

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MR JUSTICE F WILLIAMS JA  
THE HON MISS JUSTICE SIMMONS JA  
THE HON MRS JUSTICE V HARRIS JA**

**SUPREME COURT CIVIL APPEAL 91/2016**

<b>BETWEEN</b>	<b>BERNARD WALKER</b>	<b>1<sup>ST</sup> APPELLANT</b>
<b>AND</b>	<b>EDRIS EDWARDS</b>	<b>2<sup>ND</sup> APPELLANT</b>
<b>AND</b>	<b>MICHELLE EDWARDS-WALKER</b>	<b>RESPONDENT</b>

**Written Submissions filed by Samantha Smith-Daley for the appellants**

**24 October 2022 and 7 July 2023**

**PROCEDURAL APPEAL**

**(Considered on paper pursuant to rule 2.4(3) of the Court of Appeal Rules 2002)**

**Practice and procedure – Whether the application for extension of time to file a claim under the Property (Rights of Spouses) Act ought to have been considered before the application for extension of time to file an affidavit in response - Property (Rights of Spouses) Act ss 13 and 14 – Civil Procedure Rules 2002 rr 8.8 and 10.2**

**F WILLIAMS JA**

[1] I have read in draft the judgment of Simmons JA. I agree with her reasoning and conclusion and have nothing to add.

**SIMMONS JA**

[2] The 1<sup>st</sup> appellant, Bernard Walker ('Mr Walker') and the 2<sup>nd</sup> appellant, Edris Edwards ('Ms Edwards'), are son and mother, respectively and are registered as joint

tenants of all that property registered at Volume 1169 Folio 53 of the Register Book of Titles and situated at John Town Road, Port Antonio in the parish of Portland (‘the property’).

[3] The respondent, Michelle Edwards-Walker (‘Mrs Edwards-Walker’) and Mr Walker are husband and wife but are now separated.

[4] By notice of appeal filed 5 October 2016, Mr Walker and Ms Edwards (collectively referred to as ‘the appellants’) seek to set aside the order of Kirk Anderson J (‘the learned judge’) made on 11 May 2016, which reads as follows:

“1. [Ms Edwards’] oral application for permission to make an oral application for an extension of time to file [an] Affidavit in response out of time, is denied.

2. [Mr Walker’s] written application for permission to allow [his affidavit] in response, which was filed out of time to stand, is denied.

3. Costs of the oral and written application [sic] [for the appellants] are granted in favour of [Mrs Edwards-Walker] and such costs shall be taxed if not sooner agreed.

4. A date shall be set for the adjourned first hearing of the Fixed Date Claim Form filed on the 1<sup>st</sup> day of October, 2015.

5. The adjourned first hearing of the Fixed Date Claim Form which was filed on the 1<sup>st</sup> day of October, 2015, shall be held before a Judge in Chambers and on that hearing date, the Fixed Date Claim Form shall be treated as an undefended claim.

6. The [appellants’] oral application for leave to appeal this Court’s Order is denied.

7. [Mrs Edwards-Walker] shall file and serve this Order.”

[5] They also seek an order that Mrs Edwards-Walker’s fixed date claim form be struck out and further and/or alternatively that the time for the appellants to file and serve their defence be extended by 28 days from the date of this court’s order.

## Background

[6] In about 2015, Mrs Edwards-Walker filed a claim under the Property (Rights of Spouses) Act ('PROSA') against Mr Walker and Ms Edwards, seeking a beneficial interest in the property. At the time, Mr Walker and Mrs Edwards-Walker had been separated for over 12 months. The orders sought are as follows:

"(i) That the time prescribed for [Mrs Edwards-Walker] to seek Orders under [PROSA], be extended to the date hereof and

(ii) A declaration that [Mrs Edwards-Walker] has a one-half beneficial interest in [the property], by virtue of Mrs Edwards-Walker's contribution to the improvements made to the said dwelling house pursuant to Section 14 of PROSA, and

(iii) That [Ms Edwards] has no beneficial interest in [the property] and

(iv) That [the property] be put up for sale to satisfy [Mrs Edwards-Walker's] interest therein.

(v) That the sum owing to Carib Construction Electrical Services be first taken from the proceeds of the sale of [the property] and Mrs Edwards-Walker be given one-half of the net residue and

(vi) That [Mr Walker] and/or [Ms Edwards] be given a right of first refusal to buy [Mrs Edwards-Walker's] interest in [the property]. The said right of first refusal is to be exercised by [Mr Walker] and [Ms Edwards] within six (6) calendar months and

..."

[7] The fixed date claim form was supported by her affidavit dated 30 September 2015.

[8] On 6 January 2016, the appellants filed an acknowledgement of service indicating that they had been served with the fixed date claim form and affidavit in support on 22 December 2015. They also signalled their intention to defend the claim. On 20 April 2016,

the affidavit of Mr Walker in response to Mrs Edwards-Walker's affidavit was filed. On the same day, the appellants filed a notice of application for permission for Mr Walker's affidavit in response, that was filed out of time, to stand as if filed within time. The application was supported by a second affidavit of Mr Walker.

[9] Mr Walker, in his affidavit in support of the application, set out his reasons for failing to file his affidavit in response to the fixed date claim form within the stipulated time. He explained that having been served with the claim form and supporting affidavit on 22 December 2015, he consulted an attorney-at-law, but due to his impecuniosity, he was unable to retain counsel at that time. He deposed that he intended to challenge the claim and retained counsel as soon as he was able to do so. In the circumstances, he asked that his affidavit in response filed out of time be allowed to stand as if filed within time.

[10] On 11 May 2016, the notice of application came up for hearing before the learned judge who made the orders at para. [3] above.

[11] On 20 September 2016, leave to appeal the decision learned of the learned judge was granted by this court.

### **The grounds of appeal**

[12] In their notice of appeal, the appellants list 11 grounds of appeal, which are as follows:

i) The Learned Judge erred in fact and in law in concluding that [Mr Walker] had no affidavit in support of his application.

ii) The learned judge erred in fact and in law when he ruled that [Mr Walker] sought to rely on, in support of his notice for extension of time, the affidavit for which leave for extension of time to file a defence was being sought.

iii) Further and or in the alternative the learned judge erroneously found that no evidence was before him in support of the application when, even if he were right, which we do not submitted [sic] he was, the learned judge had the power

to swear and take evidence from the [appellants] who were present in court.

iv) The Learned Judge erred in fact and in law when he treated with the application made by the [appellants] for and [sic] extension of time and for the permission for affidavit file[d] out of time to stand before treating with the applications of the Fixed Date claim form [sic] and in particular the [appellant's] application for extension of time under the [P]roperty [R]ights of [S]pouses [A]ct.

v) The Learned Judge erred in fact and in law when he made rulings against the [appellants'] applications both written and oral for [an] extension of time to file a defence to a claim which at the time was not properly before the court as it was statute barred.

vi) The Learned Judge erred when he failed to appreciate that there are triable issues joined between both parties and the questions to be answered requires evidence from both parties for the court to make a determination.

vii) The Learned Judge erroneously exercised his discretion in denying the [sic] [appellants'] application for [an] extension of time by failing to appreciate the grounds and basis relied on by the [appellants] in support of their application for [an] extension of time.

viii) The Learned Judge erred in fact and in law when he failed to appreciate the totality of [t]he [appellants'] application and recognize that considerable [sic] more prejudice and injustice would be meted out to the [appellants] [in] not granting the extension of time than would be [suffered by Mrs Edwards-Walker].

ix) The Learned Judge in exercising his discretion whether to grant or refuse leave erred in law by failing to abide by the overriding objective in that he did not consider the effect of the refusal to grant leave to file the Defence would have on the [appellants] and not balancing it with the prejudice, if any, the grant of the Application would cause to [Mrs Edwards-Walker].

x) The Learned Judge erred in fact and in law when he ruled that the [appellants'] application for permission for [the]

affidavit in response to [the] Fixed Date Claim Form filed out of time to stand and oral application for an extension of time showed no good reason why the application should be granted.

xi) The learned judge erred in fact and [in] law when he failed to apply the test set out in **Fiesta Jamaica Limited v National Water Commission Appeal No.19/2009** Page 14 paragraph 15 to determine whether the [appellants] were to be given an extension of time.”

### **Appellants’ submissions**

[13] This court’s attention was directed to rules 10.2(1) and 10.3(1) of the Civil Procedure Rules, 2002 (‘CPR’), which provide that where a party wishes to defend a claim, a defence is to be filed and served within 42 days of the date of the service of the claim. Where there has been a failure to comply with that rule, an application may be made for an extension of time within which to do so (see rule 10.3(9) of the CPR). The court, in granting such an application, can have regard to rule 26.1(2)(c) of the CPR, which directs that in the exercise of its general powers of management, it may extend the time for compliance with any rule, practice direction, order or direction of the court even if the application is made subsequent to the time for compliance.

[14] It was submitted that the factors that are to be taken into account by the court in the exercise of this discretionary power are as summarized by Lightman J in **Commissioners of Customs and Excise v Eastwood Care Homes (Ilkeston) Ltd and Others** [2001] EWHC Ch 456, which was endorsed by this court in **Fiesta Jamaica Limited v National Water Commission** [2010] JMCA Civ 4 at para. [15]. They are: (i) the length of the delay, (ii) the reason for the delay, (iii) the appellants’ likelihood of success and (iv) the degree of prejudice that could be caused to the litigants if permission was granted. It was submitted further that the learned judge failed to apply the wider test in **Fiesta** that required the consideration of the “criterion of justice”.

[15] Counsel noted that a period of eight months had elapsed between the date of the filing of the fixed date claim (1 October 2015) and the date of the first hearing (11 May

2016). It was also stated that as the appellants were served on 22 December 2015, the final day for the filing of their defence was 2 February 2016. It is noted that the defence was not filed until 20 April 2016. It was submitted that the filing of the defence on 20 April 2016, which was a delay of 72 days, was not “a long delay” when compared with the time period between the filing of the claim and the first hearing date.

[16] It was submitted further that it was incumbent on the learned judge to not only consider the factor of delay but also the merits of the defence. The learned judge, it was argued, needed to determine whether either party would have been prejudiced if the requested permission was denied. Counsel submitted that, in the circumstances, considerably more prejudice and injustice would be meted out to the appellants in denying the application for an extension of time.

[17] The learned judge, it was stated, ought to have looked at the claim holistically and considered whether the proposed defence has a real prospect of success. Reference was made to **Hugh Bennett & Jacqueline Bennett v Michael Williams** [2013] JMSC Civ 194, para. [19], in support of that submission. It was submitted that the learned judge failed to appreciate that there are triable issues between the parties, the resolution of which requires the taking of evidence. Further, the learned judge failed to appreciate the grounds and basis relied upon by the appellants in support of their applications.

[18] It was submitted that the court has an unfettered discretion to enlarge time, save that the court should exercise its powers in furtherance of the overriding objective. Reference was made to the decision of **Philip Hamilton v Frederick Flemmings and another** [2010] JMCA Civ 19 (**‘Philip Hamilton’**), which relied on the decision of **Premium Investments Limited v Jamaica Redevelopment Foundation Inc** (unreported), Supreme Court, Jamaica, Claim No HCV 3632/2007, judgment delivered 11 June 2008. Reference was also made to **Finnegan v Parkside Health Authority** [1998] 1 WLR 411, in which Hirst LJ referred to the following passage from **Costellow v Somerset County Council** [1993] 1 WLR 256, where Sir Thomas Bingham MR, at page 264, stated:

"...Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord. 3, r. 5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed."

[19] In addition, it was submitted that the learned judge should have treated with the respondent's application for an extension of time to make a claim under PROSA before considering the appellants' applications. Moreover, the learned judge erred in fact and in law when he ruled against the appellants' oral and written applications for an extension of time to file a defence in response to a claim which at the time was not properly before the court as it was statute-barred, having been filed four years after the time permitted under PROSA.

[20] Reference was made to section 13 of PROSA, which provides that an application for distribution of property is to be made within 12 months of the separation of the parties. It was submitted that an application for an extension of time under PROSA is to be "written and made as a standalone application not tucked away in the Fixed Date Claim Form".

[21] Additionally, it was submitted that the learned judge made several errors of fact when he erroneously concluded that:

- i. Mr Walker had no affidavit evidence in support of the application when, indeed, there was an affidavit that set out the basis upon which permission was being requested.
- ii. Mr Walker sought to rely on his affidavit in response to the fixed date claim, for which the extension was being sought, to support the notice of application for an extension of time.



- iii. Further and/or alternatively that there was no evidence before him in support of the notice of application for an extension of time.
- iv. The affidavit filed in support of the application for permission for the affidavit filed out of time to stand contained no good reason why permission should be granted

[22] It was submitted that even if there was no affidavit in support of the appellants' application, the learned judge was authorized to swear and take evidence from the appellants who were both present at the hearing. In addition, Mr Walker's affidavit in support of the application stated that the delay was occasioned by his impecuniosity. He also indicated in that affidavit that he had sought to retain counsel almost immediately after being served with the fixed date claim form. This, it was submitted, was demonstrative of an intention to defend the claim. Moreover, para. 4 of the affidavit stated that it is Mr Walker's intention to vigorously defend the claim. Additionally, whilst the words 'real prospect of success' were not used in the draft defence, "the spirit ... and the face of the draft demonstrates the prospects".

[23] Counsel submitted further, that the appellants have been gravely prejudiced as the property is their home. In addition, they have taken steps to repay Mrs Edwards-Walker in a timely manner the monies which she has expended on the property. Once the payments are complete, it would extinguish any claim by her to an interest in the property.

### **Respondent's submissions**

[24] By notice, filed on 15 November 2019, the respondent advised this court that she was unable to obtain counsel to represent her in these proceedings. Therefore, no written submissions were filed on her behalf. The respondent, however, opposes the grounds of appeal relied upon by the appellants.

## The issues

[25] The principal issue in this appeal is whether it was plainly wrong for the learned judge to have refused to grant an extension of time for the appellants to file a defence. The approach of this court in matters concerning the exercise of a judge's discretion is well settled. This court could only justifiably interfere with the exercise of a judge's discretion if, in the exercise of his discretion, the learned judge erred on a point of law or made a decision that no judge "regardful of his duty to act judicially could have reached" (see **The Attorney General of Jamaica v John Mackay** [2012] JMCA App 1, in which Morrison JA (as he then was) summarized the principles in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042 at 1046). The learned judge stated at para. [19]:

"[19] It is common ground that the proposed appeal in this case will be an appeal from Anderson J's exercise of the discretion given to him by rule 13.3(1) of the CPR to set aside a default judgment in the circumstances set out in the rule. It follows from this that the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):

'[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'

[26] In this matter, the court does not have the benefit of the learned judge's reasons for his decision. An undated document intituled 'Hearing notes' was included in a bundle filed in this court on 1 November 2016. It bore the typewritten names of counsel who appeared for the parties in the court below but was not signed by them. As it was unclear whether this document was agreed as an accurate note of the proceedings before the learned judge, its contents have not been considered in this appeal. In such circumstances, it is incumbent on the court to consider "...whether [the] decision, without

reasons, demonstrates a proper exercise of the learned judge's discretion" (see **Ray Dawkins v Damion Silvera** [2018] JMCA 25, at para. [47]).

[27] The grounds of appeal raise the following issues:

- (1) Whether Mrs Edwards-Walkers' application to extend the time for making a claim under PROSA ought to have been dealt with before the appellants' application to extend the time to file an affidavit in reponse – grounds (iv) and (v).
- (2) Whether there was sufficient material before the learned judge to ground the appellants' application - grounds (i) and (ii).
- (3) Whether in the absence of such material the learned judge had the power to take *viva voce* evidence from the appellants – ground (iii).
- (4) Whether there is an arguable defence to the claim – grounds (vi) to (xi).

**Whether Mrs Edwards – Walkers' application to extend the time for making a claim under PROSA ought to have been dealt with before the appellants' application – grounds (iv) and (v)**

[28] The fixed date claim form filed by Mrs Edwards-Walker states that she is claiming a one-half beneficial interest in the property pursuant to section 14 of PROSA. That section deals with the division of matrimonial property under section 13.

[29] Section 13(1) and (2) of PROSA, which deals with the time when applications for the division of matrimonial property may be made, states:

"13.-(1) A spouse shall be entitled to apply to the Court for a division of property-

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

- (b) on the grant of a decree of nullity of marriage; or
- (c) where a husband and wife have separated and there is no reasonable likelihood of reconciliation; or
- (d) where one spouse is endangering the property or seriously diminishing its value, by gross mismanagement or by wilful or reckless dissipation of property or earnings.

(2) An application under subsection (1) (a), (b) or (c) shall be made within twelve months of the dissolution of a marriage, termination of cohabitation, annulment of marriage, or separation or such longer period as the Court may allow after hearing the applicant."

[30] In **Brown v Brown** [2010] JMCA Civ 12, Morrison JA (as he was then) at para. [77], addressed the principles that are to guide the court in the exercise of its discretion. He stated thus:

"[77]...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 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'."

[31] Based on the affidavit of Mrs Edwards-Walker, in support of the claim, the parties have been separated since May 2012. The fixed date claim form was not filed until October 2015, which was clearly outside of the prescribed statutory period of 12 months. This procedural difficulty was recognised by Mrs Edwards-Walker as the first order sought in her fixed date claim form was for an extension of time to file the claim under PROSA. No separate application was filed, and the affidavit in support of the fixed date claim form makes no specific reference to the issue of delay and does not advance any reason therefor. The issue of prejudice has also not been addressed.

[32] Section 13(2) of PROSA, as stated by this court in **Bryant-Saddler v Saddler and Hoilette v Hoilette** [2013] JMCA Civ 11, provides a limitation defence. Whilst a claim that is filed outside of that limitation period is not invalid, "...the action certainly could not proceed without the court allowing the time period to be extended, for to do otherwise would be in breach of the specific words of the section" (see para. [44] of **Bryant-Saddler v Saddler and Hoilette v Hoilette**). Phillips JA, who delivered the decision of the court, stated further at para. [45]:

"[45]...I would adopt the dictum of Edwards J in **Chang v Chang**, endorsed by this court on a procedural appeal, that:

'.. a claim once filed is an administrative procedure, it's not invalid (unless its life has expired and no application to extend [sic] 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.'

Edwards J noted that in **Brown v Brown** the application for leave to present the application for division of the matrimonial home out of time was filed after the claim form although in the same month, yet no argument was made and no decision taken that the claim was invalid. Indeed the learned judge made the further point, which I find compelling, that although a fixed date claim form may be time barred from proceeding under section 13(1) (c) of PROSA, it could yet validly proceed under section 11 where there is no limitation period as long as the marriage subsists, or section 13(1) (d) if the facts existed. So a claim may not be able to proceed in respect of a division of matrimonial property if the time period had passed and there had been no extension of the period allowed, but may yet proceed under section 11 or section 13(1)(d) using the same claim form. **Additionally, also posited by Edwards J, with which I agree, is that a claim which is filed out of time is not invalid, but cannot proceed, as an application for extension of time must be made and if granted, the time must be extended from the time allotted in PROSA to the date of the filing of the claim, for the claim originally filed**

**to stand**, or if the claim is not yet filed, to a determined date for the filing of the same.” (Emphasis supplied)

[33] In **Allen v Mesquita** [2011] JMCA Civ 36, Harris JA at para. [30] stated,

“[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. There is absolutely no reason why these principles could not be applied in the instant case.”

[34] In this matter, there is no indication that the learned judge considered the issue of whether the time should be extended for Mrs Edwards-Walker to make the claim under PROSA, as no order was made pertaining to that issue. As stated by Phillips JA in **Bryant-Saddler v Saddler and Hoilette v Hoilette** at para. [86], at this stage, the claim “could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted”. The claim, therefore, could not proceed until such an order was granted.

[35] Therefore, it would follow that the learned judge should have determined whether there is a claim to be defended before embarking on a consideration of the appellants’ application for the extension of time. Whilst he would not have been expected to raise the limitation issue, the learned judge, in my view, would have been put on notice that Mrs Edwards-Walker intended to make an application for an extension of time to make her claim under PROSA by its inclusion in the fixed date claim form (see **Diedre Anne Hart Chang v Leslie Chang**, (unreported) Supreme Court, Claim No 2010/HCV 03675, judgment delivered 22 November 2011 at para. [75]). As stated previously, Mrs Edwards-Walker’s affidavit was devoid of any reference to the length of the delay, the reason for the delay, or the issue of prejudice, which, in addition to the merits of her case, would have been required to ground her application.

[36] In the circumstances, it is my view that the learned judge put the proverbial cart before the horse in considering the appellants' application before making a decision pertaining to Mrs Edwards-Walker's application for an extension of time under PROSA. In that regard, he erred, and as such, the appeal should be allowed and the orders set aside. The matter is to be remitted to the Supreme Court for Mrs Edwards-Walker's application for an extension of time under PROSA to be considered by another judge. In the event that an order is granted in her favour, the appellants' application for permission for the affidavit in response filed out of time to stand is to be considered afresh preferably by the same tribunal. In this regard, I have noted that counsel for the appellants directed this court's attention to rule 10.2(1) of the CPR which speaks to the filing of a defence. This matter was begun by way of a fixed date claim form and rule 8.8(2)(a) of the CPR states that an affidavit containing the evidence on which the claimant intends to rely must be filed. A defendant who wishes to defend the claim would do so by filing an affidavit in response.

[37] The resolution of this issue is, in my view, determinative of the appeal and, as such, the consideration of the other issues listed at para. [27] above is unnecessary.

#### **V HARRIS JA**

[38] I too have read the draft judgment of Simmons JA and agree with her reasoning and conclusion. There is nothing that I wish to add.

#### **F WILLIAMS JA**

#### **ORDER**

- (1) The appeal is allowed.
- (2) The orders of K Anderson J, made on 11 May 2016, are set aside.
- (3) The hearing of the application for permission for Mr Walker's affidavit in response, that was filed out of time to stand as if filed within time, is remitted to the Supreme Court for hearing by another judge.

- (4) Mrs Edwards-Walker's application for an extension to file her claim under PROSA is to be considered prior to the hearing of Mr Walker's application.
- (5) Costs of the appeal to the appellants to be agreed or taxed.