

RULING ON PRELIMINARY POINT

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
CLAIM NO. 2009 HCV 03221

BETWEEN	TREVOR MESQUITA	CLAIMANT
AND	DELKIE ALLEN	DEFENDANT

Mr. John Graham and Miss Peta-Gaye Manderson instructed by John G. Graham and Co. for the Claimant.

Miss Shery-Ann McGregor and Miss Anna Harry instructed by Nunes Scholefield De Leon and Co. for the Defendant.

Heard: 8th, 9th December 2010 and 18th January 2011.

**PRELIMINARY POINT-APPLICATION FOR PERMISSION TO FILE A
CLAIM UNDER THE PROPERTY (RIGHTS OF SPOUSES) ACT-
FACTORS RELEVANT TO THE EXERCISE OF THE COURT'S
DISCRETION**

Mangatal J:

1. This is an application by the Claimant "Mr. Mesquita" for the Fixed Date Claim Form which was filed on the 22nd June 2009 to stand. It is therefore in effect seeking an extension of time for the filing of a claim under the Property (Rights of Spouses) Act "PRSA".
2. On the 3rd of November 2009, it was ordered by consent that this matter be heard with Claim No. 2008 HCV 4827. At a pre-trial review it was ordered that "The issue of whether the Claimant in Claim No. 2009 HCV 03221 is entitled to an extension within which to bring his claim

pursuant to the (PRSA) is to be dealt with as a preliminary issue at trial”.

3. Claim No. 2008 HCV 4827 is a claim by the Defendant “Miss Allen” to, amongst other things, recover possession of property situate at Lot 17 Tanglewood, Priory, in the Parish of Saint Ann, registered at Volume 994 Folio 150 of the Register Book of Titles “Lot 17”, of which she is the registered owner. Miss Allen does not mention anything in the Suit which was filed on her behalf about ever having any personal or intimate relationship with Mr. Mesquita, or about the fact that they have had a child together. She describes Mr. Mesquita simply as a licensee.
4. Sub-sections 13(1) and (2) of the PRSA read 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;

(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.
5. The stated grounds of the application are as follows:
 - i. *Cohabitation between the parties ended in June 2007.*
 - ii. *On the 3rd October 2008 the Defendant filed a claim against the Claimant for, among other things, recovery of possession of property situated at Lot 17 Tanglewood, Priory in the Parish of Saint Ann registered at Volume 994 Folio 150 of the Register Book of Titles which was served on the Claimant on or about the 13th February 2009.*
 - iii. *The property in respect of which recovery of possession is being sought is the same property which is the subject of this suit and the issues in both suits are connected.*

- iv. *Even though the parties separated in 2007 the Claimant has continued to reside at the family home.*
 - v. *The Defendant has never been in any doubt that the Claimant was contending that he had a beneficial interest in one-half (1/2) of the property as a spouse and as a person who has contributed to the acquisition and construction of the property.*
 - vi. *The Defendant has suffered no prejudice as a result of the Fixed Date Claim Form being filed out of time.*
6. In his 1st Affidavit in support of the application filed on the 14th of July 2009, Mr. Mesquita reiterates the stated grounds of the application. He states that he and Miss Allen had a relationship from 1986 to 2007 and lived together as man and wife at Lot 17 between 1996 and 2007 where they raised two children, Shaun Mesquita, born on the 25th February 1993, of the union between himself and Miss Allen, and Naji Eccleston, Miss Allen's child from a previous union.
7. Mr. Mesquita states that when he and Miss Allen, a single woman, started their relationship he was still married to his wife but he and his wife were separated and his wife resided in Canada. Mr. Mesquita was divorced from his wife on the 20th of November 2001.
8. Miss Allen responded by Affidavit filed 30th October 2009. In this Affidavit she has comprehensively disputed that Mr. Mesquita has any claim under the Act and she denies that he was her common law spouse. At paragraphs 28-30 she states:
28. *I deny the allegation that the Claimant has any beneficial or other interest in the property at Lot 17 Tanglewood and say instead that I bought the property without his help and built my home there without any monetary or other contribution from him while he and I were no longer in a relationship. I say further that throughout the course of our relationship, the Claimant owned and continued to reside at Lot 60 Tanglewood.*
29. *It has been well over 2 years since the Claimant and I separated, and we had not been together for five years prior to our separation in*

December 2006. Moreover, the Claimant and I never cohabited in my house at Lot 17(in error stated as Lot 60) Tanglewood.

30. I am advised by my Attorneys-at-Law and do verily believe that the Claimant was not therefore my common law spouse and is therefore not entitled to rely on the provisions of the Property (Rights of Spouses) Act to bring his claim.

9. In his 2nd Affidavit filed May 11 2010, Mr. Mesquita exhibits an Affidavit sworn to by Miss Allen on the 27th February 2007 in support of an application which she made in the Saint Ann's Bay Resident Magistrate's Court for a Protection Order under section 4 of the Domestic Violence Act 1995.
10. At paragraph 2 of that Affidavit Miss Allen states that she and Mr. Mesquita lived together in a relationship for fifteen years preceding the date of the Affidavit and that the union produced one child Shaun, who was then fourteen years old.
11. Mr. Mesquita also refers to an application that Miss Allen filed for an Occupation Order under section 7 of the Domestic Violence Act. In that application dated 27 February 2007, Miss Allen stated that she and Mr. Mesquita were living in the same household, described herself as Mr. Mesquita's spouse and listed his address as Lot 17.
12. In response, Miss Allen indicates that there were errors in the application for the protection order, that she made it while in great fear of Mr. Mesquita, and also, the clerk who filled out some of the forms made certain assumptions and mistakes.

SUBMISSIONS ON BEHALF OF MR. MESQUITA

13. Mr. Graham conceded that there is no reason for the delay stated by Mr. Mesquita in his Affidavits. However, he submitted that section 13 (2) does not state that you must give a reason for the delay and he submitted that the court should look at the matter in the round, notwithstanding that a reason was not stated.

14. Mr. Graham also asked the court to have regard to the fact that Miss Allen had filed an acknowledgement of service and a Defence, both of which mention nothing about the Claim being time barred, and submitted that the court would have to consider whether Miss Allen is estopped from taking this point now.
15. Mr. Graham also made reference to paragraph 27 of Miss Allen's Affidavit filed October 30 2009 where she states that they stopped seeing each other in December 2006. He made reference to paragraph 29 of that Affidavit, where Miss Allen states that she and Mr. Mesquita never cohabited at her house at Lot 17(in error stated to be Lot 60 in the Affidavit).
16. He asks the Court to note that in the Form in support of Miss Allen's application for an Occupation Order, exhibited to Mr. Mesquita's Affidavit, dated the 27th of February 2007, Miss Allen was stating that she and Mr. Mesquita were living in the same household, and she states Mr. Mesquita's address as being Lot 17.
17. Mr. Graham submits that the arguments and denials of living together and cohabiting put forward by Miss Allen are at best confusing. He submits that having regard to the evidence as to cohabiting, living together, having a child together, and other features of the case, in order to do justice it would be reasonable for the court to extend the time so that a decision can be made as to cohabitation , and by extension, property rights of the parties and so that real justice can be dispensed.

SUBMISSIONS ON BEHALF OF MISS ALLEN

18. Miss Sherry-Ann McGregor, on behalf of Miss Allen made submissions opposing Mr. Mesquita's application for an extension of time.
19. Ms. McGregor correctly submits that section 13(2) of the PRSA provides no guidance as to the factors to be considered by the Court in exercising its discretion. However, she submits that in other

jurisdictions with similar legislation, the determination as to whether an extension of time should be granted is guided by consideration of the following factors:

- (i) The extent of the delay, and the reason given, if any, for the delay;
- (ii) Whether the applicant will suffer any prejudice if the application for an extension of time is refused, and conversely, whether the Respondent will suffer any prejudice if the application is granted;
- (iii) Whether the Applicant has a claim worthy of being pursued, i.e., whether he is likely to succeed in his substantive claim if the application is granted.

Extent of and Reason for the Delay

20. Miss McGregor submits that in order to succeed on his application for an extension of time, Mr. Mesquita must show that there was ignorance, irregularity, fraud, misrepresentation or other matter which caused his delay, such that it would be an injustice to him if he were not granted an indulgence to commence proceedings out of time.
21. Miss McGregor correctly submits that no reason has been given for the delay. She submits that Mr. Mesquita has adduced no evidence to show that there was ignorance, irregularity, fraud, misrepresentation or other matter which might support a finding that it would be an injustice to him if he were not granted an extension of time. She points out that nowhere in the application or Affidavit in support is it stated that Mr. Mesquita was unaware of the time limitations, nor does he say that he never had legal representation or advice.
22. Miss McGregor also refers to the fact that Mr. Mesquita lodged a caveat in respect of Miss Allen's Title to Lot 17 on the 8th February 2007. She

highlighted this to say that had Mr. Mesquita said he did not file his claim based upon ignorance or lack of representation, it could have been inferred by the court that that is not so, based upon the fact that there was this filing of the caveat so early in the day.

Hardship/Prejudice

23. It was submitted that the loss of the right to institute proceedings is not of itself hardship. To prove hardship one must show a substantial detriment and it was submitted that Mr. Mesquita has shown none. Reference was made to **Whitford v. Whitford** (1979) FLC 90-612.
24. On the other hand, it was submitted that if Mr. Mesquita was granted an extension of time within which to bring his application pursuant to the PRSA, Miss Allen would be prejudiced by the fact that the burden of proof would now rest on her shoulders to disprove his entitlement to a 50% interest in her property. Miss McGregor submitted that the PRSA has shifted the burden of proof from the Claimant to the Defendant, unlike the position at common law or in equity.

Likelihood of Success

25. It was conceded by Miss McGregor that an application for an extension of time is merely preliminary and ought not to involve detailed examination of the evidence or cross-examination.-**Neocleous v. Neocleous** (Australia) FamCA 42; (1993) FLC 92-377 (4 May 1993).
26. However, she continued, an evaluation of the hardship likely to be suffered by the applicant necessarily involves an assessment of the prima facie strength of the Applicant's case. She submitted that the requirement that the court must be satisfied that hardship would be caused if leave were not granted, implies that it must be made to appear to the court that the applicant would probably succeed, if the substantive application were heard on the merits. If there is no real possibility of success, then the Court cannot be satisfied that hardship would be caused if leave were not granted-**Richardson v. Richardson**.

27. Miss McGregor submitted that in order to be satisfied that a common law union existed between the parties for the purposes of the PRSA, Mr. Mesquita must show that he and Miss Allen were not only involved in an intimate relationship, but that they cohabited as husband and wife. She submitted that for this reason Mr. Mesquita must satisfy the test laid down in the case of **Bowes v. Taylor** Claim No. HCV 05/07 (Unreported) judgment delivered on January 19, 2009, at paragraphs 43 to 71, to determine whether there was, in fact, a common law union and cohabitation, sufficient to bring his claim under the PRSA.
28. In response to the submission that Miss Allen may be estopped from taking this time limitation point because of the steps that she has taken up to this time, Miss McGregor referred to our Court of Appeal's decision in **Attorney-General v. Administrator-General of Jamaica**, unreported decision, S.C.C.A. No. 11/2001. She submitted that Miss Allen was not so estopped.
29. In Further Written Skeleton Submissions, Miss McGregor submitted that where a statute imposes a fixed period within which a legal claim is to be commenced, it is clear that the law treats that period as a limitation period. Further, that where the statute also allows for that fixed period to be extended by the court, the application for such extension of time is not merely procedural, because the court is being asked to consider whether to deprive a Defendant of an accrued defence. She referred to and relied upon two decisions of the English Court of Appeal in **Re Kashmir** [1923] P85, and **Re The James Westoll** P. 94, both of which concern claims made pursuant to section 8 of the UK Maritime Conventions Act, which provides as follows:

No action shall be maintainable to enforce any claim or lien against a vessel or her owners in respect of any damage or loss to another vessel....or damages for loss of life or personal injuries suffered by any person on board her, caused by the fault of the former vessel....unless

proceedings therein are commenced within two years from the date when the damage or loss....was caused....

Provided that any Court having jurisdiction to deal with an action to which this section relates may, in accordance with the rules of Court, extend any such period, to such extent and on such conditions as it thinks fit...

30. It seems to me that one has to be careful when looking at some of the decisions from other jurisdictions since the language of the Statutes under consideration differ. For example, in the Australian decision in **Richardson v. Richardson**, cited by Miss McGregor, one of the provisions there under discussion as to an extension of time for applying for an alteration of property interests, section 44(3), is described by the Court as not being wholly unfettered. It is subject to the requirement in subsection 44(4) that the Court must not grant leave unless it is satisfied that hardship would otherwise be caused to the applicant or a child. There is no such provision in our Statute and I am of the view that there is no similar fetter on my discretion.
31. I also reject Miss McGregor 's corollary argument that the Court must at the stage of the application for an extension of time consider the strength of the applicant's case on a *prima facie* basis.
32. In addition, I am of the view that although there is no reason stated by Mr. Mesquita in his application, that is but one of the factors to be taken into account in considering how to exercise my discretion. See the dicta to that effect in **Neocleous v. Neocleous** paragraph 9, 21, and 23.
33. Also, as stated in paragraph 23 of the judgment in **Neocleous**, I am of the view that the issue of prejudice or injustice to Miss Allen is more important than any explanation, or lack thereof, for the delay.
34. In **Richardson** at paragraphs 28-31, reference is made to the case of **Gallo v. Dawson** (1990) 93 ALR 479, where McHugh J. stated, at 28 and 29:

The grant of an extension under this rule is not automatic. The object of the rule is to ensure that those Rules which fix times for doing acts do not become instruments of injustice. This discretion to extend time is given for the sole purpose of enabling the court to do justice between the parties This means that the discretion can only be exercised in favour of an applicant upon proof that strict compliance with the rules will work an injustice upon the applicant. In order to determine whether the rules work an injustice, it is necessary to have regard to the history of the proceedings, the conduct of the parties, the nature of the litigation, and the consequence for the parties of the grant or refusal of the application for extension of time.....

.....

30 In Tormsen v. Tormsen (1993) FLC 92-392.....

31. Their Honours also said at 80,017:

A failure to explain the delay adequately can certainly lead to a conclusion that justice demands that the application be dismissed....

But in appropriate cases the interests of justice may outweigh the absence of an adequate explanation.

35. Ms. McGregor had argued that Miss Allen will suffer prejudice by the fact that she claims that if the extension is granted, it will shift the burden of proof from Mr. Mesquita the Claimant, to Miss Allen the Defendant. I am afraid that I cannot see the logic of that conclusion. An extension would simply mean that Mr. Mesquita would be allowed to bring the claim under the PRSA; it doesn't mean that he would have satisfied the Court that he is a spouse, or that he has any interest. The application under the Act would arise for substantive consideration on its merits after the grant of leave. In Neocleous v. Neocleous, at paragraph 12, the Court made the following instructive statement:

12. Although an application under section 44(3) has been held rightly to raise a substantive issue and not merely a matter of practice and procedure: per Fogarty J. in In the Marriage of Thallon (1992) 15 Fam LR 805 at 806, the application is of a

preliminary nature which, if granted, does not preclude a full examination of the relevant issues between the parties and which leaves open the granting or eventual denial of the claim.

Here also the question of the eventual grant or denial of Mr. Mesquita's claim would remain open.

36. I do not think that the cases to do with shipping legislation and the UK Maritime Convention Act assist. That Act clearly has a commercial background which is usually absent in relation to spouses and their relationships and interactions. In addition, the language in the English Act is quite different from that in the PRSA.
37. A copy of the relevant New Zealand legislation was provided to me by Mr. Graham. It is interesting to contrast the language of that Act with the Australian legislation. Sub-Sections 24 (1) and (2) of **The Property (Relationships) Act 1976** state as follows:

24. Time Limits for making applications

(1) The following time limits apply in relation to applications made under this Act:

(a) an application made after a marriage or civil union has been dissolved by an order dissolving the marriage or civil union must be made before the expiry of the period of 12 months after the date on which the order takes effect as a final order:

(b) an application made after an order has been made declaring a marriage or civil union to be void ab initio must be made before the expiry of the period of 12 months after the date of the making of the order;

(c) an application made after a de facto relationship has ended must be made no later than 3 years after the de facto relationship has ended.

(2) Regardless of subsection (1), the Court may extend the time for making an application after hearing-

(a) the applicant; and

(b) any other persons who would have an interest in the property that would be affected by the order sought and who the Court considers should be heard.

38. I think that it is noteworthy that in our Statute, the PRSA, there is no mention of the Court hearing from persons who might be affected. Sub-section 13(2) merely speaks of the Court's capacity to allow for a longer period after hearing the applicant. (My emphasis). That would suggest far less fetter on the Court's discretion in Jamaica, and indeed, on a literal meaning, (though I am not prepared to so hold definitively), may even suggest that the application for an extension of time need not involve the Respondent too actively.
39. It may well be that our law recognises and gives some weight to the fact that parties in a marriage or union often interact quite informally, and that their interactions do not usually take place primarily against a commercial, organized, or businesslike backdrop.
40. In my judgment, though reasons ought to have been provided by Mr. Mesquita as to the reasons for the delay, the fact that he has not done so is but a factor to be considered by the Court in assessing where the justice of the situation lies.
41. Mr. Mesquita has also not spelt out any hardship that he would suffer if the application were not granted. However, in that regard, the court will have to consider the history of the proceedings, conduct of the parties, and the nature of the litigation.
42. In my judgment, as stated in Neocleous, paragraphs 9 and 23, the more important and pertinent consideration, is the question of whether the Respondent would suffer any prejudice by leave or an extension now being granted. On his case, Mr. Mesquita's relationship with Miss Allen ended in June 2007. Proceedings were commenced on June 22, 2009, so the application is therefore about one year outside the time set out in the PRSA. It seems quite clear to me that on balance, Miss Allen would not be seriously prejudiced by the delay which has occurred. I

have not been able to trace any particular hardship outlined in Miss Allen's Affidavits. The main argument seems to have been that which I have rejected, regarding the alleged shifting of the burden of proof under the PRSA. Miss Allen seems quite prepared to treat with Mr. Mesquita's substantive application if permission is granted, based upon the contents of her Affidavits and of the Defence filed on her behalf. She has not spoken about any alteration of her position in the interim when the application should have been made. I note that although in his Affidavit, filed 14th July 2009, at paragraph 16, Mr. Mesquita asserts that since their separation Miss Allen has known that he was contending that he had a one-half interest in the property, and there is also the fact that the caveat was lodged in 2007, Miss Allen has not denied that she was aware that he was making such a claim. It would seem that it was Mr. Mesquita who has put before the Court in Claim No. 2008 HCV 4827 the evidence as to the personal relationship between the parties. This is clearly relevant evidence and in my judgment the issues in the two Claims are plainly connected.

43. This lack of evidence of hardship to Miss Allen is to be contrasted with the facts in **Richardson v. Richardson** where the wife's application for leave to commence proceedings out of time was refused. At paragraph 67, the Court pointed out that the Respondent Husband had over the 18 year period of delay, organised his life and finances on the basis that there would be no proceedings under the relevant Act. There is no such evidence here.
44. I am of the view that Miss Allen is not estopped from taking the point that the Fixed Date Claim Form has been filed Out of Time by virtue of the fact that she has filed an Acknowledgement of Service, Defence, and other documents that do not raise the point at all. I agree with Miss McGregor that such a point can be taken at any stage. However, in so far as the manner in which the history of the proceedings is a factor to be considered overall, and in relation to any hardship to Mr. Mesquita,

I think that these are factors pointing more in the direction of granting the application rather than refusing it.

45. Having regard to all of the relevant factors, and weighing the circumstances and considerations in the balance, in my judgment, it would be appropriate for me to exercise my discretion by ordering that the Fixed Date Claim Form filed on the 22nd June 2009, which was filed outside of the time period set out under section 13 of the PRSA, be permitted to stand.
46. I will hear from the parties in relation to the issue of costs.