

**BARBADOS**

**IN THE SUPREME COURT OF JUDICATURE**

**HIGH COURT**

**FAMILY DIVISION**

**Suit No. 11 of 2002 &  
Suit No. 289A of 2000**

**IN THE MARRIAGE OF**

**SHERRIE MAXINE STEVENSON**

**APPLICANT/WIFE**

**AND**

**McDONALD ALEXANDER STEVENSON**

**RESPONDENT/HUSBAND**

**Before Dr. The Hon. Madam Justice Sonia Richards, Judge of the High Court.**

**2016: February 17**

**Mrs. Sharon Edgecombe-Miller, Attorney-at-Law for the Applicant/Wife.  
Mr. Mark Goodridge Q.C., Attorney-at-Law for the Respondent/Husband.**

**DECISION**

**Introduction**

- [1] This is an application by the Wife, for leave to institute proceedings with respect to matrimonial property, pursuant to section 23(3) of the Family Law Act, Cap 214, (“the Act”).

## **Background**

- [2] The parties were married on 17 June 1995. The Wife filed an application for the dissolution of the marriage on 10 January 2002. This application was refiled on 19 June 2002. Moore J., as he then was, granted a decree nisi on 19 July 2002. The decree absolute was granted by Inness J. on 16 April 2004, and again on 02 February 2005. Notwithstanding this double grant of a decree absolute, the Registrar of the Supreme Court issued a Memorandum dated 30 May 2007, which gives the date of the decree absolute as 16 April 2004.
- [3] On 26 May 2006, the Wife filed an application for a property settlement. An affidavit in support of the application was filed on 07 June 2006. This application was filed out of time, and the process was corrected on 21 October 2008 when the Wife filed an application, with an accompanying affidavit, seeking leave to pursue her previous application for a settlement of the matrimonial property.

## **The Relevant Legislation**

- [4] Sections 23(3) and (4) of the Act are relevant to this application. Those sections provide that:

“(3) Where a decree *nisi* of dissolution of marriage or a decree of nullity of marriage has been made, proceedings within paragraph (d) (i) or paragraph (e) of the definition of “matrimonial

cause” (not being proceedings seeking the discharge, suspension, revival or variation of an order previously made in proceedings in respect of the maintenance of a party) shall not be instituted after the expiration of 12 months after the date of the making of the decree, except by leave of the court in which the proceedings are to be instituted.

(4) The court shall not grant leave under subsection (3) unless it is satisfied that hardship would be caused to a party to a marriage or to a child of the marriage if leave were not granted.”.

- [5] The application before the Court is a matrimonial cause within paragraph (e) of the definition of a matrimonial cause in section 2(1) of the Act. Paragraph (e) of that definition refers to:

“proceedings between the parties to a marriage in respect of the property of those parties, or either of them, being proceedings in relation to concurrent, pending or completed proceedings, for principal relief between the parties.”.

- [6] It follows that the Wife should have filed any application for a property settlement within twelve months of obtaining a decree nisi. Time begins to run from the date of the decree nisi, and not from the date of the decree absolute. Therefore, any confusion arising from the two orders made by Inniss J. on 16 April 2004 and 02 February 2005, in relation to the decree absolute, have no bearing on the determination of the twelve month period for the filing of the Wife’s application.

[7] The Wife has conceded that her application of 26 May 2006 was filed out of time. In her affidavit of 21 October 2008, she stated that:

“...it is now within my knowledge and information that pursuant to section 23(3) of the said Act the application was filed out of time and as such the leave of the Court must now be sought to pursue my said application which is currently before the Court.”. (Para.6.).

[8] Section 24(3) is similar in wording to section 44(4)(a) of the Australia Family Law Act 1975. The Australia provision was considered in **Whitford v. Whitford (1979) 35 FLR 445**. In that case it was held that on an application for leave:

“...two broad questions may arise for determination. The first of these is whether the court is satisfied that hardship would be caused to the applicant or a child of the marriage if leave were not granted. If the court is not so satisfied that is the end of the matter. If the court is so satisfied, the second question arises. That is whether in the exercise of its jurisdiction the court should grant or refuse leave to institute proceedings.”. (Para.452).

[9] The **Whitford** court explained the concept of hardship, and gave guidance on what was required for an applicant to prove hardship. The court opined as follows:

“The hardship referred to...is the hardship which would be caused to the applicant or a child of the marriage if leave were not granted. The loss of the right to institute proceedings is not the

hardship to which the subsection refers. It is with the consequences of the loss of that right with which the subsection is concerned. 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 probability of success, then the court cannot be satisfied that hardship would be caused if leave were not granted. Further, the matter with which the court is concerned is not whether the applicant or child would suffer hardship if leave were not granted. If the probable result of the hearing on the merits is that the hardship is not likely to be alleviated, then the court cannot be satisfied that the applicant or a child would suffer hardship if leave were not granted....

In our view the meaning of “hardship”...is akin to such concepts of hardness, severity, privation, that which is hard to bear or a substantial detriment....

It is impossible to lay down in advance what particular facts may or may not amount to hardship in the relevant sense....In an appropriate case, and depending on the circumstances of the applicant or the children, hardship may be caused by the loss or deprivation of something which is of comparatively small money value...Hardship may be caused to an applicant if leave were not granted to institute proceedings, although the applicant is not in necessitous circumstances.” (Pages 452-454).

- [10] **Whitford** was applied by the Barbados High Court in **Byer v. Byer, Suit No. 20 of 1982, decision dated 22 December 1986; Brathwaite v.**

**Brathwaite, Suit No. 84 of 1984, decision dated 08 July 1988; and Knight v. Knight, Suit No.68 of 2002, decision dated 23 April 2013.**

[11] **Whitford**, and the relevant statutory provision, have also been discussed in more recent cases from Australia. For example, in **Oxenham & Oxenham [2009] FamCAFC 167**, the Full Court of the Family Court opined that:

“....it needs to be borne in mind that the prospect of success need not relate to the whole of the proposed claim. It is sufficient if it relates to some part or aspect of it which in the context of the facts of the individual case is of significance.

It is therefore an inquiry as to whether in the particular circumstances of the case in question the applicant would suffer hardship by refusal to grant leave which [the section] permits the court to grant. As all of the authorities point out, the fact that the applicant demonstrates that he or she has a reasonable claim to present to the court is not necessarily the same thing, although that is an important aspect of the matter. That circumstances must then be considered in the light of all of the facts in determining whether at this particular stage the applicant would suffer hardship by the application being refused. That involves amongst other matters some consideration of the then financial and other circumstances of both parties.

....As the Full Court said in **Hall and Hall (1979) FLC 90-679**, at p.78,627, fundamental to the inquiry as to hardship is the question whether the applicant has a reasonable claim to be heard by the court. This is not by itself necessarily the same thing as hardship, but the stronger the applicant’s prima facie claim, the greater the likelihood of

hardship if leave were refused. The issue depends on the circumstances of each case....

In summary, in order to establish hardship in the relevant sense the applicant for leave must have a prima facie case to be heard by the court on the merits. This does not require a detailed hearing on the merits of the substantive application, but a consideration of whether there exists a prima facie case on the strength of the applicant's material.”. (Paras.100-102; see also **Ordway & Ordway [2012] FMCAfam 624**, paras.30-37).

### **Evidence of Hardship**

- [12] The Wife placed five affidavits before the Court over a four year period. Four were filed on 07 June 2006, 21 October 2008, 06 March 2009, and 03 June 2010 respectively. The Husband then filed a single affidavit in reply on 16 June 2010. The Wife's fifth affidavit followed on 19 July 2011.
- [13] The first affidavit filed by the Wife, on 07 June 2006, makes it clear that her claim is for an interest in the matrimonial home at Connell Town, St. Lucy. Neither party owns the land on which the home is constructed. The Wife alleges that the parties cohabited prior to their marriage (para.4), and that in 1987 they built a matrimonial home together at Roaches, St. Lucy. This house was moved to Connell Town prior to the marriage (para.6).
- [14] The Wife detailed her financial contributions to the construction of the house (para.8), and the purchase of food for the family (para.9). She also described her role as homemaker (para.19), and as primary caregiver for the children

of the marriage (paras.17-18). The Wife claims that the parties jointly embarked on a lucrative dairy business, to which she made a substantial contribution (paras.10-14).

[15] It is in the second affidavit of 21 October 2008 that the Wife alleges that she would “endure significant hardship” if her application for leave to file out of time was not granted. This affidavit was filed in support of her application for leave to file out of time. The Wife reiterated her direct and indirect contributions to the construction of the matrimonial home (para.8), her roles as homemaker and caregiver (paras.9 and 10), and her contribution to the dairy farm (para.10).

[16] The Wife lamented that the Husband continued to enjoy the benefits of the matrimonial home and the dairy farm, while she and the children of the marriage were forced to live with her mother (paras.11-12). At times the Wife also has to rely on her mother’s financial assistance (para.12). She pleaded for an equitable outcome by way of the realization of her financial and other contributions to the marriage (paras.13-14).

[17] The Wife’s third affidavit of 06 March 2009, provides additional information about the period of cohabitation prior to the marriage of the parties (para.3). She further details the construction of the matrimonial

home at Roaches, St. Lucy (paras.4-6), and her employment and sources of income during that time (para.7).

[18] The Wife expands on her knowledge of and involvement with the dairy business, and the other animals on the farm (paras.9-13, 16-21, 27-36). She again contends that she would be caused significant hardship if the Court did not allow her to realize her direct and indirect contributions to the family business and to the other assets of the marriage (para.38).

[19] The fourth affidavit offers reasons for the Wife's delay in filing the property application (paras.5-13). There is additional emphasis on her financial and other contributions to the marriage and the matrimonial assets (paras.16-21). She reiterates the distress of having to depend on her mother, and the significant hardship to be faced if she is not allowed to pursue the property application (para.27).

[20] The fifth affidavit annexes documents to support the Wife's contention that her property application was no surprise to the Husband. This affidavit, together with aspects of her fourth affidavit, will become relevant if the Court determines that she would experience hardship, if not granted leave to file the property application out of time.

[21] In his affidavit, the Husband argues that the Wife never contributed directly or indirectly to the acquisition or purchase of the matrimonial home

(para.10). He says too that the Wife never contributed financially to or assisted with the operations of the farm. Due to her work schedule at her mother's shop, she never had the time to assist in the business, or to perform any meaningful role as homemaker and caregiver (paras.11-13). The Husband alleges that the Wife conducted her hairdressing business at an apartment in St. Peter, and that she moved eighty thousand dollars worth of furniture from the matrimonial home to that apartment (para.14).

[22] The Husband does not believe that the Wife would suffer any hardship if the Court refused her application for leave to file out of time (para.18). He described the Wife's circumstances as comfortable (para.19); she owned her own restaurant business with a large customer base; rented rooms; continued her hairdressing business; travelled frequently; had purchased a new vehicle; and was living an extravagant lifestyle (paras.19-22). There would be no hardship to the children of the marriage, as proper arrangements were in place for them through a Court order (para.23).

[23] The question to be answered is whether the Wife has made out a prima facie case of entitlement to an interest in the matrimonial assets. According to the application filed on 26 May 2006, her claim is for fifty percent of those assets. Among the orders applied for are:

“(b) A Declaration that the Applicant is entitled to an interest in the property situate at Connell

Town in the parish of Saint Lucy in this Island and the dairy also situate at Connell Town in the parish of Saint Lucy in this Island (referred to as the “property”).

- (c) An alteration of interest in the said property referred to above so as to vest one-half share in the Applicant.”.

[24] The Husband disputes that the Wife made any direct or indirect contributions to either the acquisition of the matrimonial home or the operations of the dairy farm. He also denies any meaningful role on her part as homemaker or caregiver. However, the Husband has not challenged the Wife’s assertion that they began cohabiting from 1986. This factor implies cohabitation for about nine years in a union other than marriage; a union that immediately preceded the marriage in June 1995.

[25] At the time of their separation in May 2000, the parties had been in a legally recognised relationship for approximately fourteen years. It was not a short legal relationship. In **Pierce v. Pierce (1999) FLC 92-844**, the Full Court of Australia found a twelve year marriage to be a long marriage. In **Walters v. Smith-Walters (B’dos. H.Ct., No.541 of 2007, decision dated 05 December 2013)**, Cornelius J. described a twelve year marriage as “clearly a long one”. (Para.57; see also **Martineau v. Reis, FH 206 of 2010, decision dated 18 July 2012**, at para.53, where Mohammed J. considered a ten year marriage to be “a relatively long marriage”).

[26] The Court notes that both parties referred to periods of separation during the marriage. However, there is no information provided as to the length of these separations. And, nothing before the Court suggests that the fourteen year legal relationship would be significantly impacted by any or all of the separations prior to May 2000.

[27] Having reviewed the Wife's affidavit evidence as to the merits of her claim, this Court is not persuaded that the claim:

“...is in itself inherently improbable, or self-contradictory in important respects, or [that] it is clearly shown by other unimpeachable evidence (such as undisputed documentary evidence or the testimony of independent witnesses) to be false...”. (Per Lindenmayer J. in **Perkins' case (1979) FLC 90-600**, at p.78,054).

[28] It was in **Knigh**, supra, that Goodridge J. found that:

“...the Wife's evidence as to her contributions to [the matrimonial assets] is so scant, devoid of detail and of such a nature that a court would not be able to assess her contribution with any degree of certainty.”. (Para.[35] of judgment).

This Court is unable to reach a similar conclusion in this case. The Wife's affidavit evidence shows that she has a reasonable claim to be heard by the Court. And denying her the right to be heard would cause her hardship, if she could not benefit from the possible substantial rights acquired in the matrimonial assets, during her fourteen years as a spouse.

- [29] The **Oxenham** court mentioned other factors to be considered. (Para.30 of judgment). One factor is the financial circumstances of the parties. The Husband has not been diligent in his payment of maintenance and ancillary expenses. Contempt proceedings were filed against him twice for breach of the relevant Court order. The first was filed on 19 February 2004 with a supporting affidavit. On 02 February 2005, Inniss J. ordered the Husband to pay maintenance arrears of \$2,400.00.
- [30] Before the Court is a second contempt application filed on 19 September 2006, alleging non-payment of expenses in the sum of \$3,091.53. The affidavit in support further alleges that the Wife was forced to seek her mother's financial assistance on behalf of the children. A court may take any outstanding arrears into account when determining the extent of the Wife's interest in the matrimonial assets.
- [31] The Wife found herself in a position similar to the wife in **Hall and Hall [1979] FLC 90-679**. In that case the wife was living in her mother's home, an arrangement which she did not regard as satisfactory. Mrs. Hall stated in her affidavit that she could not afford to move elsewhere, and that she was relying on the proceeds of her property application to put a deposit on a flat or unit of her own. In this case the Wife also expressed a desire to utilise her property settlement in the acquisition of a new home.

- [32] When the parties, separated, the Husband was in a stronger financial position than the Wife. This conclusion is based on their respective statements of financial circumstances filed by the Wife on 31 May 2000, and by the Husband on 27 July 2000. The Husband submitted that in more recent times the Wife's financial circumstances have improved significantly. Therefore, in his opinion, she would suffer no hardship if the Court refused to allow her to continue with the property application.
- [33] The case law cited earlier posits that an applicant may experience hardship although "not in necessitous circumstances". (**Whitford**, supra, at para.[9]; see also **Frost and Nicholson (1981) FLC 91-051** at 76,423, and **Oxenham**, supra, at para.99 of that judgment). What this Court has observed is that the Wife did not have the benefit of the matrimonial assets from 2002. And she was challenged by the Husband's indifference to the timely payment of maintenance and expenses on behalf of the children of the marriage.
- [34] The role of the Wife's mother in the early years of the union, may prove to be pivotal to any assessment of the Wife's contribution to the acquisition of the matrimonial assets. The Wife stated in her affidavit of 06 March 2009, that the parties lived with her mother from 1986 for about two years. This was not denied by the Husband. The courts have long recognised the contributions of a spouse via the direct and indirect assistance of a parent of

the spouse. See **Gosper (1987) FLC 91-818; Kessey (1994) FLC 92-495; Pellegrino [1997] FamCA52; Wentner & Rater [2010] FamCA 1188; Stellard and Dresdon Stellard [2011] FamCA 718).**

[35] This Court has no concrete details of the assistance rendered by the Wife's mother, prior to the final separation of the parties. The Wife worked in her mother's shop and also at her mother's bakery. The Husband did not challenge this evidence. The Court notes, *en passant*, that in the Barbadian context, it is not unusual for the immediate family of a shop or bakery owner to benefit from the products of the owner's establishment.

[36] The Husband also would have the Court accept that the Wife played a marginal role as caregiver to the children of the marriage. He swore that after his Wife left the matrimonial home in 2000, "the children have expressed and shown a great desire to be with me and to reside with me". (Para.17, affidavit filed on 27 July 2000). He also alleged that the Wife "was never at home for any lengthy period of time in which she could perform household chores and take care of the children of the marriage or myself. I was the party to the marriage who took care of the children and carried out such tasks as the Applicant was always working at her mother's shop during the said lengthy hours". (Para.14, affidavit filed 16 June 2010).

[37] Despite these assertions by the Husband, before the divorce he was ordered to pay maintenance to the Wife, who had *de facto* care and control of the children. And subsequent to the divorce application, the Wife was granted *de jure* care and control of the children of the marriage. There is nothing on the court file to suggest that the Husband ever objected to the Wife having care and control of the children, although he claimed to be their caregiver.

[38] For the foregoing reasons, the Court finds that if leave is not granted to the Wife to pursue her property application, the effect of losing that right would occasion hardship to her. The Wife has established a prima facie case to be heard on its merits.

### **The Exercise of Discretion**

[39] A finding of hardship does not mean that the Court will automatically exercise its discretion to allow the property application to proceed. The Court now has to determine whether the grant of leave would enable it to do justice between the parties.

[40] In **Oxenham**, the Full Court directed that:

“If hardship of the required type is established then the court may grant the leave but it has a discretion to refuse to do so and in considering the exercise of that discretion it would take into account any other relevant matters, but basically the question whether there is a reasonable explanation of the delay and the question of prejudice which may have occurred to the

respondent as a consequence. Other facts may be relevant in an individual case, such as, for example, any prior order or provision made, and the discretion has to be exercised on the basis of the facts of that particular case.”. (Para.100).

[41] And in **Ordway**, the court reasoned that:

“43. A consideration of these issues requires [the court] to have regard to, amongst other things, the history of the proceedings, the conduct of the parties, the nature of the litigation and the consequences to the parties of the grant or the refusal of the extension of time.

44. That would include a consideration of whether there is an adequate explanation of the delay and the prejudice, if any, that would be incurred by the party in allowing proceedings to proceed to this point in time.”.

### **1. Delay**

[42] The Wife’s property application was filed nearly four years after the grant of the decree nisi. The application for leave to file out of time came approximately two and a half years after the property application, and more than six years after the decree nisi.

[43] The Wife’s explanation for the delay is contained in several paragraphs of her affidavit of 03 June 2010. The relevant portions of that affidavit are as follows:

“5. That between the 19<sup>th</sup> day of July, 2003 and the 19<sup>th</sup> day of September, 2006 on which latter date my Application for property settlement was filed, a

significant amount of time and effort was spent in putting in place satisfactory arrangements regarding the children of the marriage. I recall that on several occasions the Respondent was in my opinion being excessively difficult in settling those figures. There were also numerous adjournments before the Law Courts regarding the children inter alia as a result of the Respondent Attorney's absence from the jurisdiction.

6. That much emphasis was placed on finalising the divorce proceedings and addressing maintenance matters before the Court.
7. After arrangements with respect to the minor children were in place I had to return to Court on matters of breach of the maintenance order by the Respondent who failed to comply with the said Order.
8. However, I do recall that up to the filing of the property settlement proceedings discussions did take place with the Respondent and his Attorney-at-law regarding division and my interest in the matrimonial property.
9. Further, it is within my information and I do verily believe that there were discussions between my Attorney-at-Law at the time and the Respondent's Attorney-at-Law of my intention to file for a division of the matrimonial property and the extent of the assets of the dairy farm which the Respondent and I started.
10. I do verily believe that the Respondent was fully aware of my intention to bring an Application for property settlement on completion of the divorce proceedings and that the proceedings were of no surprise to him.

11. That from the date of my filing and serving of the property settlement proceedings the Respondent either personally or acting through his Attorney-at-Law has never indicated any opposition to my filing of these proceedings. In fact it is within my personal knowledge that it was only in or about April 2008 that the Respondent acting through his Attorney-at-Law, indicated that he is opposing the Application for property settlement.
12. Prior to this time I am aware that letters were written from my Attorney-at-Law to the Respondent's Attorney requesting his affidavit in response to my Affidavit in support of the application regarding the division of the matrimonial property and promises were given that the same would be furnished shortly. I reserve the right to exhibit true copies of these letters before the Honourable Court if and when required to do so.
13. Further on the 23<sup>rd</sup> day of October, 2007 Madam Justice Kaye Goodridge made Orders stating inter alia that the Respondent file his Affidavit in response within 14 days of that said date. On this occasion it is within my personal knowledge that the Respondent, whether acting personally or through his Attorney-at-Law, never raised any issue at that time that the Application was out of time or that he was being taken off guard or surprised by the Application.
14. I further note that to date the Respondent has failed to comply with that Order. This continued up until 2008.
15. I submit that the Respondent has done all in his power to delay a hearing on the division of the matrimonial assets of which he knows that I have a significant interest".

[44] On 22 June 2011, counsel for the Wife obtained an Order from this Court permitting the Wife to file her fifth affidavit pursuant to the application for leave. The fifth affidavit annexed four pieces of correspondence from the Wife's Attorney-at-law to the Husband's Attorney-at-Law. These letters are dated between December 2006 and November 2007, and refer to the property settlement and reimbursement for expenses incurred by the Wife.

[45] Essentially, the Wife's reasons for the delay in filing her property application are twofold. First, much time and effort was spent on finalising the divorce proceedings, and maintenance matters, including addressing the husband's breach of the maintenance order. Secondly, the Husband was aware of her intention to file the application, and no objection was raised by him in that regard, either before or immediately after the application was filed.

[46] The Wife obtained a maintenance order before filing the divorce proceedings. Therefore, when the decree nisi was granted in July 2002, a maintenance order was already in place with respect to the three children of the marriage. A maintenance order was granted on 25 May 2000 by Chenery J. (Ag.). This order was varied six months later, on 27 November 2000, by Walrond J. (Ag.). The variation increased the maintenance payable by the Husband from \$750.00 per month to \$900.00 per month.

- [47] Despite the existence of a maintenance order, it took another two years for the court to grant a decree absolute. That passage of time suggests to this Court that satisfactory arrangements, pertaining to the three minor children of the marriage, were not in place before April 2004.
- [48] Early in 2005, Inniss J. revisited the maintenance order. He suspended the maintenance for the eldest child, who by then was eighteen years old. Maintenance of each of the other two children was set at \$350.00 per month. (See Order filed on 07 April 2005). It is this order that erroneously granted the second decree absolute. Inniss J's order also referred to arrears of maintenance owed by the Husband.
- [49] The Court accepts the Wife's explanation that she was preoccupied with other pressing matrimonial issues, at least until April 2005. In fact, the Husband's affidavit of 16 June 2010 confirms that "Subsequent to the grant of the aforesaid Decree Nisi, the Applicant and I explored and settled issues of maintenance and other ancillary relief with respect to the children of the marriage." (Para.2).
- [50] However, another year passed before the property application was filed in May 2006. The Court notes that, between April 2005 and May 2006, the Wife changed lawyers. Unfortunately, nothing in her affidavits says

whether this in any way contributed to the late filing of the property application.

- [51] The Court cannot ignore the Husband's response to the Wife's delay. By his own admission he knew the legal consequences of her late application. He was advised that, in the absence of an application for leave, he was not required to respond to the Wife's affidavit. (See paras. 2 and 5 of affidavit filed on 16 June 2010).
- [52] The correspondence exhibited by the Wife reveals that her counsel urged the Husband's counsel to file an affidavit on his behalf "...if your client has any objection to the application currently before the Court...". (Letter of 28 December 2006). And the letter of 20 February 2007 advised that "Your client's affidavit in response to that filed by my client towards the division of the matrimonial property should be filed and forwarded to me prior to the return date of 25<sup>th</sup> and 26<sup>th</sup> April, 2007.". There is no evidence of any formal reply to these letters that informed of the Husband's intention to oppose the late filing of the property application.
- [53] Between the filing of the property application and the application for leave to file out of time, the matter came before Goodridge J. (as she then was). On 23 October 2007, that Judge ordered the Husband to file his affidavit in

reply within fourteen days. There was no compliance with this order, and the Husband gave no reasons for ignoring the order.

[54] The Wife alleges that at the hearing before Goodridge J. on 23 October 2007, "...it is within my personal knowledge that the [Husband], whether acting personally or through his Attorney-at-law, never raised any issue at that time that the Application was out of time or that he was taken off guard or surprised by the Application.". (Para.13, affidavit of 03 June 2010). The Husband did not challenge this allegation by the Wife in his affidavit. Therefore, the Court accepts the Wife's statement in this regard.

[55] When the matter came before this Court on 19 February 2009, the Wife had already filed her application for leave in May 2008. The Court granted the Wife leave to file an additional affidavit by 30 March 2009. The Husband was ordered to file an affidavit in reply by 17 April 2009. The Wife filed her additional affidavit on 06 March 2009.

[56] The matter continued before this Court on 26 May 2010. At this time no affidavit had been filed by the Husband. According to his affidavit, it was on that date that his counsel informed the Court that there was no affidavit from the Husband because the Wife's affidavit neither established hardship, nor gave sufficient reason for her delay in filing the property application. (Para. 8 of his affidavit). This Court then gave the Wife permission to file

yet another affidavit by 02 June 2010. The Husband was again allowed to file his affidavit by 16 June 2010.

[57] The Husband's affidavit was filed on 16 June 2010. This Court does not accept his ill advised and recalcitrant breach of the original order made by Goodridge J. His silence was not golden. It was open to him to declare his objections to the Wife's property application in an affidavit filed at Goodridge J's request. The Court finds that the Husband's failure to make his objections known at the earliest opportunity, would have led the Wife to believe that he would not have stymied her property application because it was filed out of time.

[58] When the Wife realised that the Husband's cooperation would not be forthcoming, she was forced to bring her formal application for leave to file out of time. Before this formal application, an oral application for leave, with the consent of the Husband, could have persuaded a court to grant the application for leave.

[59] The Husband's own delay in declaring his hand, after the Wife filed the property application, contributed to the Wife's further delay in filing her application for leave. The Husband's dilatory approach to the Wife's application was not the reaction of an individual who was taken by surprise.

Therefore, the Court will not exercise its discretion to dismiss the Wife's application for leave on the ground of delay.

## 2. Prejudice

[60] In **Frost v. Nicholson**, supra, Nydh J. stated that:

“Prejudice here means that a party is faced with an action which he or she had no reason to expect or had been led to believe would not be brought.”.  
(Page 76,425).

[61] The Wife signalled in her Statement of Financial Circumstances, filed on 31 May 2000, that she had an interest in the matrimonial property. The Statement indicated that the extent of her interest was not known at the time. Therefore, the Husband cannot complain that he had no hint of, or no reason to expect, a property application by the Wife. And his slow response to the late filing of the application, belies the allegation of prejudice to his interests.

[62] The Husband contends that:

“The only person to suffer hardship if such leave is granted is me. Subsequent to the grant of the Decree Absolute and on expiry of the time period within which the Applicant should have brought an Application for property settlement, I have continued to expand and build my Dairy on my own. I have also acquired furniture and made improvements to the matrimonial home. If such leave is granted the Applicant would unduly benefit from the improved value of my assets which were so improved through my sole efforts

and sacrifices.”. (Para. 18 of affidavit filed on 16 June 2010).

[63] The sole area of prejudice identified by the Husband is the possibility that the Wife would benefit from his improvements to the matrimonial assets, after her departure in May 2000. However, he does not suggest that it would be difficult or impossible to value these improvements. It would be the Court’s task to determine the value of such improvements, and to make any corresponding adjustment to the Wife’s interest as it deems fair and just. Prejudice to the Husband has not been proved.

### **Apology**

[64] This matter was before the Court on 15 January 2016. On that date an apology was tendered to the parties, and to their respective counsel, for the delay in the delivery of this judgment. The major cause for the delay was the misplacement of the file, and the challenges faced by the Court in its attempts to reconstitute the documents on that file.

[65] Given the passage of time, the Court enquired from counsel whether there was anything further which they wished to place before the Court for consideration, before the decision was delivered. Both counsel responded in the negative. Therefore, this judgment is based on the various documents filed by the parties, and the written submissions of counsel on their behalf. Counsels’ forbearance in this matter is appreciated.

**Disposal**

[66] The Wife is granted leave, pursuant to section 23 (3) of the Act, to pursue her application filed on 26 May 2006, for settlement of the matrimonial property.

**Sonia L. Richards**  
Judge of the High Court