

BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

(Family Division)

Suit No. FL131 of 2012

BETWEEN:

DWUAN HAYNES

Applicant/Wife

AND

DOUGLAS HAYNES

Respondent/Husband

Before the Honourable Justice Cecil N. McCarthy, Judge of the High Court (Acting)

2019: 27 February

2019: 12 June

Ms. Lana Edwards for the Applicant/Wife

Mr. Mark Forde for the Respondent/Husband

DECISION

INTRODUCTION

[1] This is an application by the wife for leave to commence property proceedings out of time pursuant to Section 23(3) of the Family Law Act Chapter 214 (“the Act”). The husband opposes the application.

FACTUAL BACKGROUND

- [2] The parties were married on October 21, 2002. They separated in December, 2010.
- [3] On May 14, 2012 the decree nisi of dissolution of marriage was made under the Family Law Act.
- [4] The wife by application filed July 12, 2017 seeks leave to commence proceedings, approximately 4 years and 2 months after the limitation period has expired.
- [5] The marriage between the parties produced two children born respectively on September 15, 2003 and January 5, 2006. A third child, the biological child of the wife born May 7, 2001 was treated as a child of the marriage.
- [6] At the time of the divorce the husband permitted the wife to place a chattel house on a portion of land on which the former matrimonial home was located.
- [7] Since the dissolution of the marriage between the parties the wife has given birth to another child who also lives in her household. Four children now live in the wife's household.

- [8] The wife has been residing on the said land continuously since 2011 with the husband's consent.
- [9] A notice to quit was served on the wife in 2017 by the husband.
- [10] Subsequent to the notice to quit the husband now says that the land on which the chattel house stands belongs to his son from an earlier union and that the land was conveyed to the son in 2003.
- [11] The wife says that the husband had promised her that the land on which her chattel house stands will be conveyed to her for the children's sake. For this reason she never sought to commence proceedings for property adjustment.
- [12] The husband admits that he gave the wife permission to place the chattel dwellinghouse on the land but he denies promising to give her the land. He says that she was a licensee only.

RELEVANT LAW

- [13] The wife has applied to the Court for leave to institute proceedings pursuant to Section 23(3) of the Act.

Section 23(3) reads:

“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, suspensions revival of an order previously made in proceedings in respect of maintenance of a party) shall not be instituted after the expiration of 12 months after the date of making the decree except by the leave of the Court.”

[14] Property proceedings fall within paragraph (e) of the definition of ‘matrimonial cause’ under **section 2(1)** of the Act, which provides:

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

[15] Section **23(4)** of the Act prescribes the conditions that must be satisfied before the Court can grant leave to commence proceedings out of time. **Section 23(4)** provides:

(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.”

[16] Before considering the above statutory provisions it is convenient to ponder on the policy that informs limitation periods.

[17] In Australia, when discussing limitation periods, the following statement of McHugh J. in **Brisbane Smith Regional Health Authority v Taylor (1996 186 CLR, 551)** is often cited with approval:

“A limitation period should not be seen ... as an arbitrary cut off point unrelated to the demands of justice of the general welfare of society. It represents the legislature’s judgment that the welfare of society is best served by causes of action being litigated within the limitation period, notwithstanding that the enactment of that period may often result in a good cause of action being defeated. ... A limitation provision is the general rule; an extension provision is

the exception to it. The extension provision is a legislative recognition that general conceptions of what justice requires in particular categories of cases may sometimes be overridden by facts of an individual case.”

[18] I consider this statement to be a helpful description of the purpose of a limitation period and I adopt it for the purposes of the decision.

[19] Of course, in the context of matters between husband and wife the statutory provisions are also intended to reflect the philosophy that parties should settle their financial affairs within a reasonable time after the marriage has been dissolved.

[20] For this reason, there is an onus on the party applying for leave to establish that the facts and circumstances of his/her case justify the court in upholding the application for leave.

[21] In **In the Marriage of Whitford** (1979) FLC 90-612) the Full Court against the background of divergent opinions with respect to the meaning of sections 44(3) and 44(4) of the Australian Family Law Act, [sections 43(3) and 44(4) are in substantially similar terms to sections 23(3) and 23(4) of the Act] took the opportunity to explain those provisions.

[22] Among other things, the Court said that under **section 44(3) (s23(3))** “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 discretion the court should grant or refuse leave to institute proceedings.”(at 78,148)

- [23] The Full Court went on to discuss the meaning of ‘hardship’ as used in the legislation. It said:

“The hardship referred to in s44(4) 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 sub-section refers. It is with consequences of the loss of that right, with which the sub-section 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 possibility 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 a child is suffering hardship, but the question is whether the applicant or a child would suffer hardship if leave were not granted.”(at 78,148)

- [24] The word “hardship” was defined as akin to “such concepts as harshness, severity, privation, that which is hard to bear or a substantial detriment”.

- [25] The Full Court also said in **Whitford**:

“In ordinary parlance, hardship means something more burdensome than “any appreciable detriment”. We consider that in sub-s 44(4) the word should have its usual, though not necessarily its most stringent, connotations. It is impossible to lay down in advance what particular facts

may or may not amount to hardship in the relevant sense. As a general proposition it might be said that, the inability of an applicant to pursue a claim which in the circumstances of the applicant or a child of the marriage is trifling, generally will not cause hardship. Similarly, where the costs which the applicant will have to bear himself or herself are about as much or more than what the applicant is likely to be awarded on a property claim, ordinarily hardship would not result if leave to institute proceedings were not granted. But otherwise we find no warrant in either sub-s 44(3) or 44(4) for saying that the right or entitlement lost must be a substantial one.

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. In some cases, it may be a great hardship to an applicant if he or she is unable to gain something worth \$1,000 or even less, whilst in other cases something of that value may be considered trifling.”(at 78,148-78,149)

[26] In the recent decision of the Full Court of Australia in **Edmunds & Edmunds** [2018 FamCAFC, 121] the Court endorsed the following approach outlined in the first instance decision in that case, where the primary judge said:

16. “The authorities on the issue of an application pursuant to s44(3) are numerous. The Court must consider whether the applicant has established:
 - a) A reasonable prima facie case for relief had proceedings been instituted in time;
 - b) That denial of the claim would cause the applicant hardship; and
 - c) An adequate explanation as to the delay.
17. In appropriate cases the degree of hardship to be suffered by the applicant may well outweigh an inadequate explanation of delay.

18. Once the three elements are satisfied, in determining whether to exercise its discretion to grant relief, the question of prejudice which the respondent would suffer by reason of the delay in bringing the application ought to be considered.”(para.5)

[27] In my view the above approach is not only consistent with the recent discussions in Australia but is also a reflection of the guiding principles as set out in **Whiford**.

[28] I am not aware that the interpretation of S. 23(3) of the Act has been considered by our Court of Appeal. However, in a number of local decisions in the High Court **Whitford** has been applied. These include:-

Byer v Byer Suit No: 20 of 1982;

Rock v Rock Suit No: 207 of 1985;

Brathwaite v Brathwaite Suit No: 84 of 1984;

Knight v Knight Suit No: 68 of 2002;

King v King Suit No: 415 of 2010;

Stevenson v Stevenson Suit No: 11 of 2002; Suit No: 289A of 2000.

THE EVIDENCE

[29] The parties have opted to rely solely on the affidavit evidence filed. As a consequence, the Court has not had the benefit of hearing oral testimony to resolve the conflicts in the evidence.

[30] The wife filed an affidavit on July 12, 2017. In that affidavit she mentioned that the husband is the owner of the former matrimonial home which stands on a large parcel of land at Cherry Grove, St. John. The wife said that they lived together continuously for a period of 9 years before the marriage broke down.

[31] The wife deposed at paragraph 15 of the said affidavit that:

“During this time the Respondent completed the matrimonial home while I looked after the children financially. The house was completed during the marriage and consists of a four (4) bedroom, four (4) bathroom concrete structure which is the main house and a two one (1) bedroom, one (1) bathroom apartments.”

[32] The wife gave evidence that there are two children of the marriage one born on September 13, 2003 and the other on January 5, 2006. She also deposed that she has two other children who live with her in the two bedroom chattel house on the husband’s land.

[33] The wife said that she was served with a notice to quit giving her six months to quit the premises.

[34] She also says that she cannot afford any accommodation since her earnings are minimal and her expenses very high.

[35] The wife filed a statement of financial circumstances in which her only asset of substance is the chattel house and her income from employment \$180.00 per week.

The Husband's Evidence

[36] The husband filed an affidavit in response to the wife's affidavit.

[37] The husband disputed several facts in the wife's affidavit. However, he admitted that the parties lived together for 9 years between 2002 and 2011 before the marriage broke down. He also admitted that the marriage produced two children and that the matrimonial house consisted of a 4 bedroom, 4 bathroom concrete structure and two one (1) bedroom, one (1) bathroom apartments.

[38] The husband also accepted that he permitted the wife to place her chattel house on his land. He says she was a licensee only.

[39] Subsequent to the notice to quit filed in 2017 the husband said that he discovered that the land on which the wife's house was placed was in fact conveyed to the husband's son who was the product of another relationship prior to the marriage of the parties.

[40] In other words the wife was in fact benefitting from a 'licence' on the land of the husband's son rather than from him.

THE SUBMISSIONS

The Wife's Submissions

[41] Counsel for the wife, Ms. Edwards, submits that there are three considerations that must inform the court's decision on whether or not to grant leave:

- 1) whether the wife will endure further hardship if leave is not granted;
- 2) whether or not the grant of leave would cause injustice to the wife with greater hardship being caused as a result of the wife not proceeding with the application;
- 3) the circumstances which contributed to the delay in making the application.

[42] Ms. Edwards referred to section 23(3) of the Act and observed that the test to be satisfied is whether hardship would be caused to the applicant or a child of the marriage if leave is not granted.

[43] She asserts that not only will the applicant suffer hardship but the children since it is 'their' dwellinghouse which is sought to be removed from the land.

[44] Ms. Edwards submits that at this stage it is not the court's responsibility to determine whether the applicant will be successful but only to decide whether there is a reasonable case to be heard.

[45] In support of the above proposition she cites the following cases:

Proctor v Proctor (2016) FCCA 613

Althaus v Althaus (1982) FLC 91-233; and

Newall v Scarrow [2017] FCCA 1422

[46] She submits that the Court is required to consider whether a strict application of the rules will cause injustice.

[47] She contends that it would be an injustice to not allow the wife to pursue her claim since she did not pursue her claim because there was a binding agreement between the parties and that both the applicant and the children will suffer hardship if they are evicted from the land.

The Husband's Submissions

[48] Counsel for the husband, Mr. Forde, argues that the wife should not be granted leave.

He advances the following reasons:

- 1) The behaviour of the wife justified the husband's termination of her licence to occupy the land. The behaviour complained of is

giving birth to another child after the marriage and allowing an adult male to be part of her household;

- 2) He says that the decision of the wife to apply for leave was prompted only by the fact that she was given notice to quit since for five years she did not bring a claim for property settlement;
- 3) The Court's obligation is to examine all the circumstances and to determine whether actual hardships not just mere extra difficulty "would be visited upon the applicant or the children, should leave be granted."

[49] Mr. Forde submits that the only issue pertaining to leave being brought is finding an alternative spot for the applicant's chattel house. He says that these spots are not so expensive as to cause hardships as defined.

[50] Counsel contends that the application by the wife is only a "tit for tat" situation and a response to the notice to quit.

[51] For the foregoing reasons, Mr. Forde urges the Court not to grant leave.

ANALYSIS

[52] Based on the authorities cited earlier, in arriving at a decision in this matter, I must consider the following questions:

- 1) Does the wife have a reasonable prima facie case for relief?
- 2) Would denial of the claim cause the wife to suffer hardship?
- 3) Has the wife given an adequate explanation for delay?
- 4) If the explanation for the delay is inadequate, does the degree of hardship that the wife will suffer outweigh the inadequate explanation for delay?
- 5) Is there sufficient prejudice to be suffered by the husband by reason of the delay to justify a denial of the wife's claim?

[53] The above questions will now be addressed.

Does the wife have a reasonable prima facie case for relief?

[54] Having considered the affidavit evidence before the court, I am persuaded that the wife has a compelling case for hearing.

[55] The undisputed facts are that the parties lived together for 9 years in the former matrimonial home which is a concrete structure containing 4 bedrooms and 4 bathrooms along with 2 one bedroom apartments.

- [56] When the parties separated, the husband permitted the wife to place a chattel house belonging to the wife on lands which he owned or controlled.
- [57] It is also agreed that the wife looked after the children during the marriage and continues to have care and control of the minor children.
- [58] The wife alleged also that the matrimonial home was incomplete at the commencement of the marriage.
- [59] Even though the husband disputes the financial contribution of the wife, it is submitted that having looked after the two biological children of the marriage and a third child who was treated as a child of the marriage, a responsibility that continues to fall on the wife, the case for an alteration of the interest of the parties in the property is self-evident on the facts and requires no further consideration.

Would denial of the claim cause the wife or the children of the marriage to suffer hardship?

- [60] Having regard to the wife's modest means it is submitted that the inability to pursue her claim would cause hardship both to herself and the children.

- [61] The wife has been served with a notice to quit and she must seek alternative accommodation for her chattel house. This would require financial resources which the wife does not possess.
- [62] The wife's only substantial asset is her chattel house. The husband is the sole registered proprietor of the matrimonial home. If leave is not granted to the wife to commence proceedings the wife has no right or claim to this very substantial asset.
- [63] The immediate prospect is that the children will also suffer hardship.
- [64] I conclude that to deny her leave will result in hardship to the wife and the children of the marriage.

Has the wife given an adequate explanation for the delay?

- [65] The wife's explanation for the delay in pursuing a claim for property settlement is set out in paragraphs 23 – 26 of her affidavit, which read as follows:
23. "The Respondent told me that there was more than enough room for three(3) houses and I should build on the same land. He assured me it was for our children's sake.
 24. After granting of the Decree Absolute I did not pursue a claim for property settlement as the Respondent never asked me for rent and I never paid any.
 25. In fact the Respondent assured me that he was giving me the piece of land to construct my home on and I believed him as he said for the children's sake.

26. It was my belief that the parcel of land was given as fair settlement for my share and interest in both houses owned by the Respondent during the marriage.”

[66] In response to the above sections of the wife’s affidavit, the husband said that the wife had informed him that she had bought a chattel house and that he told her that for the children’s sake she could place the house on the land.

[67] The husband denied that he had promised the wife a piece of land on which she could put the house. However, he did not deny that the wife could have honestly held the opinion that the land was given to her as a fair settlement for her share and interest in the dwellinghouses owned by the husband.

[68] It is useful to consider the case of **Edmunds v Edmunds**, supra in which the Full Court of the Family Law Court gave the wife leave to institute proceedings for property settlement some 6 years and 9 months out of time.

[69] In **Edmunds**, one of the main reasons for the decision was that the wife believed that an informal agreement that she was to retain permanently a property in which she and the 3 children of the marriage resided, was binding.

[70] When it appeared to the wife that the husband was making a claim to a half-share of the said property she filed an application for property settlement well over 6 years late.

[71] The Full Court considered reasonable ,the wife's explanation as to why she did not issue proceedings sooner. The wife had said she had believed that the parties had reached a binding agreement.

[72] Interestingly, in the instant case, the husband does not deny that the wife may have held an honest belief that the land was to be conveyed to her. However, on the facts as deposed in the affidavits, it can only be said with certainty that the wife occupied the land rent-free with the husband's permission.

[73] As long as the wife's possession was not disturbed it is reasonable to conclude that she would not have instituted proceedings.

[74] In all the circumstances, I am of the view that there is a reasonable explanation for the delay.

If the explanation for the delay is inadequate does the degree of hardship that the wife will suffer outweigh the inadequate explanation for the delay?

[75] Alternatively, having regard to the hardship that will confront the wife and children of the marriage I hold the view that this a is a case in

which the degree of hardship that would be suffered by the wife and children outweighs any inadequacy in the stated reason for delay.

Is there sufficient prejudice to be suffered by the husband to justify denial of the wife's claim?

[77] The husband has not asserted either in his affidavit, or in his counsel's submissions to the court how he would be prejudiced by the late application for property settlement.

[78] It is obvious that whenever, a person has to meet an unexpected claim there will be some prejudice.

[79] It is my view, however that there is nothing in the evidence before the court to justify refusing leave to the wife.

DISPOSAL

[80] Accordingly, having considered the above issues, I have decided to exercise my discretion to grant the wife leave pursuant to s.23(3) of the Act to commence property proceedings against the husband under section 57 of the Act.

[81] Each party shall bear his/her own costs of the wife's application for leave.

Cecil N. McCarthy
Judge of High Court (Acting)