



[2024] JMSC Civ. 186

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. SU2022FD01401**

**IN THE MATTER OF AN APPLICATION  
PURSUANT TO THE PROPERTY (RIGHTS OF  
SPOUSES) ACT**

<b>BETWEEN</b>	<b>PAULETTE OWEN</b>	<b>APPLICANT</b>
<b>AND</b>	<b>NATHAN JOHNSON</b>	<b>RESPONDENT</b>

**IN CHAMBERS VIA ZOOM**

Miss Yolanda Kiffin and Miss Natasha Wallace, Attorneys-at-Law instructed by Yolanda A. Kiffin for the Applicant.

Miss Shelby Maye Walker, Attorney-at-Law for the Respondent.

Heard on: June 6, 2023, and February 29, 2024

**THE PROPERTY (RIGHTS OF SPOUSES) ACT, SECTION 13(2) – APPLICATION FOR EXTENSION OF TIME TO BRING A CLAIM FOR DIVISION OF PROPERTY – FACTORS TO BE CONSIDERED BY THE COURT – PARTIES UNMARRIED – MERITS OF THE CASE - WHETHER THE APPLICANT WAS THE SPOUSE OF THE RESPONDENT- WHETHER THE APPLICANT WAS A SINGLE WOMAN AND THE RESPONDENT A SINGLE MAN - WHETHER THE PARTIES CO-HABITED AS MAN AND WIFE**

**REID, ICOLIN J.**

The application was heard, and an oral decision was delivered with a promise to give reasons in a written judgment. I must apologise for the delay in fulfilling that promise.

## THE APPLICATION

**[1]** This is an application to extend the time within which to make an application under section 13 (2) of the Property Rights of Spouses Act (PROSA). The applicant filed a Notice of Application for Court Orders on April 11, 2022. She sought the following orders:

- “1. The Applicant is granted leave to make a claim under section 13(1)(a) of the Property (Rights of Spouses) Act out of time allowed under section 13(2) of the Property Rights of Spouses Act.
2. The claim by the applicant under section 13(1) (a) of the Property (Rights of Spouses) Act must be filed within ten (10) days of the date of the order granting Leave to file the Application out of time.
3. Such further relief as may be just.”

**[2]** The application was supported by the Applicant’s several affidavits filed on April 11, 2022, November 10, 2022, and December 15, 2022, respectively. The reasons for her application were as follows:

1. She was the common law spouse of the respondent, having commenced a relationship with him in 1988. The union produced one child, Paul Johnson, born on February 13, 1989.
2. They were in a relationship that exceeded 30 years, until their separation in or about November 2020.
3. In or about the year 2001, they constructed their matrimonial home on a parcel of unregistered land located at Thompson Piece District, Walderston in the parish of Manchester (‘the disputed property’). It was where they resided and cohabitated as man and wife.

4. More than 12 months have elapsed since the termination of cohabitation.
5. She was unemployed and not in a position to retain the services of an attorney-at-law.
6. In all the circumstances it would be fair and just to grant the extension of time taking into account the objective of the Civil Procedure Rules, 2000 ('CPR') enabling the court to deal with matters justly.

### **The Response**

**[3]** The Respondent has refuted all the Applicant's material assertions and relied on his affidavit filed on October 21, 2022. His evidence found strong support in the affidavits of Paul Johnson and Jonoy Daye filed on November 9, 2022, and January 5, 2023, respectively.

It was agreed by the parties that they would rest on their affidavit evidence and Counsel's written submissions. These were considered by the Court.

### **Applicant's Submissions**

**[4]** In her written submissions, Miss Yolanda Kiffin, Counsel for the applicant has sought to identify the issues for judicial determination, and these were stated as follows:

- (i) Whether the length of the delay and the reasons given have made the applicant's claim worthy of a grant for an extension of time.
- (ii) Whether the hardship/prejudice being suffered by the Applicant and respondent (if any) would on a balance, favour the interest of the Applicant in the case at bar, and therefore entitle her to the relief she seeks.
- (iii) On a *prima facie* basis, whether the merit of the Applicant's case supports the grant of this relief.

- [5] With respect to the first issue, Counsel, accepted that sections 13(1) and (2) of PROSA confer upon a spouse the right to apply for the division of property and specifically prescribed that the Application must be made within one year of the dissolution of marriage or of the termination of cohabitation. She indicated that the legislation makes no recommendation as to the factors which the Court must consider on an application to extend the time. Nonetheless, she stated that this area of the law has had the benefit of a plethora of cases and in that regard, reliance was placed on **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36; **Brown v Brown** [2010] JMCA Civ. 12 and **Paulette Diana Mcintosh v Eric George Campbell** [2014] JMCA Civ. 216.
- [6] From these cases, Counsel advanced that the Court, in exercising its discretion to grant an extension of time, was required to determine whether it would be fair (particularly to the respondent, but also to the applicant) to allow the Application to be made out of time. The court must also take into consideration factors such as the length of the delay, the reasons for the delay, whether the applicant has a claim worthy of a grant for an extension of time; the question of prejudice to the other party and the overriding objective of the **CPR** of enabling the Court to deal with matters justly.
- [7] Counsel highlighted that in the case at bar, it was to be noted that the application seeking relief was filed on April 11, 2022, approximately one year and five months after the parties separated. This was outside of the prescribed time as stipulated by section 13(1)(a). She argued that the Applicant had provided plausible details of her reasons for the delay. These included:
1. The expenses in finding other accommodations and to retain the services of an attorney-at-law, in approaching the Court for a Protection Order, due to physical and verbal acts of violence meted out to her by the Respondent.

2. Her unemployment and her impecuniosity negatively impacted her ability to afford a lawyer to pursue a claim for division of the property that they acquired together, before the Supreme Court.
3. The Applicant's ignorance of the law that there was a time limit within which the claim should have been brought.

[8] Counsel submitted that although delay was undoubtedly discouraged by the limitation defence within the statute, taking into consideration all the circumstances described, in this instance, it was justifiable based on the Applicant's peculiar circumstances. Counsel sought to rely on **Paulette Diana McIntosh v Eric George Campbell** [2014] JMSC Civ 216 where the issue of delay was examined by the Court. In that case the Fixed Date Claim Form was filed five years outside the limitation period. The court considered the claimant's lack of financial resources as her reason for bringing the claim so late and accepted her reason as a plausible justification for the delay.

[9] On the question of hardship/prejudice being suffered by the parties, Counsel submitted that the hardships faced by the Applicant far outweighed those claimed by the Respondent, who should have anticipated that this claim would have been pursued. In outlining the hardships faced by the Applicant Counsel asserted that the Applicant was forced to leave the disputed property after making a substantial contribution to the construction and maintenance of the home throughout her relationship with the Respondent. The Applicant's contribution to the development of the disputed property was based on an understanding between the parties that the house would be for their mutual benefit and their growing family. The Applicant was completely excluded from the disputed property in 2020 and had to seek the assistance of the Parish Court to access the property to remove her belongings. She was thereafter forced to pay rent for housing accommodations.

[10] Miss Kiffin submitted further that there would be no injustice to the Respondent, who from his affidavits, was clearly able to properly respond to a claim for the

division of the property. She argued that he had already sought to do so through his detailed narrative of his account of the events and it seemed that he was eager to have the issues ventilated and the matter determined. Counsel emphasized that her client, on the other hand, would suffer greater prejudice if her application was not granted.

- [11] On the issue of whether there was any merit to the Applicant's case, Counsel argued that according to PROSA, the Applicant is entitled to a share in the disputed property and should be able to access her share through the Courts. Counsel submitted that her client had satisfied the statutory definition of a "spouse" as outlined in PROSA and relied on the Applicant's evidence that the relationship with the Respondent commenced in 1988 and ended when they separated in or about November 2020. Counsel relied on the Protection Order dated February 14, 2022, which was granted by the Mandeville Parish Court as evidence indicating her client's continued occupation of the disputed property.

### **Respondent's Submissions**

- [12] Miss Shelby-Maye Walker in her written submissions for the Respondent contended that the application for an extension of time should be refused based on the applicant's failure to establish a *prima facie* case that she was the common law spouse of the Respondent. She argued that if the Court accepted the Respondent's submission that a *prima facie* case had not been established, then the disputed property could not be considered the matrimonial home. She also asserted that if the application was to be granted without proof of that *prima facie* case, then the Respondent would be severely prejudiced in having to expend money to defend the claim.
- [13] Miss Walker, like Counsel for the Applicant, relied on **Allen v Mesquita** (*supra*) for guidance as to the relevant issues to be considered when deciding whether an extension of time should be granted. Miss Walker submitted that if the Court was to accept that the parties had a common law union that ended in November 2020,

the applicant should have filed her application in October 2021. She pointed out the delay of approximately six months after the time prescribed by the Act.

- [14] Counsel also highlighted that the Applicant failed to put forward any good reason for the delay in bringing the application outside of the prescribed period. Miss Walker argued that the applicant sought legal advice from her attorney at law in respect of a Protection Order, shortly after she vacated the disputed property; but did not take the opportunity to seek legal advice in respect to her entitlement in relation to the said property.
- [15] Counsel contended that the Applicant's reliance on her financial constraints as the reason for her not seeking legal advice and bringing her claim within the prescribed time was dubious. She asserted that if the applicant had financial constraints, she could have sought legal aid. Furthermore, the attorney-at-law who represented her in the application for a Protection Order was the same attorney at law who was representing her in the case at Bar. Counsel submitted, therefore, that not much weight should be placed on financial constraint as a reason for her delay and relied on the cases of **Smith v Service** [2013] JMSC Civ 78 and **Natalie Tenn v Wayne Wiltshire** [2020] JMSC Civ 246.
- [16] In support of her contentions, Counsel reiterated that the Applicant had not established a *prima facie* case to warrant the granting of the orders sought. Miss Walker pointed out that in deciding whether the extension of time should be granted, there were also several other important issues that were at the root of the application under section 13 of PROSA. These included:
- a) Whether the applicant is the respondent's spouse.
  - b) Whether the disputed property was the matrimonial home; and
  - c) The time when the relationship between the parties ended.

[17] Counsel indicated that where there was a dispute as to the status of the parties' relationship, a declaration from the Court that the Applicant was the Respondent's common-law spouse would be sufficient to establish a *prima facie* case. She added that in the absence of such a declaration, this Court would have to analyse the evidence to determine that specific issue.

[18] Counsel indicated further out that there were several undisputed facts that would assist the Court in determining whether the parties had cohabited as man and wife at the disputed property for a period of not less than five years immediately preceding the application. Counsel asserted that the Respondent's evidence clearly revealed:

- i. That the parties consistently lived separate and apart from each other.
- ii. They shared a visiting relationship which commenced in 1988 and produced a son.
- iii. The Applicant lived in the Cayman Islands between 1992 and 2001, and from 2005 to 2017.
- iv. The Respondent lived in the Cayman Islands from 1997 to 2002 and from 2011 to 2016.
- v. While living in the Cayman Islands, the parties lived separately.
- vi. The Applicant moved to the disputed property in 2017 and left it in November 2020.

[19] Counsel argued that based on these facts as outlined above, the Applicant has failed to establish a *prima facie* case that she was the common law spouse of the Respondent. She argued that at no point in time did both parties cohabit as man and wife for a period of not less than five years immediately preceding the institution of the proceedings or termination of cohabitation. Miss Walker also emphasized that the Affidavit of Paul Johnson further supports the Respondent's



claim that the Applicant was not his common-law spouse. Additionally, Jonoy Daye has confirmed in his affidavit, that the Applicant was in a relationship with his father Winston. Jonoy Daye said the relationship ended badly, causing the Applicant to remove from his father's house to the disputed property in 2017. The Respondent also admitted to having a three-year relationship with another woman while he was living in the Cayman Islands.

- [20] Counsel further contended that the Applicant had not provided any documentary evidence of the financial contributions she claimed that she made towards the construction of the disputed property. Her claim that she sent money to her son has been disputed by him. Furthermore, Counsel declared that the Respondent would be severely prejudiced if the application for extension of time was granted because he would have to spend a considerable amount of money and time defending a claim that had no merit.

## **THE ISSUE**

- [21] I find that the major issue to be determined by this Court, is whether an extension of time should be granted. However, arising out of this, is the important question of whether there exists sufficient evidence to establish that the Applicant was the common law spouse of the Respondent. This question must be considered in order for the Court to properly deal with the application.

## **THE APPLICABLE LAW**

- [22] The claim is being brought under PROSA and as such, the appropriate starting point would be a consideration of the relevant provisions under the Act. Section 13 of PROSA reads 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) *...*

*(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.”*

[23] Applications under section 13 are subject to a ‘twelve months’ timeline, following a precipitating event. In this case, the precipitating event giving rise to this application is the alleged separation of the parties in 2020. The prescribed ‘twelve months’ period for making such an application for the division of property has passed. The Applicant is therefore statute-barred from bringing the claim, thereby resulting in her application for an extension of time to pursue the claim. The Court, therefore, must consider the affidavit evidence in determining whether it should exercise its discretion in granting the extension of time.

[24] There is no dispute that applications made outside of the ‘twelve months’ limitation period have been judicially considered in several cases including: **Allen v Mesquita** [2011] JMCA Civ 36; **Annette Brown v Orphiel Brown** [2010] JMCA Civ 12; the consolidated appeal of **Angella Bryan-Saddler v Samuel Oliver Saddler** [2013] JMCA Civ 11 and **Sharon Smith v Vincent Service** [2013] JMCA Civ 78.

[25] In **Annette Brown v Orphiel Brown** (supra), Morrison JA (as he then was) eloquently stated at para. [77] that:

*“[77]...On an application under section 13(2), it seems to me, that all 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 merits of the case (on a purely prima facie basis), delay and prejudice, 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)).”*

[26] Likewise, in the case of **Allen v Mesquita** (supra), Harris JA (as she then was) held at para. [18] that:

*“[18] The court, in exercising its discretion for an extension of time, is required to take into consideration factors such as the length of the delay, the reasons for the delay, whether an applicant has a claim worthy of a grant of an extension of time and the question of prejudice to the other party...”*

[27] In essence, in considering the application for an extension of time, I must give effect to the overriding objective of ensuring that justice is done while applying the provisions of the enabling statute and the principles from the above-mentioned authorities. I therefore must have regard for factors such as the length of the delay, the reason(s) for the delay, and the issue of prejudice to either party, if the application is granted or refused. I must also consider whether the Applicant, on a balance of probability, has a claim worthy of a grant of an extension of time. The burden in respect of presenting a *prima facie* case rest solely on the Applicant.

## **ANALYSIS AND FINDINGS**

### ***Length of Delay***

[28] As outlined above, Section 13(2) of PROSA provides that the time limit for bringing an action is within ‘twelve months’ of the end of cohabitation by the parties. The Court must therefore consider when time begins to run in respect to the termination of the relationship. In the instant case, the Applicant has alleged that their common-law union was terminated in November 2020. The Notice of Application for Court Orders seeking leave to extend time to make an application under PROSA was filed on April 11, 2022, approximately one year and five months after the separation. Therefore, the application should have been brought no later than November 2021.

[29] I, however, do not find that this was an inordinate delay. I rely on **Saddler v Saddler** (supra) where Phillips JA at para. [44] opined, “*The fact that the legislation specifically provides a time within which a claim shall be made, but also refers to*

*a longer period being allowed by the court, indicates that although the time is limited, the time period is flexible, and can be extended, once the court exercises its discretion in favour of the applicant after hearing him/her”.*

### **Reasons for the Delay**

[30] The significance of the Applicant giving reasons for the delay in not applying within the time stipulated was highlighted by Harris JA in the case of **Allen v Mesquita** (supra). In that case, the Applicant did not advance any reasons for the delay. Harris JA said at para. [18] that:

*“[18] ...he was under a duty to supply reasons for his failure to act within the prescribed time. The failure to advance an excuse is not simply a factor which goes towards deciding the justice of the case, as the learned judge found. The reasons for a tardy application are fundamental factors to be taken into account in determining whether an applicant had explained the delay in not acting timeously. In order to justify an extension of time to carry out a requisite step in any proceedings, there must be some material on which the court can exercise its discretion. **Indeed, the absence of good reasons is not in itself sufficient to justify a refusal of an application to extend time**, however, some reason must be advanced ...” (emphasis added)*

[31] According to the Applicant’s evidence, time would have begun to run from the alleged cessation of cohabitation in November 2020. The reasons advanced by the Applicant include her impecuniosity, rendering her unable to afford legal representation, a lack of awareness of her rights in respect to the division of the matrimonial property and she, being unaware that there was a limitation period within which to file a claim.

[32] The Respondent has not provided any evidence to refute the reasons given by the Applicant for the delay.

[33] I note that Miss Kiffin asserted that there were plausible reasons for the delay. Counsel Miss Walker on the other hand contended that the Applicant failed to put forward any good reasons for the delay. The reasons put forward were mainly financial constraints. I am reminded by Sykes J (as he then was) in **Smith v**

**Service** (supra), who, in dismissing a similar argument, stated at para. [29] that “... [t]here [was] no evidence Miss Smith sought to engage the Legal Aid Clinic which has reduced fees”. The same remarks may be articulated here. There was no evidence that the Applicant sought legal aid assistance to pursue the PROSA application.

- [34] The applicant sought to rely on **McIntosh v Campbell** (supra) on the issue of financial constraints. However, the case at bar can be distinguished on the basis that in **McIntosh v Campbell** (supra) the applicant was unemployed, had sought legal aid but was unable to pay the legal fees after coming up with the “money for the consultation”. The learned judge found that the respondent did not advance any reason to contradict those put forward by the applicant. He also made certain admissions in respect to the applicant’s contribution to their relationship and purchases of items still in his possession and which formed part of the properties being claimed by the applicant. In the case at bar the Respondent had made no such admissions.
- [35] I take note of the fact that the Applicant was not unfamiliar with seeking legal assistance, given the fact of her association with her current attorney-at-law in the matter before the Parish Court. I note also that **Smith v Service** (supra) is distinguishable from the case at bar as the lack of funds did not play a major role in the decision to grant an extension of time.
- [36] The Applicant has also relied on her ignorance of the law as another reason for the delay. The Court recognises the significance of the fact that the applicant had counsel at an earlier stage (at the Parish Court) dealing with legal matters touching and concerning the said disputed property.
- [37] The Applicant supplied reasons for her failure to act within the prescribed time, however, I agree with Counsel for the Respondent that the Applicant failed to put forward any good reasons for the delay. In any event, relying on **Allen v Mesquita**

(supra), I do not believe that the absence of good reason is sufficient to serve as a bar to the grant of the application.

***Prejudice to the parties***

[38] An Applicant seeking an extension of time must show that there are substantial reasons why the other party should be deprived of the right to a defence of limitation. Harris JA in **Allen v Mesquita** (supra) in consideration of the issue of prejudice opined at para. [22], that “*A duty resides with the party who seeks an extension of time to show that he would suffer hardship if it is not granted*”.

[39] The learned Judge of Appeal continued at para. [26], that:

*“[26] .... A court, in deciding whether a limitation period should take effect, is under an obligation to consider the circumstances of the particular case, taking into account whether there is any good reason which would prevail against the statute operating.”*

[40] Further, at para. [30] Her Ladyship averred:

*“[30] The common thread which runs through these cases is that a court will not grant an extension of time to file a claim, on the application of one party, where to do so may cause prejudice to the other party and that an applicant must show that there are substantial reasons why the other party should be deprived of the right to limitation given by the law.”*

[41] The Applicant stated that she had sacrificed a lot to contribute to the building of their house and had relied greatly on their common intention to build their house for their joint benefit and, therefore, wished for an opportunity to claim her share of the property. She indicated that if the application was refused, she would suffer the loss of bringing a claim for her entitlement to the disputed property.

[42] The Respondent did not specifically address whether there would be any prejudice to him if the claim was allowed other than his complete denial of the Applicant's entitlement to the property. It is noted, however, that it was his counsel, Miss Walker, who advanced the argument that the financial cost to defend the claim would be prejudicial to him. It was incumbent upon the Respondent to

demonstrate, through his evidence, the nature and extent of the prejudice he would have suffered.

- [43] There is however no doubt that the delay in making the claim has deprived the Respondent of the limitation defence. Additionally, there was no evidence that this delay, which I do not find to be woefully excessive, unlike in **Smith v Service** (supra) and **Natalie Tenn v Wayne Wiltshire** (supra), would cause the Respondent more harm. I, therefore, find that the possible prejudice would be far greater to the Applicant than it would be to the Respondent.

### ***Merits of the case***

- [44] In deciding the merits of the case, the Applicant must prove, on a balance of probabilities, that she has a *prima facie* case worthy of a grant of an extension of time. In considering the evidence, one issue that is interwoven into the case of both parties is whether the Applicant was the spouse of the Respondent, and that she was a single woman cohabiting with a single man (the Respondent) for not less than five years preceding the termination of cohabitation.

### Evidence

- [45] It is necessary to set out in some detail the contents of the affidavits. It was agreed by the Applicant that the Respondent purchased a lot of land at Thompson Piece District, Mizpah, Walderston in the parish of Manchester from Leanora Johnson for Two Thousand Dollars (JMD\$2,000.00). She said that their relationship began in 1988, but the construction of their home started in or about the year 1997. They had discussions and it was agreed that they would build their matrimonial home on the said land, and they planned and made preparations for it. She asserted that her monetary contributions to the matrimonial home came from monies she earned whilst employed as a domestic helper in Jamaica. She said that in 1992, she travelled to the Cayman Islands, on a work permit, where she was employed as a domestic helper. She added that they began cohabiting as man and wife in 2001

and their relationship ended in 2020, with their common law union which spanned over 32 years.

- [46]** The Respondent has denied the worthiness of the Applicant's case. He contends that there was never a common intention between him and the Applicant to build any house for their joint benefit. He pointed out that between 1997 and 2016 when his home was being constructed, he and the Applicant were never in a common law relationship. He explained that they never cohabited as man and wife, even for five years, because their relationship ended in or around 1997, just before he moved to the Cayman Islands, where he worked for five years. He added that between 1997 and 2008, they communicated solely in respect of their son, Paul, and he would send money to her for Paul's maintenance. The Respondent stated that by this time, the Applicant moved from her relative's home, and for several years, he did not know where she lived. He asserted that he had never visited any of the Applicant's places of abode and would see their son, Paul, during the weekdays when Paul came to his workplace in Mandeville to visit him after school.
- [47]** The Respondent alleged that by 1997, he started construction of his home in Walderston, and it was his principal address when he returned from the Cayman Islands. In or around 2008, Paul asked him if he could allow the Applicant to stay at his home for a short while because she had a dispute where she was living at the time. The Respondent asserted that this was the first time the Applicant came to his home in Walderston. He allowed her to stay at his home for about three weeks, after which she returned to the Cayman Islands.
- [48]** In or around 2011, the Respondent said that he went back to the Cayman Islands, and he did not return to Jamaica until 2016, during which time his mother, nieces, and nephews occupied his home at the disputed property. While in the Cayman Islands, he and the Applicant lived separate lives. He stayed with the Applicant for about two months when he just arrived in the Cayman Island until he was able to find his own accommodations. He said that it was during this period that he started a relationship with another individual which lasted for about three years.



- [49]** The Respondent explained that the Applicant came to his house for the second time in or around November 2017 after she ended her relationship with another individual and asked to stay there as she did not have anywhere else to go. He said that it was at this point, after not being together since 1997, that they decided to give their relationship another try. He said that the Applicant moved into his home, and they shared his bedroom. The relationship ended after three months, in February 2018, when the Applicant moved out of the room they shared. She moved into another room and continued to occupy that room until around July 2018 when she moved out of the house.
- [50]** The Respondent further added that in or around April 2019 the Applicant again moved back to the house, and she occupied that other room. During the time the Applicant occupied the house, they lived separate lives. He said that she did not pay rent, but she was responsible for the electricity bill, and she purchased her food. He cooked his own food and did his laundry. He said it was in or around November 2020 the Applicant moved out of his home after being served with a notice to quit.
- [51]** Additionally, the Respondent contends that since 1997, he and the Applicant were never in a relationship except for the three months from November 2017 to February 2018. He also added that the Applicant, at all material times, had access to everywhere in the house except his room which he kept locked. He vehemently denied that the Applicant contributed financially or otherwise to the purchase of the land or the construction of his home.
- [52]** The evidence of Paul Johnson ('Paul') supported the Respondent's contention that there was no common law union between the parties spanning at least five years immediately preceding the filing of the application or at all. Paul stated that the disputed property was never used as the matrimonial home of the parties. Paul deponed that the parties had a relationship until he was about eight years old. He remembered this because his father would often come to visit him and his mother

at his (maternal) grandmother's house where he and the Applicant resided. He said the Respondent moved to the Cayman Islands when he was eight years old.

**[53]** Paul said that it was while the Respondent was in the Cayman Islands that he and the Applicant moved from his grandmother's home, and they lived at several places from that time until he was a teenager. Paul outlined that he and the Applicant lived at two locations in Greenvale, two locations in New Green, and one location in Belvenie. During this time, Paul said that the Respondent had no knowledge of where they lived as the Applicant would always warn him (Paul) not to reveal this information to the Respondent. Paul said he would see the Respondent when he (Paul) visited him after school at the restaurant where the Respondent worked.

**[54]** Paul asserted that while he was in preparatory school the Applicant had a relationship with Vincent Bryan. He said that Mr Bryan lived in the Cayman Islands and would often send money to the Applicant. Mr Bryan would always come to their house to visit when he was in Jamaica. Paul said that this relationship lasted over 10 years. Furthermore, about eight years ago (2014), the Applicant also dated a Pastor whom she eventually moved in with, and she often talked about them getting married.

**[55]** Paul further stated that while the Applicant lived in the Cayman Islands, she had a visiting relationship with Joseph Service. This relationship lasted over three years. Paul added that whenever he went to the Cayman Islands to visit the Applicant, he would see Mr Service at her house. Paul further added that the Applicant also had a relationship with Winston, whom she lived with up to the time she moved into the Respondent's house in 2017. Paul said that while living in the Respondent's house, the Applicant had a relationship with a gentleman in Trelawny and she would go to visit him for extended periods.

**[56]** Paul explained that the Applicant stayed at the Respondent's house on two occasions. The first time was in or around 2008 when he (Paul) asked the Respondent if the Applicant could stay at his (the Respondent's) house as she had

a dispute where she was living. Paul explained that the reason he asked permission for her to stay at the house was because he knew that she would not be staying there for long as he knew that she was to return to the Cayman Islands within three weeks. He said he remembered picking up the Applicant's belongings and taking them to the Respondent's house.

**[57]** Paul stated that the second time that the Applicant stayed at his father's house was 2017 after the Applicant's relationship with Winston ended badly. Paul added that he never received any money from the Applicant for the construction of the Respondent's home. When the Respondent went back to the Cayman Islands in 2011 and continued the construction of his home, Paul said he was the one responsible for overseeing the construction. He said the Respondent sent him money to purchase building materials, fixtures and to pay the workmen. Paul maintained that he was the only one who controlled all monies in respect of the construction of the Respondent's home. Paul added that he too made financial contributions for construction materials, fixtures and also provided manual labour. He said that between 2011 and 2016 the Respondent was able to complete the lower and upper levels of his home. He added that the parties did not share a common law relationship and neither did the Applicant make any contribution, whether financial or otherwise, to the construction of the Respondent's home.

**[58]** Additionally, the evidence of Jonoy Daye ('Jonoy') supported several of Paul's assertions. Jonoy alleged that he had known the Applicant for several years, however they developed a relationship as a result of the intimate relationship she had with his father, Winston Daye. The Applicant and his father were involved in an intimate relationship for some time which resulted in her moving into his father's home located at Huntley District in the parish of Manchester. Jonoy said that she moved in shortly after the death of her mother in or around 2017. He said that he was the one who went to her mother's house and transported the Applicant's belongings to his father's house. He remembered transporting her furniture including a whatnot and some of her clothing.

- [59]** Jonoy stated that he also resided at his father's home throughout their relationship. He said he would see them interact like a couple and the Applicant also cooked and took care of his father's laundry. He said his father was married at the material time but was separated from his wife. Jonoy added that the relationship between his father and the Applicant ended badly in 2017 which resulted in her moving out of his father's house.
- [60]** The Applicant has vehemently denied the Respondent's assertions that they were not in a common law union. She accepted that at the start of the relationship she resided with her mother at their family's home while the Respondent resided with his cousins. She said that the Respondent would visit her every day and sometimes sleep over and after their son's birth, they continued their visiting relationship until sometime in the year 2000 when their living arrangements changed. She said that they acquired and moved into their matrimonial home in or about 2001 and began cohabiting as man and wife.
- [61]** The Applicant admitted that she first travelled to the Cayman Islands in 1992. She said she would remit sums from her income to the Respondent to assist in the care and maintenance of her family, to include the Respondent, and to put towards the construction of their matrimonial home in 1997. She said that although construction had commenced, their home was not yet habitable, so when she returned to Jamaica, she continued to reside with her parents at their residence and the Respondent would reside with his cousins, but they continued their visiting relationship.
- [62]** The Applicant stated that while the Respondent was in the Cayman Islands, the construction of their home yielded two bedrooms, an outside kitchen, and a make-shift bathroom upstairs. When the Respondent returned to Jamaica, they cohabited as man and wife in their matrimonial home. She denied that between 1997 and 2008 their conversations were limited to that of their son, Paul. She said they also discussed plans for the construction of their home and her assisting him with other job opportunities in the Cayman Islands. In 2005, she left for the Cayman

Islands on a job opportunity and returned to Jamaica in about 2017. The Respondent was aware of this as he, with the joint assistance of her parents, would care for their son and see to the continued construction of their home. On major holidays, their son would visit her in the Cayman Islands.

**[63]** She maintained that the disputed property became their principal place of abode because, although she travelled occasionally, between the Cayman Islands and Jamaica during the period 2005 to 2017; whenever she returned to Jamaica, she would always reside at their matrimonial home. The Applicant insisted that at no time did she ever ask their son to seek permission from the Respondent as she did not require permission to access her home. She also insisted that she had never sought the permission of the Respondent to access their home. She vividly recalled the Respondent's mother occupying their home but could not speak to his other family members residing there.

**[64]** The Applicant said she received the Respondent when he travelled to the Cayman Islands, in or around 2011, and the Respondent stayed with her at West Bay in the Cayman Islands. She again sought employment for him in the Cayman Islands where he was employed by Ms Lorraine as a chef at her restaurant located in West Bay. Over time, he found cheaper accommodation in Georgetown, which was closer to where he worked. However, this new rented space proved difficult for the Respondent's work commitments. The Applicant, therefore, found accommodations elsewhere for him which was closer to his place of employment. She pointed out that although they occupied separate accommodations, they made every effort to see each other on weekends and on their days off. Despite them being in a relationship, she later became aware of the Respondent's infidelity and confronted him about it, but he was consistent in his denial of any other relationship outside of theirs. They eventually worked on their relationship and focused on their family and home.

**[65]** The Applicant further stated that she returned to Jamaica in 2017 and resided in their matrimonial home and did not seek permission from the Respondent to

occupy their home. She added that her mother had transitioned in the said year, and she was preoccupied with her burial arrangements, but she was not involved intimately with anyone, save and except the Respondent. She emphasized that there was never a break in their relationship and that they have always been in a relationship and continued cohabiting as man and wife in 2017 when she returned home to Jamaica. In 2019, she left for Boston in the United States of America to visit relatives and spent approximately three months before returning to Jamaica. She insisted that it was not until November 2020 when the Respondent began assaulting her verbally and physically, that she moved into another room at their home. Shortly afterwards, she travelled to the United States of America to escape the abusive hands of the Respondent. She returned to Jamaica in or around February 2021 to rented accommodations.

#### Law and analysis

**[66]** Under section 2 (1) of PROSA the word “*spouse*” includes:

*“(a) a single woman who has cohabited with a single man as if she were in law his wife for a period of not less than five years;*

*(b) a single man who has cohabited with a single woman as if he were in law her husband for a period of not less than five years,*

*immediately preceding the institution of proceedings under the Act or the termination of cohabitation, as the case may be.”*

**[67]** “*Cohabit*” means to live together in a conjugal relationship outside of marriage. It is widely acknowledged, that the expression ‘spouse’, is not only limited to married couples but encapsulates other domestic arrangements such as common law unions of not less than five years. To establish whether the Applicant was the common law spouse of the Respondent, she must therefore prove on a balance of probabilities, that:

- (i) both parties were single, and

- (ii) they cohabited as if in law they were husband and wife for not less than five (5) years immediately preceding the institution of these proceedings or termination of cohabitation.

“*Common law union*” has been described as a relationship that bears the likeness to marriage, in that, the interaction between the parties must be such as if they are married to each other. (see **Millicent Bowes v Keith Alexander** (unreported) 2006/HCV05107 delivered on January 19, 2000.)

- [68] It can be distilled from the evidence that there is a great divide between the parties regarding the cessation of the relationship, whether the parties cohabited as man and wife during the relationship at the disputed property, the nature of their relationship, and whether the Applicant contributed to the construction of the disputed property and maintenance of the household. All these contradictions in the parties’ evidence give rise to the issues of whether the Applicant could be considered the “spouse” of the Respondent, and whether the property qualifies as the family home or other matrimonial property. The only aspects of the case that seem not to be in dispute is that the land is unregistered and was purchased by the Respondent, their relationship began in 1988, and the parties share a son, Paul.
- [69] I find that the discrepancies between the parties demonstrate that there are issues that need to be properly ventilated. The onus is on the Applicant to provide evidence for the Court to garner that on the face of that evidence proffered, this claim is worthy of an extension of time. I find that the Applicant’s ability to prove on the face of her affidavit evidence that she was a common-law spouse of the Respondent goes to the heart of her claim under PROSA.
- [70] It is my duty at this stage to examine the merits of the case and determine whether a *prima facie* case has been presented to prove on a balance of probability that the Applicant was the common-law spouse of the Respondent.

[71] Indeed, the question of whether the Applicant was the spouse of the Respondent is both a question of law and fact. The Court must consider whether the parties cohabited together as if they were husband and wife. The Court relies on **Bowes v Alexander** (supra) where McDonald-Bishop J (as she then was) at para. [43] endorsed the several “signposts” of cohabitation highlighted by Tyrer, J in **Kimber v Kimber** [2000] 1FLR 383, to include the following:

- (1) *“Living together in the same household*
- (2) *A sharing of daily life*
- (3) *Stability and a degree of permanence in the relationship; that is not a temporary infatuation or passing relationship such as a holiday romance*
- (4) *Finances, that is to say, is the way in which financial matters are being handled an indication of a relationship?*
- (5) *A sexual relationship*
- (6) *Children*
- (7) *Intention and motivation ...”*

[72] It was the burden of the Applicant to produce evidence to satisfy both the legal and factual requirements of cohabitation. I note that PROSA was enacted to simplify the division of property belonging to spouses and to deal with issues relating to property between spouses. The Applicant has not only alleged that she was the common law spouse of the Respondent but also that she had contributed overtime to the building of the disputed property and that was where she lived with him as a family. I find that for the applicant to succeed in her application, she must prove, *prima facie*, that she was the Respondent’s spouse.

[73] I find that, on the face of the Applicant’s affidavit, she has failed to provide sufficient proof that, as a matter of law and fact, she was the common-law spouse of the Respondent. It can be distilled from their evidence that between 1988 and 1997, there was a relationship between the parties. Though this lasted for eight years, the parties were involved in a visiting relationship and did not cohabit as man and



wife. Consequently, the Applicant would not be considered as a spouse for that period.

**[74]** The Applicant asserted that they began cohabiting as man and wife in 2001 and continued until 2020 and she also denied that she fostered any intimate relationship with anyone else. However, in none of her affidavits did she refer to her status as a “single woman” or to the Respondent as a “single man.” The failure of the Applicant to prove this critical piece of evidence is fatal to her case. Additionally, I find that the Applicant has also failed to provide sufficient evidence that she cohabited with the Respondent during the period under consideration.

**[75]** The omission of these two crucial pieces of evidence rendered the Applicant’s case untenable. I agree with Counsel Miss Walker that the Applicant has failed to prove a *prima facie* case that she was the spouse of the Respondent. In her evidence, the Applicant simply reiterated that she was in a common-law relationship with the Respondent, and she was faithful. She failed to prove a fundamental part of her case which was that throughout the material time, the parties were both single and remained single.

**[76]** I further find that the evidence before the Court does not coincide with the Applicant’s argument that they were living together in the same household as man and wife at the disputed property since 2001. In fact, on examination of the evidence, it is observed that the parties lived mostly, outside of the jurisdiction, and lived apart, for most of the period 2001 – 2020. In the instances when they were in Jamaica, the Applicant has failed to convince this Court that the parties were living in the disputed property for a continuous period of not less than five years immediately preceding the termination of cohabitation.

**[77]** The period of them residing in the same residence at any given time would have been rather sparse, especially between 2005 and 2017. It is noted that the Applicant deponed that in 2005, she left for the Cayman Islands on a job opportunity and returned to Jamaica in or about 2017. She also admitted travelling

occasionally, between the Cayman Islands and Jamaica between 2005 to 2017. She, however, gave no clear indication of the frequency of her travels to establish that they were living together at the disputed property. She agreed that between 2011 and 2016, the Respondent was also in the Cayman Islands, but they did not live together.

**[78]** The Applicant has failed to provide satisfactory evidence to convince this Court of the over three decades of common law relationship that she shared with the Respondent. I take note of the fact that the Courts have accepted that many Jamaican families do arrange their lives so that the husbands or wives (to include common-law spouses) can travel and work overseas to facilitate a better life for their families and over time, live in another jurisdiction, while maintaining a home in Jamaica and cohabiting for short periods of time in their home when in Jamaica. However, I find that the Applicant has not presented any cogent evidence to illustrate that this situation occurred between herself and the Respondent. The Applicant has failed to show that this was an arranged way of life for the parties. She failed to show that this arrangement was intended and that this was how they ordered their lives. Consequently, I cannot conclude that the parties were living together in the same household for five years preceding the separation.

**[79]** Additionally, I found that I was unable to grasp a partnership reflecting the likeness of a marriage characterized by shared tasks, and duties in the household given that for the period under consideration, the parties spent most of the time overseas, living separate lives and residing in separate dwellings. The Applicant has not provided any evidence regarding how the parties shared their time when they were together or when they cohabitated as man and wife in the disputed property. There was also no sufficient evidence to find that there was some stability in the relationship throughout the alleged period of their union. The evidence of Paul and Jonoy was crucial in challenging the creditworthiness of the Applicant's case, and their evidence provided much support for the Respondent's defence that she was

not his spouse, and neither was she a single woman residing with the Respondent for the requisite period.

- [80]** Even though I noted that there was a discrepancy between the Respondent's evidence and Paul's evidence regarding the number of times the Applicant resided at the disputed property I do not believe that this was sufficient to shift the balance in favour of the Applicant. There were obviously too many missing pieces of crucial evidence that were fatal to the Applicant's case.
- [81]** Furthermore, the Applicant has not demonstrated, on the evidence, the nature and extent of her contribution to the construction of the home. She spoke of her relatives who would have assisted in collecting monies to use on the construction of the disputed property but there was no evidence from any of them to counter the evidence produced by the Respondent and Paul. She tendered a receipt into evidence showing the purchase of the land by the Respondent but failed to provide any documentary proof to corroborate her financial contribution to the purchase of the disputed property. I find that, while the absence of this piece of evidence was not fatal to the Applicant's case, it certainly would have been helpful in rebutting some of the assertions made by the Respondent and Paul. Apart from the Applicant's statements, there was no other evidence that the parties were financially intertwined.
- [82]** I note that the overarching objective of the CPR, is fairness and to deal with matters justly, which demands that if there is no merit in the case, then the application should not be granted. Although I find that the delay in making the application would not have served as a bar for claiming under PROSA, and the Respondent would not be prejudiced if the application was granted, I am compelled to find that based on the lack of merits of the Applicant's case, her application ought to be refused.
- [83]** I find that the Applicant has not established a *prima facie* case that she was the common-law spouse of the Respondent. Consequently, the Court cannot exercise

its discretion in favour of the Applicant and the orders sought in her application are hereby refused.

## **ORDERS**

1. The orders sought in the Notice of Application for Court Orders filed on April 11, 2022, are refused.
2. Costs of the Application to the Respondent to be agreed or taxed.
3. The Applicant's attorney at law is to prepare, file and serve the order.