed to the learned judge of coterminous jurisdiction. I respectfully adopt the finding of Phillips J.A at paragraph 94 of **Brown v Brown** that the issue of jurisdiction is one of law and can be raised at any time.

[18] Having accepted that the issue of jurisdiction now arises as a result of the decision in **Allen v Mesquita** and was not one raised or canvassed before the learned judge when she made the order extending time, I have the jurisdiction to revisit the matter. With that understanding, I agree to hear the application for leave to apply for division of matrimonial property out of time pursuant to section 13 (2) of the Property (Rights of Spouses) Act filed November 17, 2011. Mr. Steers' only preliminary objection to the court hearing the application at this time was that, in his view, the claim having been filed before leave was applied for it was invalid and no order of the court could revive it.

The Application for Leave

[19] An application under section 13 (2) is an application under the discretionary powers contained in the Act to extend time. The issue facing the court on such an application is whether it should exercise the discretion granted to it in favour of the applicant.

[20] Prima facie the limitation period in the Act is one to which the defendant is entitled. The burden is on the applicant to show that there are substantial reasons why the defendant is to be deprived of the right that the limitation gives him. The court has to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect.

[21] I pause here to state that Counsel Miss Kitson, on behalf of the applicant, made cogent written and oral arguments championing the view that as a married woman, the applicant was not out of time and therefore did not need the grant of leave or of extension of time within which to make the application. She posited her theory on the wording of the Act. Section 13 is headed Division of Property and reads:

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

[22] Miss Kitson posited the view that based on section 13, a married woman had two periods within which to apply under the Act; the first was after separation and the second was after the grant of a decree of dissolution of marriage. This she notes was in stark contrast to spouses in a common law union who only had one window of opportunity. She argued that effectively therefore, the limitation period could only affect persons in a common law union.

[23] In the case of the applicant, Counsel submitted most robustly and I must confess temptingly, since she had made a petition for dissolution of marriage and the court had not yet granted a decree absolute in her petition 2009/M01099, even though 2 years had passed since her separation, her right to apply still subsists until 1 year after the grant of a decree absolute.

[24] The substratum of this hypothesis, if I understand it correctly, is that for the married spouse who has filed for a divorce, the 12 months period after separation is subsumed into the12 month's period after divorce. She noted that in this regard the applicant's case is distinguishable from **Allen v Mesquita**. Miss Kitson submitted that her argument was supported by a purposive interpretation of the Act. It is best to quote her argument verbatim at paragraph 15 of her submissions. There she states:

> "However, if an entirely literal approach is taken to the construction of section 13, it could mean, that a married applicant is precluded without leave of the court, from obtaining orders for the division of property in the time period which begins 12 months after the couples separation and ends on the date the decree absolute is grant (sic). Such an interpretation would not only make a mockery of the Court's 'discretion' to grant or refuse leave since any refusal of leave within this period could simply be overcome by a subsequent application for division of property once an absolute had been granted. It cannot be taken that Parliament would have intended a result which effectively stultifies a Court's discretion, puts litigants to unnecessary expense and results in protracted litigation."

[25] She also argued that a purposive interpretation of the relevant section of the Act would allow parties to a marriage a period of time in which to file their application for division of property orders from the date of separation to the grant

of the dissolution of the marriage. She noted that any other interpretation would have an absurd result. She cited several cases in support of her argument.

[26] Some of the cases cited were; **Chandler v Vilett** (1669) 2 WMS Saunders 120; **Morton's (Earl) Trustees v McDougal** (1944) S.C. 410; **Tolly v Morris** (1979) 1 W.L.R 592. She relied quite heavily on **Tolly v Morris** and especially the opinion of Lord Diplock at page 601 of the judgment. Lord Diplock, in that case, speaking of the two separate limitation periods available to minors in personal injury claims under the Limitation of Actions Act, said:

> "**On this construction the two periods might overlap, but there might be an interval between them, during which the infant's right of action, would be statute-barred. Such an interregnum during which the plaintiffs' rights were temporarily unenforceable would have had no rational justification, and as early as 1670 the court of King's Bench applied a purposive construction to the statute and held that there was but a single limitation period applicable to persons under a disability. Its terminus a quo was the accrual of the right of action, and its terminus adquem was six years after the date on which the disability had ceased: Chindler v Vilett (1670) 2 WMS Saunders 120. In 1836 a powerful court of Kings Bench held in Piggot v Rush (1836) 4 Ad. & E. 912 that it was then far too late to overrule the construction of the statute that had been adopted in Chandler v Vilett and followed in many subsequent cases."**

[27] In that case the limitation on actions for debt was 6 years. A minor could also bring a claim within 6 years after he attained majority. A minor had filed a claim outside the 6 year limited for debts whilst he was still a minor. It was agreed initially that he was statute barred. It was also argued that he should wait until after his majority to bring the claim within the 6 years after his full age. This view was rejected by the Court at page 838 & 839 in **Chindler**. The House of Lords in **Tolly v Morris** affirmed this approach.

[28] Counsel urged the court to adopt this same purposive approach to section 13 of the Act. She noted that the married spouse's cause of action would accrue

at the start of the separation and terminate twelve months after the dissolution of marriage.

[29] As I said, tempting as it may be to yield to this wholly logical submission, I am forced to reject it. It seems to me the framers of the Act deliberately created these sub-categories of applicants. The Act must be taken to be framed in a manner designed to recognize those married persons who do not believe or recognize divorces based on moral or religious grounds. This segmentation in the Act must be taken to be intended to allow married persons who separate with no reasonable likelihood of reconciliation to be able to bring a claim without having to acquire a decree of dissolution of marriage, against their moral or religious persuasion. They would have 12 months within which to do so. I confess I can discern no other reason for this segmentation of the limitation periods for a married person.

[30] If persons, such as the applicant, who intend to get a divorce, wish to apply before doing so, they must come within the 12 months or wait after their divorce and apply within the 12 months thereby allotted. Clearly this is subject to the courts discretion to extend time in cases of delay.

[31] It is also to be noted that before, during and after separation and divorce other issues may be settled by the court between the parties other than property and it may be convenient for a party with those several issues to have them settled before the divorce is granted.

[32] I also bear in mind that a party who comes under s.13- 1 (c) does so as a matter of evidence, if no petition for dissolution of marriage is made. That application would beg the question as to when the parties became separated with no likelihood of reconciliation. In the case of a wife who does not intend to divorce, it may be the date of the application or some other date as a matter of evidence. On the other hand a party who intends to divorce cannot file a petition

until they have separated for 12 months. After those 12 months they can file a petition for dissolution of marriage. Time begins to run for the applicant from the date of separation which is in the petition. It is that date which as a matter of evidence which will be used to determine time under section 13 (1) (c). A married person would therefore have to file the application under section 13 before the petition in order to avoid time running out.

[33] I find therefore, that because of the two categories of married persons envisioned by the section 13 (1) (c) and the difference in calculation of time (based on the evidential requirements) I cannot agree with the submission that time does not run against a married woman under section 13 until after the divorce and therefore the applicant was not out of time. I find the applicant is out of time and leave is required.

Factors to be Considered Regarding Leave

[34] In **Brown v Brown** Morrison J. A. outlined some of the factors a judge had to consider in granting leave under section 13 (2). These in summary were:

(a) fairness to the applicant and fairness to the respondent;
(b) the merits of the case (on a purely prima facie basis);
(c) delay and any prejudice resulting there from; and
(d) the overriding objective.

[35] In **Allen v Mesquita** Harris J.A. in noting that the Act did not outline the factors to be taken into account, said this:

> **"Where the factors governing an extension of time are not provided for by statute or the rules of court a court of first instance or an appellate court may, in exercising its inherent jurisdiction, give consideration to the conditions which generally support an extension of time to do an act or to comply with any rule or law. It follows that, in determining whether an extension of time should be granted, a court ought**

> **to follow the general procedure underpinning an entitlement to such grant. Thus, in seeking an extension of time to file his claim, an applicant must also seek leave to extend the time and place before the court reasons to be evaluated by the court to justify his right to do so. Such reasons should explain the delay in filing the claim. The grant of leave is a precursor to the grant or refusal of an extension of time."**

[36] In paragraph 18, the learned judge of appeal went on to indicate that the court in exercising its discretion to grant an extension of time is required to take into account the length of delay; reasons for the delay; whether an applicant has a claim worthy of a grant of an extension of time and the question of prejudice to the other party.

[37] It is clear therefore that the first issue in considering whether to grant leave is a consideration of the reason if any given by the applicant for making a late application.

[38] In this case the applicant in her affidavit filed November 17, 2011, paragraph 8, requested permission to apply out of time and for an order extending time so to do. In her affidavit she gave reasons for the delay. Her reasons begin at paragraph 12. She indicated that she was a full time mother and housewife. As a result her husband became very successful and focused on the development of his businesses and acquisition of assets all over the world. She is aware and has some knowledge of the extent of her husband's business interest and assets. However, the details were not readily available to her.

[39] At paragraph 13 she stated that it was necessary to obtain legal opinions and gather what evidence she could in respect of her husband's assets including those outside of Jamaica. This, she said, was a timely (by that I take it she meant time consuming) and expensive process. At paragraph 14 she stated that the delay in filing her application was due to the time and expense associated with obtaining the requisite legal opinions and evidence in support of her claim in respect of her husband's assets worldwide.

[40] Those were her reasons given for the over 2 years and 7 months delay in filing her claim since the separation from her husband.

[41] Counsel Mr. Steer submitted that this was not a good enough reason for a 2 year delay. He argued that the evidence failed to show any reason why it took her 2 years and 7 months to file a claim. He argued that there were no details of the efforts made to secure these assets. The reason advanced he maintained, was inadequate.

[42] It is clear from the fact that all of 2 days were set down for the court to just hear applications in the matter and the trial set for five days, that this is no ordinary case. The defendant is alleged to own considerable assets; some are companies in this jurisdiction, some are companies and other assets outside of the jurisdiction. I agree with Mr. Steer that more could have been said in detail about the efforts made regarding indentifying the location of assets, but they are so numerous that I reject that any detailing of the efforts on each would assists the court beyond burdening it down with an extremely lengthy affidavit.

[43] The applicant is primarily a housewife who worked intermittently since her marriage. Her resources seem limited in comparison to the vast resources of her husband. The indication is that he holds assets all over this and other jurisdictions. Certainly, I accept that it would take some time to locate and identify those assets and seek the requisite assistance to do so. It must have been a Herculean task. Faced with this formidable task and the necessity for acquiring legal opinion regarding those outside the jurisdiction, its expected there would be some delay.

[44] I have considered that it may have been better to file a “holding claim” and seek to amend at a later stage. However, I am aware that this approach is

sometimes a two edged sword and can invite unnecessary objections, applications and prolonged litigation.

[45] I accept the reason given by the applicant for the delay. I find that in the circumstances of the parties, it is entirely plausible.

[46] I have also considered whether the applicant as a claim worthy of grant; (considering the merits of the case on a purely prima facie level). The parties were married in 1995 and separated in 2008. It is not a marriage of short duration. They have one (1) child born that same year. Although she was a working woman prior to her marriage, she subsequently became a full time mother and housewife for the most part. There is no dispute that there is a family home. There is no dispute she was a good wife and mother who took care of her family and her child and her husband's needs, so that he could go out to work and be successful. There is no dispute that the applicant's indirect contribution as mother and home maker gives her the right to a claim in the assets of her husband and a claim to ½ share in the matrimonial home as spouse.

[47] Miss Kitson submitted that there would be no prejudice to the respondent especially in light of the fact that the applicant could apply again after the divorce. Mr. Steer's response (tongue in cheek I believe) was that she ought then to wait until after the divorce.

[48] It was Miss Kitson's submission that the possible prejudice was far greater to the applicant, in that if she was to wait until after the divorce the respondent could take the opportunity to dissipate assets in the meantime. She also pointed out that it would be fair to both parties to have all the matters heard at the same time, as there were also matters involving custody and maintenance before the court between the parties.

[49] Mr. Steer insisted that the applicant had not shown any risk of hardship. On the contrary, he indicated the hardship was to the respondent. He did not say exactly what that hardship was. He pointed again to the case of **Allen v Mesquita,** where the court said the delay of one year was inexcusable. He said in this case it was 2 years and 7 months and to grant an extension in those circumstances would be prejudicial to the respondent. He urged the court to refuse to exercise its discretion in her favour. He said that on the authority of **Allen v Mesquita** the application should have been made promptly and this application had not been prompt; neither was the reason given plausible.

[50] In considering the question of unfairness and prejudice, I take into account that if the applicant succeeds the respondent will be deprived of his defence of limitation. In this case more so than in other cases of limitation, it is merely a technical defence because the application may be brought back after the grant of decree absolute. What then would be the advantage to the respondent of denying the applicant's request at this time? He gains time; time to do what one may ask? Perhaps, as the applicant claims, time to dissipate assets; assets which maybe family assets. If this is so then the possible prejudice to the applicant would be far greater.

[51] If the application is denied both parties will be denied the possible advantage of limiting time, convenience and expense by having all their matters dealt with and disposed of at the same time. The difference between this case and **Allen v Mesquita** is that the common law spouse has only one period of limitation under the Act and the applicant in that situation had only one window of opportunity. The prejudice to a respondent in such a case is far greater if he or she is denied their defence of limitation.

[52] Although neither side submitted on the overriding objective, it may be worth noting that part of the overriding objectives of the Civil Procedure Rules 2002 is to enable the court to deal justly with the cases. Although no rule applies here

specifically, this is a case management conference and part of the duty of the Court in pursuit of the overriding objective is to act in a manner which will save expense, and ensure cases are dealt with expeditiously and fairly.

[53] For those reasons therefore, I am minded to grant leave to the applicant to bring her application out of time and to extend time within which to do so.

The Status of the Fixed Date Claim Form Filed Out of Time

[54] This raises the issue of the status of the Fixed Date Claim Form filed July 26 2010. Mr. Steer submitted that on the authority of **Allen v Mesquita** the Fixed Date Claim form was invalid; indeed he graphically opined that it was dead and that the subsequent order of the court could not "raise the dead". He pointed to paragraph 9 & 10 of the judgment of Harris J.A. in support of his contention. Miss Kitson on the other hand, took the view that this was a faulty interpretation of the judgment and a false imputation. Mr. Steer on the other hand, pointed to the judgment of Fraser J. in **Hoilette v Hoilette** HCV 01526/2006, delivered November 4, 2011 in which the learned judge applied that interpretation to the judgment of Harris J.A.

[55] In paragraph 9 of the judgment Harris J.A. said:

> "**Before the hearing of the appeal commenced Mr. Manning raised a point in limine as to the validity of the fixed date claim form. Although this is a preliminary point of law as to jurisdiction, which in this case is decisive of the appeal…."**

Harris J.A. then went on to look at the submissions of Counsel in paragraph 10, part of which was to the effect that the Fixed Date Claim form was filed outside of the time prescribed by the Act and until the court had granted leave to an applicant to bring his claim, no valid claim could be brought; and that as a matter of law, the validity of the claim filed June 2009 could not have been corrected by a subsequent order of the court.

[56] It is on this paragraph of the judgment that Mr. Steer based his submissions as to the invalidity of the fixed date claim form and is also the basis of the decision by Fraser J in **Hoilette v Hoilette**.

[57] However, I do not understand **Allen v Mesquita** to be an authority for saying that a claim filed before leave is granted is invalid. This was part of the submission of Counsel on which the learned Judge of Appeal made no ruling one way or the other. In that regard I respectfully beg to differ from Frazer J. My understanding of the judgment of Harris J. A. on this point is that leave must be granted to a proposed claimant to apply out of time under section 13 of the Act before time can be extended to do so.

[58] This means that an applicant must get leave to apply out of time before an extension can be granted. Only then can the applicant proceed with the claim. No where in the judgment does it say a claim form filed before leave is granted is invalid.

[59] Mr. Steer's argument and that raised in **Hoilette v Hoilette** is that this is implicit in the judgment of Harris J.A. where she refers to the issue of jurisdiction. I do not agree. Two cases were cited at the Court of Appeal in **Allen v Mesquita** by Counsel in support of his contention. The first was **The Khasmir** (1923) Probate Division 85 and the second was **The James Westoll** (1923) Probate Division 94. Neither of them is an authority for saying a claim filed before application for leave is made is invalid.

[60] In the case of **The Khasmir**, the claim arose out of a collision at sea resulting in loss of life. The plaintiff was the mother of one of the deceased. The accident was on October 6, 1918 and the action was filed by Writ in December 1922. A summons was thereafter filed under section 8 of the Maritime Conventions Act 1911 for leave to maintain an action notwithstanding that the

time for bringing the action had expired. In the case of section 8 there was a 2 year limit, with a proviso that the court could extend time as it thinks fit.

[61] It is to be noted that the Writ (now replaced by the claim form as a means of instituting such suits) was filed before the application was made in chambers by summons (which would now be roughly replaced by the procedure on a Notice of Application for Court Orders).

[62] In **The Khasmir,** the application for leave was heard on the summons with supporting affidavit. Leave was denied because the court took the view that the explanation for the delay was insufficient. The court made no pronouncement on the invalidity of the Writ filed prior to the application for leave being made. The case was totally concerned with the exercise of the discretion to grant leave to apply out of time. No argument had been raised and no decision was made on the validity of the writ which had been filed prior to the application.

[63] The case of **The Khasmir** followed the reasoning of the court in the case of **The James Westoll**. That decision was an appeal from the refusal of Bergrave Deane J to grant leave to commence proceedings against the owners of the steamship The James Westoll, in respect of loss of freight. A collision took place on March 2, 1911. Ship and Cargo owners settled their actions under an agreement lodged in court and made an order of the court from May 10, 1911. On May 27, 1913 the time charterers of the second ship involved in the accident notified the owners of the James Westoll that they had a claim. They then applied in chamber for leave to institute the action. Leave was refused under the discretionary power vested in the court under section 8 of the Maritime Conventions Act and they appealed.

[64] The appellate court took note that no proceedings were commenced and no notice of any claim was given to the owners of the James Westoll in respect of any claim by the time charters before 1913, two months after the statutory period

had elapsed. The Court noted that the proposed plaintiff was requesting an extension of time in which to commence an action to recover damages. This application, the Court noted, was to invoke its discretionary power under the proviso to section 8.

[65] In considering the application Lord Parker of Waddington said this;

> **"It appears to me that what the court has to do is to consider the special circumstances of the case and see whether there is any real reason why the statutory limitation should not take effect."**

[66] Having read the affidavit of the applicant the Court found that the only reason for the delay given was that the party could not ascertain the amount of the claim. It was declared to be an insufficient reason. Lord Parker took the view that there was plenty of time to make the claim and the applicant would suffer no injustice by reason of the section. He found however, that the defendant may suffer serious inconvenience and injustice if he were to allow the claim to proceed.

[67] The Court reiterated that the exercise of the power to extend time under the proviso was a discretionary exercise and should not be interfered with unless the Judge had made a mistake or been influenced by some wrong principle of law or misconception with regard to the facts of the case.

[68] It should also be noted that the defendants had appeared to the writ filed in **The Khasmir** under protest, at which time the plaintiff took out the summons asking that the time for bringing the action be extended for the reasons given. On appeal it was described as an appeal from the refusal of the court below to act under section 8 to extend the time during which an action might be brought by the appellant against the respondent. There was also an alternative application against a fund paid into court which is not relevant to the issue to be determined here.

[69] The application by Counsel for the plaintiff which was referred to by Hill J was for the Court to, in its discretion, extend the time so as to enable the action to be brought as at December 5, 1922 which was the date the Writ was filed. The learned Judge did not question the validity of the Writ. He noted that it was only under section 8 that the plaintiff could apply for the discretionary power to be exercised in his favour, he then went on to consider whether this was a case in which the Court ought to exercise its discretion in favour of the applicant. After noting that the defendants were entitled to the benefit of the limitation, Hill J said:

> "**It is a statutory limitation which is in respect of these life claims after a period of two years. Therefore, one starts with that and it seems to me that it is upon the plaintiff, who comes to have the time extended, to show that there are substantial reasons why the defendants should be deprived of the right to limitation which the law gives them."**

[70] The learned judge then went on to find the reason insufficient. He went on to say:

> **"The fact of the limitation decree does not make it any better for the plaintiff - it makes it worse because the limitation decree, by fixing a period and giving liberty to apply for an extension, increased the plaintiff's <u>opportunity to bring in a claim and apply for an extension of time for so doing</u>." (Emphasis mine.)**

[71] In my view, these words showed that Hill J recognized that it is quite lawful to file a claim and then apply for an extension of time to proceed with the claim. Such a claim or writ is not invalid. If leave is refused or extension not granted then the claim could proceed with no further.

[72] I am further fortified in this proposition by the discussion on limitation of action to be found in "A Practical Approach to Civil Procedure", 12th Edition by Stuart Sime. Generally a court has the power to strike out a statement of case which is an abuse of the courts process. At paragraph 22.22 p. 323, Sime gives examples of what would amount to an abuse of court. One example given is of a

claim issued after the expiry of the limitation period which may be struck out as an abuse of process. The limitation point may also be determined as a preliminary issue at the trial or by way of notice of application; but such claims cannot be struck out on the grounds that they show no reasonable cause of action. The reason given for this by Sime, is that the limitation period is a procedural defence and does not affect the existence of the claimant's cause of action. He cites **Ronex Properties Ltd v John Laing Construction Ltd** (1983) OB 398 as authority for this proposition.

[73] In **Ronex** Stephenson L.J. said this:

> **"There are many cases in which the expiry of the limitation period makes it a waste of time and money to let a plaintiff go on with his action. But in those cases it may be impossible to say that he has no reasonable cause of action. The right course is therefore for a defendant to apply to strike out the plaintiff's claim as frivolous and vexatious and an abuse of the process of the court, on the ground that it is statute barred."**

[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 cause of action but it cannot be enforced.

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

[77] It was also noted by Sime that most limitation periods are laid down by the Limitation of Actions Act but that there were limitation periods laid down by several other statutes and procedural rules which impose time limits which act like limitation periods. Some legislations like the Act in question, carry flexible limitation periods in the sense that it carries a discretionary extension of the period. Therefore, in my view, the principles applicable to the cases under the Limitation of Actions Act would also be applicable to other statutes, unless they otherwise provide.

[78] In **Thompson v Brown** (1981) 1 WLR 744, the House of Lords described the limitation period as a windfall from which the defendant can be deprived. The House of Lords determined that the discretion to extend time under section 33 of the Limitation Act 1980, to override the usual 3 year limitation period in personal injury cases, is one which is unfettered by any rules of practice. The court must consider all the circumstances of the case.

[79] Their Lordships also noted that an extension under section 33 would always be prejudicial to the defendant but that the extent of the prejudice was related to the strength or otherwise of the claim or defence. In **Donavon v Gwentoys Ltd**. (1990) 1 WLR 472, Lord Griffith said that the relevant period of delay for the

purpose of s. 33 was the period after the expiry of the limitation period. In weighing the degree of prejudice to the defendant the Court is entitled to take into account the date upon which the claim was first made against the defendant. Here Lord Griffiths accepts that a claim will be filed before an application is made to dis-apply the limitation period.

[80] In **Cain v Francis and McKay v Hamlani** (2009) 3 WLR 551, it would appear that, in England at least, the earlier the claim is brought after expiry of the limitation period the less prejudicial it will be held to be to the defendant. This is because the defendant would have had an earlier notice of the claim than otherwise.

[81] In **Horton v Saddler** – 8 & 9 May 2006 delivered June 14, 2006; reported as **Horton v Saddler (2007) 1 AC 307,** a claim was brought and the defendant pleaded that it was statute barred. The claimant applied to dis-apply the limitation period. This was tried as a preliminary issue. The court found that there was discretion to extend time in exceptional circumstances where equitable to do so and that it could allow the action to proceed even though it was out of time. The important thing to note here is that time was extended and the case proceeded on the original claim.

[82] Sir John Donaldson MR in **Ronex** said:

> **"It is trite law that the English Limitation Acts bar the remedy and not the right and furthermore, they do not have this effect unless pleaded."**

[83] In **Sevcon Ltd v Lucas CAV Ltd** (1986) 1 WLR 462, in referring to a limitation of action with regard to patent rights Lord McKay of Clashfern said of the potential plaintiff:

> "**If he were to institute proceedings for infringement before the patent for the invention was sealed, the procedural requirements of the proviso would not be satisfied but a statement of claim could not**

be struck out as disclosing no cause of action, although it might be liable to be struck out as an abuse of process of the court."

[84] It would also appear that the claim filed prior to the application gives the court the opportunity to assess the strength or weakness of the applicant's case. A weak case will not be allowed to proceed. One would have to look at the merits of the case in the claim filed to determine the strength of it. The weakness of the claim was a significant factor in the consideration of extension of time in **Thompson v Brown** and in **Nash v Eli Lilly and Co** (1993) 1 WLR 782. In **Long v Tolchard and Sons Ltd** (1999), The Times, 5 January 2000, the strength of the claim was a strong deciding factor in dis-applying the limitation bar.

[85] This brings me now to two other cases. The first is **Georgia Pinnock (as Executrix of the Estate of Dorothy McIntosh deceased) v Lloyd's Property Development Ltd and Others** heard before Panton P, Harris J.A. and Phillips J.A. in the Court of Appeal 15, 16 December 2010 and delivered April 1, 2011. In this case the facts are unimportant and although not strictly on point the lesson to be learnt from it I believe is germane to this issue. The issue there surrounded the validity of a fixed dated claim form filed to institute new proceedings but which was filed in an existing proceeding before the court, between the same parties. The existing claim was filed in 1993 as CLM 270/1993, in which judgment was given. The appellant purported to institute new proceedings by filing a fixed date claim form 4th February 2010 bearing the same suit number as the 1993 claim.

[86] At first instance the court held that it was not possible to bring a fixed date claim form within an existing claim. A fixed date claim form cannot validly be used to make an application in an existing claim. It was decided therefore that the fixed date claim form was invalid as an improper claim and that a fresh claim had to be brought. The court also directed that the fixed date claim form was not the most appropriate way to proceed with the claim and ordered that the claim be

made by way of Claim form. The fixed date claim form dated 2009 filed in suit number CLM 270/1993 was struck out.

[87] Though the issue in **Georgia Pinnock** does not speak to limitation it does speak to the issue of the validity of a claim even when the procedure was invalid. By Rule 8.1 (2) of the Civil Procedure Rules, proceedings are started when the claim form is filed. Judgment having been given in CLM 270/1993 a new action may not be brought on that same cause of action. See Halisbury Laws of England 4th edition volume 26 at paragraph 551. The question then arises as to the validity of the fixed date Claim Form filed 4th February 2010 in CLM 270/1993. According to Phillips JA it could not proceed in the same suit in respect of the same transaction/cause of action.

[88] Phillip J.A. however, declined to agree with the court below that it ought to have been struck out. The judge of appeal took the view that it ought to have been amended instead or re-filed with the required stamps and fees paid and the seal of court impressed and a new number assigned. The learned judge of appeal held that striking out the fixed date claim form was draconian.

[89] I believe the lesson to be learnt from this case is that a claim once filed is an administrative procedure, it's not invalid (unless its life has expired and no application to extended been made) and can either proceed, be amended or re-filed. There is no such thing as a dead or invalid claim only one which is subject to being struck out as an abuse of process or one whose life has expired.

[90] Which now brings me back to the case of **Brown v Brown**. There, the appellant's claim form was filed in January 2007. In that same month and subsequent to it, by Notice of Application for Court Orders she sought an order "for leave to present the application for division of the matrimonial home out of time." Leave was granted on 28th June 2007 for the applicant to present her application out of time. The appellant's marriage was dissolved on 13th May

2005. The Act came into existence April 2006. No argument was made and no decision was taken that the claim form filed prior to the application was invalid and that the leave granted on 28 June 2007 could not validate an invalid claim. The Court of Appeal sent the case back for hearing on the claim, as filed, having found that the Act was retroactive.

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

[92] This shows that the claim form itself is not invalid but the applicant would not be able to proceed with the application for division of property if time is not extended to do so.

[93] The decision in **Allen v Mesquita** was that the order made by the learned trial judge was bad as leave was required and no order for leave had been made; That the court had to consider the circumstances for granting leave to extend time before an extension of time could properly be made and in that case no reason having been given for the delay, the court had no justification for extending time. No where in the judgment did the court refer to the validity of the claim or whether it could be corrected by a subsequent order.

[94] Upon my reading of the judgment of **Allen v Mesquita** I see no reference in it to, neither did the Judge of Appeal pronounce on, the validity of the claim form filed. She did say the issue was one of jurisdiction which effectively disposed of

the appeal. However, the issue of jurisdiction as dealt with by her and as she saw it was the jurisdiction of the judge to extend time before dealing with the circumstances of granting leave. She held that the grant of leave was a precursor to the extension of time. The court not having exercised its mind to the circumstances conducive to the grant of leave the learned judge of first instance had no jurisdiction to extend time. That I believe is the true ratio of the case.

[95] As stated previously, this is an adjourned case management conference where the duty of the court is to actively manage the cases. The applicant filed an application for extension on the same date as her claim even though it was not then supported by affidavit evidence required for the court to consider leave. The respondent however, was put on notice and is not thereby prejudiced. I would be surprised if the legislature had the power to make law retrospectively but a judge of unlimited jurisdiction who has the discretion to extend time, has no power to do so retrospectively, where the Act granting the discretion does not state otherwise.

[96] I therefore made the following orders:

1. Leave is granted to the claimant to make an application under the Property (Rights of Spouses) Act 2004, out of time.
2. Time is extended for the claimant file an application under the Property (Rights of Spouses) Act 2004 to July 26, 2010.
3. Permission is granted to the applicant to proceed with application on the fixed date claim form filed July 26, 2010 as HCV 03675.
4. Leave to appeal granted.