[2013] JMCA Civ 11

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 57/2009

BEFORE: THE HON MRS JUSTICE HARRIS P (AG)
THE HON MISS JUSTICE PHILLIPS JA
THE HON MR JUSTICE BROOKS JA

BETWEEN	**ANGELA BRYANT-SADDLER**	**APPELLANT**
AND	**SAMUEL OLIVER SADDLER**	**RESPONDENT**

Miss Tavia Dunn instructed by Nunes Scholefield DeLeon and Company for the appellant

Gordon Steer and Mrs Sharon Usim instructed by Usim Williams and Co for the respondent

19, 23 January 2012 and 22 March 2013

AND

SUPREME COURT CIVIL APPEAL NO 137/2011

BETWEEN	**FITZGERALD HOILETTE**	**APPELLANT**
AND	**VALDA HOILETTE**	**RESPONDENT**
AND	**DAVION HOILETTE**	**1ST INTERESTED PARTY**

AND **SIMEON DAVIS** **2ND INTERESTED PARTY**

Miss Catherine Minto instructed by Nunes Scholefield DeLeon and Co for the appellant

Gordon Steer instructed by Miss Barbara Hines of Chambers Bunny & Steer for the respondent

14, 16, 17, 29 February 2012 and 22 March 2013

HARRIS JA

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

PHILLIPS JA

[2] These two appeals arise from two different actions filed in the Supreme Court both relating to applications wherein the applicants were claiming an entitlement to pursue their claims under the Property (Rights of Spouses) Act (PROSA) and to obtain benefits enunciated in that statute, including declarations of the legal and beneficial interests in the division of the family home and other property, which applications were refused by the court. At the end of the submissions in appeal no 57/2009, which I shall refer to as the Saddler appeal, counsel requested that the court defer giving its reasons until after hearing submissions in appeal no 137/2011, the Hoilette appeal, as the main issues on appeal were similar. Although the appeals had not been formally

consolidated, the court agreed to pursue that course. These are my reasons for the orders I would make in respect of the two separate appeals.

[3] In the Saddler appeal, N. McIntosh J (as she then was) in the court below, after hearing an application filed on 29 June 2007, asking, inter alia, that the time limited to make the application for division of property pursuant to PROSA be extended to 15 January 2007, the date on which the fixed date claim form had been filed; and that the said fixed date claim form and all documents filed in support thereof be ordered to stand as valid, refused the same on 25 March 2009, indicating that the marriage had been dissolved many years ago on 11 July 1999, long before PROSA came into effect and PROSA did not have retrospective effect. The application was not considered on its merits. The learned judge granted leave to appeal, which was duly filed on 4 November 2009.

[4] In the Hoilette appeal, on a preliminary objection taken in the court below, when the fixed date claim form was set down for hearing, on the basis that he had no jurisdiction to hear the claim, Fraser J, on 4 November 2011, ruled that the fixed date claim form had been amended out of time to include a claim under PROSA and, as the amendment had been made without prior permission or extension of time to do so, the fixed date claim form was invalid and could not be corrected by a subsequent order. The learned judge indicated, however, that the claimant was still free, even at that stage, to make an application for leave to extend time, and for the grant of extension of time to file the claim under PROSA. The learned judge also granted leave to appeal (in the event that it was desired), which was duly filed on 21 November 2011.

[5] In both of these appeals, based on a review of the matters arising on the grounds of appeal as hereinafter set out, the following issues emerge:

(a) Does PROSA have retrospective effect?

(b) Is a claim form valid if (i) filed outside the 12 month limitation period stated in section 13(2) of PROSA or (ii) filed under a repealed statute?

(c) Is leave/permission together with an extension of time application required prior to the filing of a claim for relief under PROSA?

(d) Is a claim made under PROSA without leave/permission or extension of time irregular and curable by a subsequent application filed pursuant to section 13(2) of PROSA?

(e) What, if any, is the effect of the orders made in the action prior to the filing of the application under section 13(2) of PROSA?

[6] In my view it will be necessary for this court, in determining these issues, to consider the true and proper construction of the following sections of PROSA, namely: sections 2, 3, 4, 6, 7, 14, 24, and, in particular, section 13(1), (2) and (3), which is set out below:

"Division of Property

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.

(3) For the purposes of subsection (1)(a) and (b) and section 14 the definition of 'spouse' shall include a former spouse."

[7] Although the other relevant sections are referred to in more detail later in this judgment, I will nonetheless give an outline of the same:

- Section 2 of PROSA defines (for the purposes of this judgment), inter alia, "family home", as the dwelling house wholly owned by either or both of the spouses and used by them habitually or from time to time as their only or principal family residence with any land, buildings or improvements attached thereto, and used wholly or mainly for the

purposes of the household; and "spouses" to include a single woman and a single man who have cohabited as if in law they were husband and wife respectively for a period of not less than five years immediately preceding the institution of proceedings or the termination of cohabitation. A single man or woman for these purposes includes widow, widower or divorcee.

- Section 3 indicates, inter alia, that save as specifically stated, PROSA shall not apply after the death of either spouse, and every rule of law or equity shall continue to apply as if the death had not occurred; the death of either spouse shall also not affect anything done in pursuance of PROSA, and any proceedings in train while one of the spouses dies can be continued and completed including an appeal and the court can make any order as if the spouse had not died. Section 4 makes it plain that PROSA is to have effect in place of the rules of common law and equity. Section 24 preserves proceedings which have commenced under any other enactment before PROSA came into effect and any remedies in relation thereto and states that they may be enforced and continued as if PROSA had not been brought into operation.
- Sections 6, 7 and 14 respectively deal with each spouse's 50% entitlement to the family home (6); the power of the court to vary the equal share rule and the factors which the court may take into consideration (7); and the division of property other than the family home and the factors which the court can take into consideration (14).

[8] However, in order to understand the different questions involved in the two appeals, I will set out in summary the background facts in respect of each appeal.

Summary of the background facts in respect of the Saddler appeal

The Saddler claim

[9] The appellant had on 2 November 1995 initially filed an originating summons under the Married Women's Property Act (MWPA) asking for declarations, inter alia, that she had a beneficial interest in all that parcel of land situated at 8 Walford Close, Kingston 6, in the parish of Saint Andrew, being the land comprised in certificate of title registered at Volume 1177 Folio 711 of the Register Book of Titles. It was her contention that, as the parties had reconciled in 2000, she had not pursued that application. However, when the parties again separated in September 2005, her efforts to renew the originating summons were initially permitted by James J, but the summons was later dismissed by this court on 1 September 2006. The court stated that the summons, having not been served within the required 12 month period, was deemed to have expired, and to allow the proceedings to be pursued after 11 years, would be an abuse of the process of the court.

[10] It was the further contention of the appellant that, as the parties had reconciled and were operating as a family unit, she did not think that the petition filed by the respondent for the dissolution of the marriage would have been pursued. In her affidavits before the court she attempted to show that there was ample evidence for her to have concluded that the marriage continued to be extant. The respondent's

position was stridently to the contrary, insisting that the parties never renewed their relationship as husband and wife, but maintained a platonic relationship. The parties were therefore in conflict as to the status of their relationship, prior to the commencement of the claim, which position was initially reflected in the submissions of counsel for the respondent as being of significance. The decree absolute of divorce was, however, granted on 11 July 1999. A maintenance order was made in favour of the appellant by and with the consent of the respondent, but the appellant claimed that no consideration had been given to her accommodation in those deliberations, and she would therefore suffer tremendous hardship if she were unable to pursue her claim under PROSA to obtain her interest in the family home.

[11] The fixed date claim form, claiming an interest in the family home at 8 Walford Close, was filed on 15 January 2007. It was filed without any prior application for permission or for an extension of time from the court to do so. In fact that application which was filed on 29 June 2007, sought the orders previously referred to in paragraph [3] herein. The grounds of the application were that the appellant had occupied the family home firstly as the wife, and then subsequently as the common law spouse of the respondent and was therefore entitled to apply for a declaration with regard to the family home under section 6 of PROSA. Additionally, she was also entitled to apply for an extension of time to do so under section 13(2) of PROSA, particularly since the balance of hardship favoured her making such an application. As indicated previously, McIntosh J rejected the application.

The Saddler appeal

[12] The appellant appealed the decision of McIntosh J on three grounds, namely that (i) the learned judge had erred in her interpretation of sections 4 and 24 of PROSA, and also that the Act had retrospective effect, and therefore the court could exercise its discretion to grant applications for extension of time to consider proceedings under the Act and could do so from 1 April 2006; (ii) if section 13 of PROSA was interpreted so that the court did not have the power to extend time although related to facts prior to 1 April 2006, the provision for extension of time would have been rendered an "absurdity" and "absolutely useless" to all those litigants to whom the relevant events set out in section 13 of PROSA occurred prior to 1 April 2006; and (iii) PROSA could not be interpreted so that no common law spouse could rely on its provisions until five years after the promulgation of, or the coming into effect of the Act.

Submissions

For the appellant

<u>Ground (i) – the interpretation of sections 4 and 24 of PROSA</u>

[13] Counsel for the appellant submitted that, cumulatively, the effect of and proper interpretation of the above provisions is the following:

> "1. As of April 1, 2006 the rules and presumption of the common law and equity were no longer applicable in disputes between spouses in relation to property, and the new rules, as set out in the PRSA, would apply;

2. A spouse who had commenced legal proceedings in relation to property pursuant to legislation which pre-existed the PRSA would be entitled to have those proceedings determined in accordance with the provisions of that pre-existing legislation;

3. Any remedy available to the spouse under that pre-existing legislation would continue to be available even after the coming into effect of the PRSA for the purposes of determining those proceedings."

[14] Counsel submitted that, in the Saddler claim, the proceedings had first been instituted under the MWPA but had been dismissed on a procedural point, rather than on the merits, so there was no impediment to proceeding under PROSA. In any event, it was submitted, the remedies available under PROSA were entirely different.

Grounds (ii) and (iii) - the interpretation of section 13 of PROSA- retrospective effect

[15] Counsel referred to sections 2 and 6 of PROSA relating specifically to the definition of "spouse" (which includes unions between unmarried couples) and the triggering effect of the entitlement to apply for division of the family home, respectively, under PROSA and submitted that the combined effect of those sections is as follows:

"1. Spouses whose marriage or cohabitation commenced prior to April 1, 2006 and ended after that date would be entitled to commence proceedings under the PRSA, provided they had maintained the relationship for a minimum period of 5 years.

2. Spouses who had terminated cohabitation or their marriage on April 2, 2006 would have been entitled to commence proceedings under the PRSA on April 2, 2006 or afterwards,

> notwithstanding that their entire relationship would have predated the existence of the PRSA:"

Counsel submitted further that the specific wording of section 13 of PROSA allows the exercise of the discretion of the court to extend time if the proceedings had not been commenced within the limitation period of 12 months set out therein. Counsel also encouraged the court to apply the "mischief rule" of statutory interpretation in determining the correct clarification to be accorded the provisions of PROSA.

[16] In supplemental written submissions, having by then had sight of the decision of this court in **Brown v Brown** [2010] JMCA Civ 12, counsel submitted that as the learned judge in the court below had arrived at her decision on the basis that PROSA did not have retrospective effect, and this court having decided in **Brown v Brown** on 26 March 2010 that it did, her decision was clearly flawed, and must be overturned. The application for extension of time, having not been decided on the merits, counsel argued that it should be remitted to the court below for a decision to be made after hearing the parties under cross-examination, relative to their relationship and the issue of 'cohabitation', to ascertain whether the appellant is entitled to relief under PROSA, having regard to all the circumstances including the delay in pursuing her claim.

[17] In oral submissions counsel had by then had sight of another decision of this court which impacted on the matter namely, **Delkie Allen v Trevor Mesquita** [2011] JMCA Civ 36, and was therefore impelled to respond to a position taken by the respondent that the fixed date claim form was invalid, the appellant having not

obtained leave and extension of time prior to the filing of the fixed date claim form. Counsel indicated that the fixed date claim was valid as it complied with all the requirements of the Civil Procedure Rules (CPR) and the specific requirements of section 13(2) of PROSA, as the application for extension of time had been filed, and the section does not require that the application for extension of time precede the filing of the fixed date claim form. Even if that were so, counsel argued, and leave and extension of time must be applied for and granted prior to the filing of the fixed date claim form, the claim form would only be irregular, and such an irregularity could be remedied by the requisite leave being granted by the court retrospectively, during the course of the proceedings. Counsel relied on **Re Saunders (a bankrupt); Re Bearman (a bankrupt)** [1997] 3 All ER 992 and **Diedre Anne Hart Chang v Leslie Chang** HCV03675/2010 delivered 22 November 2011, the latter case being endorsed by Panton P on 11 January 2012, in this court on a procedural appeal (SCCA No 142/2011, delivered 11 January 2012), in support of these submissions.

For the respondent

[18] Counsel for the respondent submitted that, as the originating summons under the MWPA had been dismissed from 1 September 2006, the respondent was entitled from then to the benefit of the property at 8 Walford Close, Kingston 6. Counsel submitted further that the parties had been divorced since 1999 and since to benefit under PROSA, the appellant had to show that she had cohabited with the respondent for five years prior to commencing proceedings and on the evidence could not do so, the appellant had no locus standi to obtain any benefits under PROSA. Her case

therefore had no merit and was doomed to fail. Counsel referred to several authorities and definitions in various texts in respect of "cohabit" and "conjugal relationship" to support the contention that the appeal could not succeed.

[19] In written supplemental submissions, counsel relied heavily on **Allen v Mesquita** and referred to **Chang v Chang**. He submitted that the true and proper construction of section 13(2) of PROSA is that the appellant was only entitled to apply to the court for extension of time prior to the commencement of the proceedings. That not having been done, there was no fixed date claim form before the court. Counsel submitted orally that there was power in this court to differ from the ruling in **Chang v Chang** and it could adopt the ruling in **Allen v Mesquita**. Counsel submitted that section 13(2) does not permit of an interpretation for leave of the court to be granted subsequently. Counsel referred to section 44(3) of the Family Law Act in Australia, submitting that that section before its amendment was similar to section 13(2) of PROSA and so cases decided interpreting that particular provision ought to give some guidance. He referred specifically to **Butler v Butler** [1990] 1 FLR 21. He submitted that the filing of the fixed date claim form without leave made it void, not irregular, and therefore it cannot be cured. Counsel accepted that section 13(2) of PROSA had retrospective effect and therefore one could apply to the court subsequent to the triggering events set out in section 13(1) of PROSA even after 20 years had elapsed, and the court could still exercise its discretion to extend the time, but, he stated, the application for leave and extension of time must be made first, before the

commencement of the proceedings. He submitted that the section is clear and unequivocal and ought to be construed accordingly.

[20] In reply, counsel for the appellant submitted that the respondent, not having filed a counter notice of appeal, ought not to be permitted to pursue his arguments on the issue of cohabitation. Additionally, she argued, that question is a matter of fact and must first be dealt with in the court below before this court can make a determination on the issue. Counsel submitted also that no reliance ought to be placed on any authorities dealing with section 44(3) of the Australian Family Law Act, either before or after its amendment, as the wording of that provision is not similar to section 13(2) of PROSA. It was counsel's contention that **Butler v Butler**, having been based on section 44(3) was inapplicable to the matter before us and could give no assistance whatsoever. In **Butler**, she submitted, the language of the relevant statute was mandatory and inflexible, whereas in the instant case, the language of the relevant provisions of PROSA, specifically section 13(2), is merely directory.

Summary of the background facts in respect of the Hoilette appeal

The Hoilette claim

[21] On 27 April 2006 the appellant filed a fixed date claim form with affidavit in support thereof, stated to have been filed under sections 16 and 17 of the MWPA for the division of certain property, namely the parties' matrimonial home at 76 Caribbean Park Estate, Tower Isle in the parish of Saint Mary, being all that parcel of land registered at Volume 944 Folio 28 of the Register Book of Titles, and property at

Huddersfield in the parish of Saint Mary, and other orders consequential thereto. The parties were married on 21 December 1982. It was the appellant's contention initially that he was entitled to a greater share of the matrimonial home as he had always earned more money throughout the marriage and had made the greater financial contribution. With regard to the Huddersfield property, he claimed that the respondent had constructed a dwelling house on the property which comprised a two-storey unit with three bedrooms on the upper floor alone. The construction, he said, had been achieved by the use of funds from their joint savings account. By September 2007, the appellant's position was "that in the interest of expediting a resolution of this matter", he would agree to a 50% division of all real property owned by the parties.

[22] The respondent's position was that the matrimonial home was owned jointly and equally by the parties, but the Huddersfield property was owned jointly by their biological son Davion Hoilette, and their informally adopted son, Simeon Davis. She made a claim in the said proceedings for maintenance, and also claimed an interest in two buses registered as PP-2023 and PD-2799 respectively, the first of which, she claimed, was purchased with the use of her savings, and the second through earnings from the operation of the first bus, both of which she claimed had been operated by the appellant exclusively.

[23] Many orders have been made by the court in this matter, commencing with the order made by P Williams J on 10 July 2007 granting permission to amend the fixed date claim form to include a claim under PROSA (sections 16 and 17 of the MWPA having been repealed on 1 April 2006, when PROSA came into effect) and stating that

the amended fixed date claim form filed on 20 June 2007 to that effect, "stands as a valid claim form". On 7 November 2007, with the consent of the parties, Thompson James J made a declaration that the appellant was the legal and equitable owner of 50% of the matrimonial home at 76 Caribbean Park Estate. The property was to be valued and the appellant was to buy the respondent's share, or the property was to be sold by auction or by private treaty. An order was also made for the respondent to account for all rents received from the property over a particular period and to pay to the appellant his 50% share of the rent collected during the said period. In the following year, on 5 November 2008, by and with the consent of the parties, Thompson James J ordered, inter alia, that the matter be referred to mediation.

[24] Over a year later, on 14 January 2010, F Williams J ordered inter alia that the appellant was permitted to issue a witness summons to the National Housing Development Corporation Limited for a representative from that body to attend court for the purpose of providing documents in relation to the application for title in respect of the Huddersfield property. Previously, an application had been filed by the appellant for the committal of the respondent on the basis of her failure to account for the rental in respect of the matrimonial home. That application was adjourned by Anderson J on 6 May 2010, to 8 July 2010, and on 7 July 2010, the trial of the matter was adjourned by Campbell J to 24 January 2011. The respondent's application to vary the consent order was adjourned by Campbell J to 7 January 2011, and other notices of application which were before him were also adjourned to 11 August 2010. On 24 August 2010, Simmons J refused to vary the consent order. Later on in that year, Rattray J on 3

December 2010 made an order that the 1st and 2nd interested parties, namely the sons who had by then become interveners in the action (by order of the court made on 2 February 2010) give specific and standard disclosure of certain documents requested by the appellant.

[25] The parties had obtained the decree nisi for dissolution of marriage on 15 November 2004, and the decree absolute on 10 March 2010.

The decision of Fraser J

[26] Despite the many appearances before the court by the parties and the several orders made in the matter as set out above, some of which had been acted on by the parties, when the matter finally came before Fraser J for trial the respondent took a preliminary point that the fixed date claim form was invalid based on the decision of **Allen v Mesquita**. The respondent utilized the arguments which had been before that court namely, that there had been no prior application for leave or extension of time to file the fixed date claim form and that the invalidity of the claim form could not be subsequently cured. The appellant's response was that Fraser J had no power to interfere with the judgment of P Williams J ordering the fixed date claim form to stand, as P Williams J was a judge of coordinate jurisdiction. Fraser J held that being bound by **Allen v Mesquita,** and since that authority held that the grant of leave was a precursor to the application for extension of time, and both must be effected prior to the filing of the proceedings, neither of which had occurred, which could not be corrected by a subsequent order, the proceedings were invalid. There was, he found,

therefore "no valid claim under the PRSA before the court on which to proceed". He also held, pursuant to **Brown v Brown,** that he could make that order, in spite of the order made by P Williams J, as the jurisdictional point had not been raised before P Williams J.

The Hoilette appeal

[27] The notice of appeal filed on 21 November 2011 contained four grounds of appeal, which challenged the orders of Fraser J as follows:

> (i) The learned judge erred in ruling that there was no valid claim before the court when the application was made to amend the claim form to include a claim under PROSA.
>
> (ii) The learned judge erred when he relied on **Brown v Brown** and **Allen v Mesquita,** as the claims which were the subject of those decisions had been commenced under PROSA without leave and or extension of time (which the latter case decided was required), and so there was no valid claim before the court at the time when the application for extension of time was made, which was not the position in the instant case.
>
> (iii) The learned judge erred in failing to recognize the special circumstances of the instant case in that final orders had been

made, namely the consent order on 7 November 2007, which had been acted on by the parties, so there could be inconsistency on the record, and other orders had been made without objection;

(iv) The learned judge erred in applying the jurisdictional point raised in **Brown v Brown** to the instant case, as the issue of jurisdiction was at the root of the claim in **Brown v Brown** as the marriage between the parties had been dissolved before PROSA had come into effect.

Submissions

For the appellant

Ground (i)

[28] It was counsel's contention that the wording of section 13(2) of PROSA was clear and unequivocal. Parliament had given the court an unfettered and flexible discretion with regard to extending the time to make the application for benefits under PROSA. There were no limiting and or restrictive words; there were also no words requiring an application for leave or extension of time prior to any claim being made for reliefs. Counsel argued that if Parliament had intended to create a condition precedent in the section it would have done so. Additionally, even if that were so and the section was to be given that interpretation, the failure to request leave in advance of the filing of the claim, would not make the proceedings an irrevocable nullity, but rather existing

proceedings capable of redemption by the late giving of leave. Reference was made to the dictum of Lindsay J in **Re Saunders**. The proceedings, counsel submitted, would certainly not be invalid or void ab initio, as Fraser J had found, especially since the filing of the fixed date claim form had complied with the provisions of the CPR (rules 8.1 and 3.7). Counsel relied on the dictum of Edwards J in **Chang v Chang** to say that a claim form once filed is an administrative procedure and is not invalid, unless its life has expired, with no application for extension having been filed, or is subject to being struck out as an abuse of the process of the court.

Ground (ii)

[29] Counsel submitted that the fixed date claim form in the instant case having been filed under the MWPA and not PROSA, the learned judge ought to have found either (i) that there was no claim under PROSA and so the application which was granted by P Williams J would have preceded the claim under that statute, with which the respondent could have no objection or (ii) that the claim having been filed under the provisions of a statute which had been repealed, the claim would have been irregular and could have been amended to cure that irregularity as was done in **Goodison v Goodison** SCCA No 95/1994, delivered 7 April 1995. Alternatively, counsel argued that sections 16 and 17 of the MWPA were procedural provisions and did not create substantive rights nor were they causes of action, but they were merely the vehicle through which the courts dealt with the division of property between married couples in a summary way, pursuant to well-established equitable principles of implied, resulting and constructive trusts. In support of these submissions counsel

relied on **Chin v Chin** SCCA No 115/96 delivered 20 December 2005, **Pinnock v Pinnock,** SCCA No 52/1996 delivered 26 March 1999, **Gissing v Gissing** [1970] 2 ALL ER 780 and **Pettitt v Pettitt** [1969] 2 ALL ER 385. The claim could therefore have been saved as having been filed under section 48 of the Judicature (Supreme Court) Act (JSCA) which permits the determination of questions with regard to the properties of parties by a judge of the Supreme Court. This position, was further underscored, counsel submitted, by the fact that if spouses are unable to qualify under the provisions of PROSA, they may still pursue their rights pursuant to the common law.

Grounds (iii) and (iv)

[30] Counsel argued that there was no objection to the order made by P Williams J, and there had been no appeal in relation thereto. The order therefore would continue to stand until reversed by the Court of Appeal, but could not be reversed by a single judge of coordinate jurisdiction, and especially since there had been a consent order with regard to the ownership of the matrimonial home, which had been acted on. There had also been enforcement proceedings, namely the committal proceedings, and all the affidavits filed in the matter had been subsequent to the order of P Williams J and contained evidence relevant to the claims being made under PROSA, so there could be no claim that any real prejudice had occurred. Counsel also questioned whether the decision of **Allen v Mesquita** delivered on 7 December 2011 could affect the rulings of the court made at an earlier date, namely 10 July 2007, when that court could have had no knowledge of the ratio decidendi of the more recently decided case, and in

circumstances wherein the earlier decision had not been appealed, and which as counsel had already submitted, had been acted on by both parties.

For the respondent

Grounds (i) – (iv)

[31] Counsel submitted that the claim when filed under the MWPA was invalid as the provisions under which it had been filed had been repealed. The amendment to the claim under PROSA was also invalid as it did not comply with the provisions under that Act. Counsel submitted further that the two statutes, namely MWPA and PROSA were diametrically opposed to each other, and could not co-exist in "any shape or form". He referred specifically to section 4 of PROSA which, he said, stated that the old common law presumptions had been removed, for example, the presumption of advancement. Counsel submitted that previously when the claim had been commenced by originating summons in circumstances wherein the parties were not married, the court could easily direct that the matter continue as if begun by writ and statement of claim as there was no difference in the application of the law, whether the parties were married or not. That was not so under PROSA, he argued, as the court could adjust property rights according to what the court considered to be fair (sections 6, 7 and 14), and the contribution of the wife to the acquisition of assets did not have to be financial as existed in the past, where if she had not worked throughout the marriage, and therefore had made no financial contribution to the properties acquired in the marriage, she would have been awarded nothing. The statutes were therefore not compatible and

one could not segue seamlessly from one to the other. Counsel conceded, however, that section 11 of PROSA preserved the approach required under the repealed sections 16 and 17 of MWPA, but submitted that the appellant had not pursued the protection of that section in the action, and rule 8.8 of the CPR requires the claimant to state the provisions of the statute under which relief is being sought.

[32] Counsel submitted that on any true construction of sections 13(1) and 13(2) of PROSA when read together, the application for extension of time cannot be made retrospectively as the words in the provisions could only be referring to the commencement of the claim. Counsel submitted that the decision in **Brown v Brown**, in dealing with retrospective application, had decided that spouses who had separated before PROSA came into effect could still claim benefits under the statute. That case, he argued, was not dealing specifically with the issues which arose for determination in **Allen v Mesquita**, which related to the question of the efficacy of the claim if the application to bring the matter under the statute had not been made prior to the filing of the proceedings. He referred to several cases which, he submitted, ought to assist the court in its deliberations as to the correct interpretation of section 13 of PROSA. He was clear that section 13 was not a procedural section, but was a section conferring jurisdiction on the litigant under PROSA, and as a consequence, he relied on the cases which stated that the principle of *nunc pro tunc* (now for then), which permitted the application for leave or extension to be made subsequent to the filing of the proceedings, was not applicable if relating to provisions granting jurisdiction. He submitted that section 13 of PROSA was a limitation section, and in that specific regard

had no retrospective effect, and that although the respondent had no difficulty with the orders already made in the claim, P. Williams J had no basis on which to make the order that she did. Additionally, to date there had been no application for extension of time and the appellant had not put any evidence before the court for its consideration, in order to exercise its discretion in his favour. As a consequence, he submitted, the appeal had no merit and ought to be dismissed.

Discussion and analysis

[33] As already indicated, the issues relevant to these appeals were set out in paragraph [5] herein, namely: (a) Does PROSA have retrospective effect?; (b) Were the claim forms in the respective appeals invalid? (c) and (d) Are leave and/or extension of time to file the claim form required prior to its filing, or can they be obtained effectively, lawfully thereafter?; and (e) Would all the orders made subsequently be valid also?

Does PROSA have retrospective effect?

[34] In **Brown v Brown**, Cooke JA stated that section 3 of PROSA, when read in conjunction with section 24, makes it clear when it is that the provisions of PROSA do not apply. He stated further that the provisions do not exclude a claimant who has not proceeded under the old regime from proceeding under PROSA. With regard to section 4 of PROSA, Cooke JA opined that the legislature had by that section directed that "there was to be an entirely new and different approach in deciding issues of property rights as between spouses", and indicated that section 4 set out what that approach would be. Indeed, Cooke JA posited that the provisions of section 4 of PROSA were

directions "to the court as to the approach irrespective of when the divorce or termination of the relationship took place provided the claim is within the ambit of the Act". The view then taken by the learned judge of appeal was that when the new definition of "spouse" was understood and the provisions of sections 6 and 7 dealing with the family home applied, one could only conclude that PROSA had retrospective effect. He stated in para. [12] of his judgment that the language and import of the sections as he had construed them, "reflect the intention of the legislature that persons who were divorced, or who had terminated their relationships before the coming into operation of the Act were to have its benefits". Morrison JA and I endorsed these sentiments.

[35] Indeed Morrison JA expressly stated that there were several indicia in PROSA which suggested that the Act was to have retrospective effect. He referred, inter alia, to what he called the expanded definition of a spouse to include persons in common law relationships of the specified duration. He set out his reasoning and conclusion with his usual clarity. This is how he put it (para [74]):

> "It seems to me that this provision must have been intended to operate retrospectively, in the sense that as of the date when the Act came into force all persons who satisfied the new statutory criteria would become immediately entitled to take the benefit of the new provisions, notwithstanding the fact that the requisite five year period had already elapsed from before the Act came into force. It would also follow from this that persons who had not yet completed the five year period as of that date would be able to count the time already elapsed in calculating the end of the period. To read this provision prospectively, it seems to me, would mean that persons in a common law relationship would be obliged to wait out the five year qualification period, reckoned as of the

> date the Act came into force, before being able to bring proceedings under the new provisions. This is a result that I consider to be as startling as it would be unjust."

[36] Morrison JA also stated that the only clear interpretation which could be accorded sections 3 and 24 of PROSA was that save as specifically excluded, the provisions should apply to every other situation from the effective date of the statute. With regard to sections 13 and 14 of PROSA, he noted that these sections referred to the fact that a "former spouse" was entitled to apply under PROSA, and he concluded that this was a further measure of the legislature protecting the rights of persons which had accrued in the past, for, he reasoned, if that were not so, and you were no longer a spouse and unable to pursue your claim under sections 16 and 17 of the MWPA (which would have been so even before it was repealed, in keeping with the decision in **Mowatt v Mowatt** (1979) 16 JLR 362, the marriage having been already dissolved), and you were also unable to pursue a claim under PROSA, you would only be left with the ordinary common law action with all its attendant difficulties, condemned from over 35 years ago, which result, he stated, would not only be anomalous and unfair, but also completely at variance with the emphatically articulated objectives of PROSA.

[37] For my own part I found that, on any true and proper construction of PROSA, as well as by necessary and distinct implication, the Act had retrospective operation. I also agreed that "simple fairness" would dictate retrospective application of the statute. I

was also persuaded that the inclusion of "former spouse" in sections 13 and 14 of PROSA recognize:

> "rights existing for sometime immediately preceding the operation of the Act and contemplates persons who were once spouses applying to the court for division of property even if the parties were divorced by the grant of a decree of nullity or dissolution of marriage sometime before the commencement of the operation of the Act." (para [121])

[38] It is clear therefore, beyond question, that it has already been determined by this court that PROSA has retrospective effect. The fact that the decree absolute had been granted to Samuel Oliver Saddler on 11 July 1999 was not an absolute bar; it did not mean that PROSA did not apply to the Saddlers' relationship and that their rights could not be determined by the application of its provisions. McIntosh J would therefore have erred in this regard. Of course, the parties would nonetheless have to comply with section 13 (2) of PROSA, in order to obtain any benefits under the Act.

Is the claim form valid if (i) filed outside the 12 months limitation period stated in section 13 (2) of PROSA or (ii) filed under a repealed statute?

[39] This ground will be resolved, in part, on the court's determination of the true and proper construction to be given to the words in section 13(1), (2) and (3) of PROSA, which has been set out previously in paragraph [5] herein.

[40] With regard to the approach to be undertaken in construing particular provisions in a statute, I accept the approach adopted by Brandon J in **Powys v Powys** [1971] 3 All ER 116 at 124 where he said this:

> "The true principles to apply are, in my view, these: that the first and most important consideration in construing an Act is the ordinary and natural meaning of the words used; that if such meaning is plain, effect should be given to it; and that it is only if such meaning is not plain, but obscure or equivocal, that resort should be had to presumptions or other means of explaining it."

[41] It is clear that section 13(2) is a provision which sets out a time line for the application for division of property under PROSA. There are certain events which trigger the right to apply. They are set out in section 13(1) (a), (b), (c) and (d) above. But the application if being made under subsections (a), (b) or (c) shall be made within 12 months of the dissolution of the marriage, termination of cohabitation, annulment of marriage, separation **or such longer period as the Court may allow after hearing the applicant**. So it is clear that the time to apply under PROSA can be extended, and that would be effected by the exercise of the court's discretion.

[42] It is therefore my view that the words in section 13 are plain and unequivocal and must be given their ordinary and natural meanings. Once a spouse as defined in PROSA applies to the court on the basis of the matters set out in section 13(1)(a) – (d) in accordance with section 13(2) of PROSA, and the claim form is in compliance with Part 8 of the Civil Procedure Rules relating to the commencement of proceedings, the claim would be valid. The only submissions made by counsel challenging the validity of the claim form relate to: (i) whether leave is required together with an application for extension of time if the time limit under section 13(2) of PROSA has not been exceeded, and if that is so, when ought those applications to be filed? (which questions will be

dealt with under issues (c) and (d)), and (ii) the fact that the Hoilette fixed date claim form was filed under a statute which had been repealed at the time of its filing, namely, the MWPA.

[43] Initially, as already indicated, there was a submission on behalf of the respondent in the Saddler appeal that the appellant did not have any locus standi to make an application under section 13(1) of PROSA. However, as that is a matter of fact which would first have to be decided by the trial judge if the matter proceeds to trial, by way of viva voce evidence, I will say no more about that. The parties, however, were divorced in July 1999 which would make them former spouses under PROSA.

[44] Either as former spouses (Saddler claim) or on the basis of separation without any reasonable likelihood of reconciliation (Hoilette claim), prima facie, the parties would have appeared to have been entitled to apply under section 13(1) of PROSA, to obtain the statutory remedies open to them under sections 6, 7, 14 and 23 of the Act. Their claim to apply under PROSA could only be defeated by their failure to comply with section 13(2). That section is a limiting section, and thus provides a limitation defence. A fixed date claim form filed under section 13 claiming relief permitted under PROSA could not therefore be struck out as an abuse of process simpliciter. If filed outside the time limited in the section, 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 in the section. 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. If the time is not extended by the court, as the matter could proceed no further, the limitation defence would succeed, as although a procedural defence, it is a complete defence, and the claim would be time barred. Before that application is made, however, the claim, in my view, is not invalid. The words in the statute, in my opinion, give the court a wide discretion to permit persons to access the benefits provided in PROSA, particularly since the statute is dealing with the protection of the rights of persons within families.

[45] In fact 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.

[46] In the Saddler claim the fixed date claim form was filed in January 2007, and the application requesting that the time be extended for the filing of the claim to January 2007 was filed in June 2007. In my view the claim was not invalid, but irregular, and could not proceed if the order was not granted by the court. In the Hoilette claim the amended claim form was filed on 20 June 2007 and the order made on the application filed for it to stand on 10 July 2007. Without that order the claim could not proceed. Of course it must be taken as a given that in order for the application for extension to be successful and to obtain the exercise of the discretion of the court in favour of the applicant, the applicant must set out the length of the delay, the reasons for the delay, whether the claim is worthy of the grant of extension and whether there is prejudice to the other party (**Allen v Mesquita**). As indicated the question of whether leave was required will be dealt with later in this judgment.

[47] The fixed date claim form in the Hoilette claim was, as stated, subject to another challenge. It had been filed under the MWPA which had been repealed a few weeks

before. The issue therefore was: was there a valid claim form before the court in July 2007?

[48] It has been well settled, perhaps since the decision in **Pettitt v Pettitt**, that sections 16 and 17 of the MWPA (similar to section 17 of the Married Women's Property Act, 1882 in England) only provided a vehicle for the court to declare the respective interests of the parties in the property in question. As stated with the utmost cogency and clarity by Lord Morris of Borth-Y Gest at pages 392I-393A, section 17 was a purely procedural section. He indicated:

> "It gave facility for obtaining speedy decision. It related to 'any question between husband and wife as to the title to or possession of property'. In regard to a question as to the title to property the language suggests a situation where an assertion of title by either husband or wife has been met by a denial or by counter-assertion on the part of the other. The language is inapt if there was any thought of taking title away from the party who had it. The procedure was devised as a means of resolving a dispute or a question as to title rather than as a means of giving some title not previously existing. One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept entirely separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this, in my view, negatives any idea that s.17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to the title to property the question for the court was -'Whose is this' and not – 'To whom shall this be given'."

[49] The court was not therefore determining what was fair and equitable between the parties, but declaring their rights as they existed and there was no power to take

property owned by one party and give to the other. The power accorded the court under the MWPA and PROSA are therefore entirely different. The regime of PROSA is to achieve fairness between parties in a family union with respect to the family home, and in respect of other property owned by them by recognizing each party's contribution through various means.

[50] However, the fact that the court is empowered differently under the two statutes does not mean that the court could not permit the amendment of the proceedings incorrectly brought under the MWPA to continue as if commenced under PROSA. The first question one would have to consider is: could the fixed date claim form filed under the repealed statute yet be valid so as to permit the later possible amendment thereto?

[51] By section 48 of the JSCA, a judge of that court was given the power to recognize all equitable estates, titles and rights and all equitable duties and liabilities, and remedies and to grant such relief as could have been granted in the Court of Chancery before the passing of the JSCA. The court was also given the power to give effect to all legal claims, demands, estates, rights, duties, obligations and liabilities existing at common law or by any custom or created by statute. In fact, section 48(g) of the JSCA reads thus:

> "The Supreme Court in the exercise of the jurisdiction vested in it by this Act in every cause or matter pending before it shall grant either absolutely or on such reasonable terms and conditions as to it seems just, all such remedies as any of the parties thereto appear to be entitled to in respect of any legal or equitable claim properly brought forward by them respectively in such cause or matter; so that as far as possible, all matters so in controversy between the said

> parties respectively may be completely and finally determined, and multiplicity of proceedings avoided."

[52] I agree with counsel for the appellant in the Hoilette appeal that in filing the fixed date claim form, regardless of its inaccurate title, the claimant wished the court to determine between the parties, their respective common law, equitable and legal rights and remedies. It would have been a valid claim, and the court is also enabled under PROSA to determine those rights and remedies. But even if not, the real question would be: was all the relevant information before the court and would the defendant have been taken by surprise? At worst, the incorrect title would be considered an irregularity in procedure and once the court is still able to resolve the substantive issues in spite of the irregularity, the court would proceed (see **Goodison v Goodison**). Additionally, if the mode of commencement of the proceedings was wrong in respect of the type of claim form used, the defect could be cured. Lord Templeman in delivering the decision of the Board in **Herbert W Eldemire v Arthur W Eldemire** (1990) 38 WIR 234 relating to a case brought by originating summons which perhaps should have been begun by writ, and dealing with a claim on behalf of a beneficiary in a will in respect of property held in trust, indicated that as a general rule, although the originating summons may not be the appropriate machinery for resolving disputed facts, the court could direct that there be cross-examination on the affidavits or that the proceedings should continue as if begun by writ, or direct that a fresh proceeding be brought by writ. The important point however was, as he stated, "In general the modern practice is

to save expense without taking technical objection, unless it is necessary to do so in order to produce fairness and clarification."

[53] In this case, whether the matter had commenced in March 2006 or on 1 April 2006, the procedure would have been by way of fixed date claim form as allowed by both the MWPA and PROSA, in spite of the fact that there were disputed issues of fact to be resolved by the court. As a consequence, the amendment to the claim to refer to PROSA instead of the MWPA, would not have affected the parties in any way whatsoever in respect of those issues, and the amended claim under PROSA had already been served and was before the court many months before the order was made by P Williams J. I have already decided that the claim was a valid one in which there could have been an amendment. The submission therefore that one could not segue from one claim under MWPA to PROSA, in my view, has no merit.

Are permission and extension of time required under PROSA, and if not obtained prior to the filing of the claim can they be obtained subsequently?

[54] As indicated above, section 13(2) states the time within which the application for benefits under PROSA shall be made. However, the words, "or such longer period as the court may allow" make it clear that the court has a discretion to extend the time set out in the statute. That does not seem to be in dispute. The issue is: when can that discretion be exercised, in the light of the words of the statute? If an applicant is desirous of filing an application outside the 12 month period allotted in the section within such longer period as the court may allow, the following questions arise:

(i) Would an applicant need to apply for leave and for extension of time to apply under section 13 of PROSA?

(ii) Would an applicant need to obtain leave and or extension of time under section 13 of PROSA before filing the fixed date claim form?

(iii) Having not obtained leave and or extension of time prior to the filing of the fixed date claim form, can the application for leave and or extension of time be filed subsequently for either the continuation or the commencement of the claim?

[55] It is crucial in the analysis of PROSA to review carefully the specific words in the various provisions, the regime created by the legislation and the mischief that the legislation was promulgated to address, as each statute has a different intent and purpose and the provisions must be examined within that framework. Section 13 does not specifically state that the application must be made with leave of the court. But the provision does speak to a longer period which the court may "allow".

[56] In the Stroud's Judicial Dictionary of Words and Phrases, 5th edition, by John S James, Volume 2, (D-H), at page 924, under the word "EXTEND" the following is stated:

"EXTEND.

(1) Where there is a prescribed time for doing a thing but an express power is given, e.g. to a Taxing Master, to 'extend' that time, such power may be exercised after the prescribed time has expired (**Re Macintoch** [sic] [1903] 2 Ch 394); so, of the words 'or within such further time as may be allowed,' e.g. by the magistrate (**R v Lewis** [1906] 2 K.B. 307).

(2) 'Extended period' (Land Commission Act 1967 (c.1), s.46 (2)). Where there is, as under this section, a prescribed time limit for serving a notice, but an express power is given to 'extend' that time, an application for extension of the period must be made before the expiry of that period. The word 'extended,' in its natural sense, contemplates the continuance of a period which has not yet come to an end (**Secretary of State for Scotland v Tronsite**, 1978 S.L.T. 34; not following **Re Macintosh** [1903] 2 Ch. 394, see main work p. 987)."

[57] In **Re Macintosh**, the provision required the Taxing Master "to make his certificate in a month (unless the said master shall extend the time to enable him to make his certificate), or the order is to be of no effect". Vaughan Williams LJ indicated that "if you take the actual words of the order itself and have nothing else to assist you at all, prima facie the power to extend must be exercised within the limit of the month". However when read with Order LXV rule 27, sub-rule 57, which allowed for an extension of time even though the application for extension of time was made after the allotted time, the court held that upon the construction of the order read in conjunction with sub rule 57, the power could be exercised even after the time appointed had elapsed. The Taxing Master, the court held, would not extend the time without considering whether there were circumstances which would justify him in doing so, having regard to the object of the statute which, Williams LJ stated, should not be used in a way which could be considered oppressive.

[58] In **R v Lewis**, the relevant provision, rule 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates) 1890, stated that notice of appeal to a magistrate must be given to him or to his clerk and to the pilotage authority within seven days after receipt from the pilotage authority of a notification of its decision, "or within such further time as may be allowed by the magistrate". It was held by the court that under that rule, a magistrate has power to extend the time for giving notice of appeal, although the application for an extension of time is not made to him until after the expiration of the period of seven days within which the notice of appeal ought to have been given. It is true, however, that the court appeared to do so reluctantly, indicating that the decision turned on the peculiarity of the practice and the short time frame within which notice was expected to be given to two different bodies, nearly contemporaneously. Indeed Lord Alverstone CJ in deciding the matter began his deliberations stating that the decision of the court turned upon the proper construction of the rule, and he posited the question: "Are we to hold that the principle which has in many cases been held to govern the question of an extension of time after the original time limit has expired applies to this particular rule?" He found, as indicated, that it did not. The court in **R v Lewis** referred to **Re Macintosh** and indicated that the interpretation it had given to the rule was due to the "peculiar rule" in the case, for if otherwise, the rule would have been reduced to such minute proportions "that it would hardly be worthwhile to make it". However, the court also endorsed counsel's submission that in any event, the magistrate, even after the

allotted time, would have to consider the exercise of his discretion and would not do so if the delay was great.

[59] These cases and the many authorities cited to the court, some of which were helpful and others not, make it even clearer to me how important it is to examine the words in the statute closely and the mischief with which the provisions attempted to grapple. In **Brown v Brown** Morrison JA in tracing the legislative history of PROSA referred to the establishment of the Family Law Committee in October 1975 charged with the responsibility, inter alia, to examine the existing law relating to divorce and other areas of matrimonial and family law and to make recommendations for reform. In the interim report, produced by the committee, "the Green Paper", it was recognized that there were several challenges facing persons with regard to the division of matrimonial property. Morrison JA set out in paragraph [25] of his judgment, some of the concerns expressed by the committee:

> "The present law relating to ownership of matrimonial property is unsatisfactory, creates injustice between the parties and is out of touch with social realities. It recognizes only money contribution to the acquisition of property and ignores the contribution made by a wife in the performance of her role as a mother and a homemaker."

The general proposals read thus:

> "1. That legislation should be enacted to give to the Court a wide discretion upon application by either spouse to order the division of matrimonial property, however held, between the spouses, and that this power should apply to all marriages, whenever solemnized.

2. That the proposed legislation should contain guidelines for the exercise of judicial discretion in this respect; and

3. That the proposed legislation should contain specific provisions governing the matrimonial home."

[60] The memorandum of objects attached to the Bill to be enacted sought, inter alia: (i) to bring common law unions, which should be common law spouses who were single and had cohabited for a period of not less than five years, within the ambit of the provisions with respect to the division of property on the breakdown of the union; (ii) to give the Supreme Court, the Family Court and the Resident Magistrates Courts the jurisdiction to hear all matters relating to property owned by either or both spouses; (iii) to make provision for the family home, and other property owned by either or both spouses, to be divided equally except where that would not be equitable; (iv) to provide for other matrimonial matters such as ante and post-nuptial agreements, the declaration of property rights and the determination of the value and share of property; and (v) to make consequential amendments to other relevant family and matrimonial legislation.

[61] So PROSA was promulgated to give a wider group of persons access to the courts for division of matrimonial property, based on various contributions, (that is other than money,) throughout the marriage or common law relationship. The court has the jurisdiction under Part II of PROSA, pursuant to section 6, to order that each spouse is entitled to one–half share of the family home and in section 7 to vary that 50% rule, in exceptional circumstances. In section 14 of PROSA, the court is

empowered to divide other matrimonial property in accordance with certain factors as set out therein, namely (i) the contribution to the acquisition, preservation or improvement of the property either financially or otherwise, (ii) the fact that there is no family home; (iii) the duration of the marriage; (iv) any agreements with respect to the ownership and division of the property, and (v) any other fact and circumstances that in the opinion of the court the justice of the case requires to be taken into account. "Contribution" referred to above has been given a wide interpretation and includes, inter alia, the care of any relevant child or any aged or infirm relative or dependant of a spouse; the giving up of a higher standard of living than would otherwise have been available; giving assistance whether of a material kind or otherwise, which enables the other spouse to acquire qualifications, or aiding the other spouse in the carrying on of that spouse's occupation or business.

[62] The statute had obviously complied with its objective of wholesale social reform, which the family legislation had needed for so many years. It recognized the real fabric of Jamaican family life, with respect to the common law relationship and endeavoured to treat with the imbalance of the earning capacity of parties to the union and the resultant contribution to the financial and other wealth of the family, in a fair and equitable manner.

[63] I must now address the case out of this court which has been relied on by the respondent in the Hoilette claim successfully in the dismissal of the application made under section 13 of PROSA, and in both appeals, **Allen v Mesquita**. In the Hoilette claim, Fraser J indicated that he had followed and applied the principles enunciated in

that case as he said correctly, he was bound to do, but in my view, he erred in his understanding of the decision and also when he endeavoured to extend its *ratio decidendi*.

[64] In **Allen v Mesquita** the respondent had filed a claim under PROSA outside the 12 month period prescribed in section 13(2) of the Act. Upon his application for court orders seeking an order that the fixed date claim should be permitted to stand as filed, the judge, having found that the application should be treated as one for an extension of time, ordered that the fixed date claim should stand. On appeal against this order, the appellant's attorney raised a point in limine arguing that the claim having been filed outside of the prescribed time, until the court had granted leave for the respondent to bring his claim, no valid claim could be brought and the validity of the claim could not be corrected by a subsequent order. Counsel for the appellant did not provide any authorities in support of this submission and counsel for the respondent did not advance any arguments or provide any authorities, having conceded that he could not have advanced anything useful in relation to that jurisdictional point.

[65] Harris JA, in delivering the judgment of the court, stated that a party who seeks leave to bring an action in circumstances where leave is required, must satisfy the court that he is entitled to place himself under the umbrella of the court's jurisdiction. She held that in determining whether an extension of time should be granted, a court ought to follow the general procedure underpinning an entitlement to such a grant. Accordingly, she held that in seeking an extension of time to file his claim under PROSA, an applicant must also seek leave to extend the time. The appeal was allowed on the

basis that the judge below in granting the extension had failed to take into account that before a grant of an extension of time could be made, leave must be granted and no application had been made for leave. The court reiterated that "before making the order the learned judge was under an obligation to satisfy herself that she was clothed with the jurisdiction to hear and determine the application. There being no evidentiary material before her outlining the reasons for the respondent's failure to have made the application within the statutory period, she erred in treating the application as being one for an extension of time to file the claim and ordering that the fixed date claim form should stand". The court did not say that the application for leave and extension of time must be made before the filing of the fixed date claim form. The court also did not make any pronouncement on whether the validity of the claim could be corrected by a subsequent order.

[66] Although Harris JA was of the view that her conclusion on the preliminary point raised was sufficient to dispose of the matter, she nonetheless went on to consider the grounds of appeal filed. In doing so, she examined whether the respondent had satisfied the factors to be taken into account in granting an extension of time as established by the authorities. After a detailed analysis of the evidence that was before the court, Harris JA concluded that the respondent had failed to satisfy any of the requirements, viz, he: had not advanced any reasons for his delay in bringing the application (which, she said, led to the inevitable conclusion that there was no foundation upon which a finding in favour of the grant of an extension could have been anchored); had not demonstrated that he would be prejudiced if the extension were not

granted; and had failed to show any reason that the appellant should have been denied the benefit she had accrued by virtue of the expiry of the limitation period of 12 months under the Act. The learned judge of appeal concluded that to permit the action to proceed would result in a grave injustice. There were, therefore, two bases on which the appellant failed in **Allen v Mesquita**.

[67] In my opinion, the real *ratio decidendi* of the case was that this court thought that the learned judge below had erred when she granted an extension of time under section 13 of PROSA without the necessary evidentiary material being before her. The learned judge, it was found, gave greater weight to the prejudice she perceived would have been suffered by the claimant, as against the importance of the absence of any reasons, explaining the delay in respect of the application, and why the appellant should be deprived of the accrued right in respect of the limitation bar. With the greatest respect to the obvious wisdom and clarity given and expected from the court as constituted, there were no authorities placed before the court in respect of the necessity for an application for leave to be made simpliciter or together with an application for extension of time under section 13 of PROSA, once the application had not been made within the 12 months stipulated in the section. The position taken by the court with regard to "leave", namely that the applicant must seek leave to extend the time to file the application under section 13(2) of PROSA, as leave was necessary as a precursor to the application for extension of time, would therefore in my view have been obiter dictum, and made per in curiam. I must reiterate however, that this court did not in its judgment in **Allen v Mesquita**, address the issue of the effect of a

subsequent order being made by the court, after the filing of the application by fixed date claim form outside of the time period prescribed in the section.

[68] Although not raised in the arguments of the parties, it is necessary to mention the case of **Attorney General v Administrator General (Administrator of the Estate Elaine Evans** SCCA No 11/2001, delivered 29 July 2005, in which this court considered a similarly worded provision in the Fatal Accidents Act, which stated that an action under that Act "shall be commenced within three years after the death … or within such longer period as a court may … allow". The respondent had filed a writ pursuant to the Law Reform (Miscellaneous Provisions) Act and the Fatal Accidents Act four years after the accident giving rise to the claim had occurred. There was no evidence that the respondent had previously sought leave for an extension of time to file and serve the writ, but the court below granted the respondent's application to file the statement of claim out of time.

[69] On appeal by the Attorney General, all three judges of the court were agreed that the action under the Fatal Accidents Act had to fail, although on slightly different bases. Downer JA stated that leave was required to commence the action after three years had passed, and no leave having been sought to file and serve the writ, the proceedings were invalid. Smith JA held that the proceedings were null and void stating that "unless the court allows it, any action brought outside of the statutory period is a nullity" and that the court below had no jurisdiction to enlarge the time as no such application had been before the court. Panton JA (as he then was) for his part, stated that the claim had been filed outside of the statutory period and no application had

been made to rectify it suggesting that the filing of the claim outside the statutory period without first obtaining permission may not be an incurable defect. It is of significance that the court in that case, like the court in **Allen v Mesquita**, was not provided with any authorities to assist in its determination of the meaning and effect of the relevant section of the Fatal Accidents Act. It is to be noted too that it does not seem that the case decided whether leave and or extension could be granted subsequent to the filing of the claim as a determination of this issue was not necessary for the disposal of the appeal.

[70] It may be helpful at this time to refer to some of the authorities submitted to the court which I found useful for the determination of this matter. There are three cases in which the courts have reviewed other cases decided over several decades in respect of how the courts have approached provisions requiring the parties to obtain leave, namely: **Emanuele v Australian Securities Commission** [1997] HCA 20; **Re Saunders**; and **Re Testro Bros Consolidated Ltd** [1965] VicRp 4.

[71] In **Emanuele**, the High Court of Australia was concerned with the proper interpretation to be accorded section 459P of the Corporations Law (the Law). The Australian Taxation Office (ATO) was owed a considerable sum by a group of companies (group A), of which the appellants were directors and commenced winding up proceedings. As the ATO was unable to proceed against group A due to certain provisions in the Law, the Australian Securities Commission (ASC) intervened in the proceedings and gave notice of its intention to apply for an order to wind up the companies in insolvency pursuant to section 459A of the Law, which reads as follows:

> "On an application under section 459P, the Court may order that an insolvent company be wound up in insolvency."

[72] Under section 459P several different entities were competent to apply, including the company, creditors, directors and contributories, but ASC was not one of them. Under section 459P(2) the ASC could so apply, but the application "**may only be made with the leave of the Court"** (emphasis added). At first instance, O'Loughlin J made an order winding up the group A companies in insolvency. ASC had not sought leave to apply for the winding up of the companies. An appeal to the Full Court by the directors against the making of the order, did not succeed, as that court amended the order by adding a paragraph granting the order purportedly *nunc pro tunc*. An appeal by special leave to the High Court was brought to deal with the principal question, namely whether the full court's order, dismissing the appeal to that court, was supportable on the ground that the grant of leave to apply *nunc pro tunc* satisfied the requirements of section 459P or otherwise avoided the consequences of the failure of the ASC to obtain a grant of leave before the winding up order was made. The High Court dismissed the appeal but by a majority 3-2 (Dawson, Toohey and Kirby JJ).

[73] One of the issues on appeal was whether the requirement to obtain leave to apply under section 459P was procedural in nature and did not impose a condition precedent to the jurisdiction of the court. The court held that it did not. Indeed, Toohey J stated that not only was section 459P not a jurisdiction-conferring provision, but it did not create a cause of action or go to the relief that may be granted by the court. It was section 459A that empowered the court to order that an insolvent company be

wound up in insolvency, and provided part of the source of the court's jurisdiction. Toohey J also endorsed this statement of Gallop ACJ and Morling AJ in **Ceric v CE Heath Underwriting and Insurance (Australia) Pty Ltd** [1994] NTSC 101 with regard to a statutory requirement that an action not be commenced except with the leave of the court:

> "We find it difficult to describe a proceeding commenced in a court which has jurisdiction to entertain the proceeding as a nullity."

[74] The court maintained that a distinction was to be drawn between a situation where a time limit had been stated such as the provision in **David Grant & Co Pty Ltd v Westpac Banking Corporation** [1995] HCA 43, which stated that applications to set aside statutory demands "may only be made within 21 days", which could define the jurisdiction of the court by imposing time as an essential condition, as against a situation where a proceeding is already underway and is subject to the court's control and is one in which a timely but deficient order has been made.

[75] Although dissenting, Gaudron J in **Emanuele** stated adamantly that a provision conferring power on a court is not to be construed as subject to implications or limitations unless clearly required by its terms, its context or its subject matter. Similarly, provisions, he stated, should not be construed as directing an inflexible approach unless that is clearly indicated. He stated at page 10 of the judgment:

> "Courts are possessed of powers to be exercised in the interests of justice. And as a general rule, the interests of justice are not well served by the exercise of powers

> inflexibly and without regard to the convenience of the situation."

[76] Kirby J stated that the full court in acting as it did had drawn support from a long line of cases in the field of company law where it had been held that:

> "a requirement to obtain leave of a court before securing an order winding up a company was not a condition precedent to the jurisdiction of the Court but a procedural error which could be cured, in a proper case, by an order ***nunc pro tunc***." (Emphasis as in the original)

With regard to the general approach to statutory leave requirements, the learned judge had this to say:

> "1. The fundamental task of the Court is to give effect to the purpose of Parliament as expressed in the language of its enactment. This is sometimes explained in terms of finding the will of Parliament, although other authorities reject this formulation as a misleading fiction. The point to be made is that the task is basically the familiar one of giving meaning to ambiguous legislation. The clearer the words and the fewer the ambiguities, the simpler is the task of the court whose fidelity is always to the legislative text, properly understood.
>
> 2. In performing the task of construction, a court will seek to ascertain the purpose to which the provision was directed. It will endeavour, so far as the language of the enactment permits it, to avoid a construction which would result in such inconvenient outcomes that the legislation would miss its apparent target and fail to achieve its obvious objectives. It is for this reason that a court will not examine the words of the provision in isolation. Instead, an attempt is made to understand the words in the context of the enactment as a whole, the legislative history of the provision in question, the terms of similar or different provisions elsewhere in the Act and in any available documentation which throws light upon the suggested ambiguities. It is both permissible, and often helpful, to look to the consequences which would flow if one construction were favoured rather than another. If the result

> would be such inconvenience as to produce a "total failure" of the legislation and substantial injustice, it will more readily be inferred that the alternative construction should be adopted upon the hypothesis of Parliamentary rationality and good sense."

[77] Kirby J recognized that there have been other cases which have ordered strict compliance with provisions requiring advance leave and that any action commenced without leave would be a nullity and incapable of being revived by leave retrospectively given. However, he stated that that approach although followed in some cases has been rejected generally and he cautioned the approach of drawing analogies from different legislation. He said:

> "Minds can differ in deriving the legislative purpose especially, where Parliament has omitted expressly to provide for a consequence of default in obtaining leave. Even historical patterns must be studied with care. The focus should remain, from first to last, upon the statutory language containing the leave requirement, understood in its context and having regard to its apparent purposes."

[78] Kirby J concluded that in some cases if the requirement can be considered purely procedural and treated as directory, then any defective slip could be corrected as being an oversight and cured in the interests of justice.

[79] In **Re Saunders**, the plaintiffs had sued the defendants, who were solicitors, seeking damages in contract and in tort in respect of their duties as solicitors to them, but thereafter learned that bankruptcy orders had been made against them before the writs had been issued. Section 285(3) of the Insolvency Act 1986 prohibited the

commencement of any action against a bankrupt without the leave of the court. The plaintiffs applied for leave, but the defendants objected on the basis that the court did not have jurisdiction to give retrospective consent, and the "so-called" proceedings which had begun without leave were a nullity, which could not be validated after late leave given after their respective commencements. It was held as follows:

> "The court had power, in appropriate circumstances, to give leave to commence proceedings under s 285(3) of the 1986 Act, notwithstanding that the proceedings in question had already been commenced, as it was the long-recognised practice of the English courts to treat proceedings begun without the stipulated leave as not an irretrievable nullity but rather as existing and capable of redemption by the late giving of leave. Moreover, while the 1986 Act could have used emphatic language making retrospective leave clearly impossible had that been intended, it in fact re-used language having clear roots in the earlier statutes. Since the facts were such as to justify the grant of such leave, the court would exercise its discretion accordingly."

[80] Lindsay J did a masterful canvassing of the authorities relating to provisions addressing the requirement of leave in various statutes in several jurisdictions and over many years, commencing from as early as the late nineteenth century, such as in **Re Wanzer Ltd** [1891] 1 Ch 305 and **R v Lord Mayor of London, ex p Boaler** [1893] 2 QB 146. The learned judge said that judges of great experience in England had pursued the practice developed so long ago and "treated retrospective leave in insolvency as a thing capable of being granted and as requiring no particular discussion". He continued:

> "As the Court of Appeal emphasized in **Rendall v Blair** (1890) 45 Ch D 139, the legislature knows well enough how to provide that leave shall be a strict condition precedent to

> valid proceedings being issued and that clear words are to be used if that is intended, words perhaps even requiring a provision for the dismissal of the proceedings if the condition precedent is not satisfied. Without some such clear language being used the provision can be taken to be directory, the word used in **Rendall v Blair**, and in Australia, used in **Re Testro Bros Consolidated Ltd** [1972] VR 18 and **Re Horsham Kyosan Engineering Co Ltd** [1972] VR 403. To the same effect is the view taken in **Canada (Wheat Board) v Krupski** (1994) 26 CBR (3rd) 293 and elsewhere that a want of leave is only an irregularity."

[81] Lindsay J drew the distinction, depending on the words of the statute as to the form of leave which could be granted, that is to say, whether the order could merely grant leave for the continuation of the proceedings or whether the provision related to the commencement of proceedings and therefore the order should be made *nunc pro tunc.*

[82] The decision in **Re Testro Bros Consolidated Ltd** related to a petition by the Attorney General under section 175 and section 221(1)(e) of the Companies Act 1961 in Victoria, Australia, to wind up the company Testro Bros Consolidated Ltd, which was opposed by counsel for the official manager of the company and by counsel for a number of creditors and contributories, which principally concerned the findings and opinions in an adverse report on the affairs of Testro Bros and other companies, produced by Sir James Tait QC, as an inspector appointed by the Governor-in-Council under the Companies Act, and upon which the petition of the Attorney General had been based. Section 175 required that leave be obtained from the court before the Attorney General could present the petition to wind up the company, and as no leave

had been obtained, the issue in the case was whether the court could give such leave retrospectively, *nunc pro tunc,* and whether it ought to do so. Sholl J reviewed authorities that, he said, had covered over 70 years in Australia which permitted the grant of leave *nunc pro tunc*, and he said that this had been the practice in England also, in that, subsequent to the Judicature Acts, the omission to obtain leave could be subject to an application to stay proceedings in which an action was pending, or could be pleaded as a defence. But in his opinion:

> "…the absence of leave is not a matter going to jurisdiction, and prohibition or certiorari will not lie; it is an irregularity in procedure, in a matter within jurisdiction—and certainly so in the Supreme Court—so that the proceedings are not void or 'null', though they may be called 'invalid', in one sense of that term. They cannot be ignored, but may be stayed, or set aside for irregularity;…"

[83] Sholl J then made this powerful statement with which I entirely agree, which is applicable to the instant case, and which statement is oft-cited in the authorities dealing with this subject area of the law. He stated at page 17:

> "Now since the proceedings are within jurisdiction, there is also jurisdiction to stay them. No doubt a stay would normally be granted ex debito, but a stay is a discretionary remedy, and the Court cannot be obliged to impose it under all circumstances. I think a court other than the Supreme Court might stay proceedings pending an application to the latter. If the proceedings are brought without leave in the Supreme Court itself, they are irregular as lacking that Court's own leave. If this Court were unable to give the leave once the proceedings had begun it would be necessary to start them afresh, as indeed Gillard J has held. But with all respect, I do not feel able to adopt the view that this court is prevented by the Statute from recognising and

> sanctioning, even retrospectively, its own proceedings, more especially when the principal, and it may be the sole, effect of its order will be to save costs, and the re-issue, re-service, and re-delivery of documents identical with the existing documents. If the Court is of opinion that leave, had it been applied for, would have been given, why should it not decide, if it wishes, to treat as regular and effective, proceedings over which ex concessis it has jurisdiction, and dispense with the need merely to repeat them? If the Court can stay the current proceedings, and yet grant leave to bring them all over again, it seems to me that it must be able to achieve a similar result by treating the current proceedings as if brought with leave, whether it calls what it does giving leave nunc pro tunc, or not…"

[84] With the greatest of respect to the industry of counsel for the respondent in the Hoilette appeal, the cases of **Tung v Augustine** [1973] VicP 60 and **Bestobell Overseas Ltd v Carden** [1988] VR 891 are not relevant. They are both personal injury cases, and in the former the decision of the court turned on the particular wording of section 23 of the Limitation of Actions Act 1958, a section quite dissimilar to section 13 of PROSA, and the latter related specifically to the application of certain amending Limitation of Actions Acts to the cause of action, as to whether based on when the cause arose, the action could survive. **Caska & Caska** [2001] Fam CA 1279 (23 November 2001) was also unhelpful as although counsel submitted that the court was dealing with a provision similar to section 13 of PROSA, namely section 44 (3) of the Family Law Act in Australia (as unamended), the specific provision was not submitted to the court, but from what I was able to discern, the provision did impose a prima facie time limit of 12 months on the institution of proceedings for divorce or nullity of a marriage, but specifically stated that the proceedings shall not be instituted except by

leave of the court in the proceedings or with the consent of the parties to the marriage. The amended provision stated that the court could grant leave at any time even if the proceedings had already commenced. The reason I found the case unhelpful was that having referred to several of the relevant cases including **Testro Bros Consolidated Ltd**, **Emanuele**, **Ceric** and others, the court ultimately found it inappropriate, and therefore declined to express a concluded opinion on whether the court had the power to grant leave under section 44(3) nunc pro tunc, and that even if it did, whether that was a case in which the power ought to be exercised.

[85] The case of **Butler v Butler** referred to by the respondent in the Saddler appeal was also not helpful, as the issue in that case related to the interpretation of section 3 (1) of the Matrimonial Causes Act in England, which provided that no petition for divorce could be presented to the court before the expiration of one year of the marriage. The petition was presented before the expiration of the year, and the court held correctly that the petition had fundamentally breached the provisions of the Act, was null and void, and the court had no jurisdiction to entertain it.

[86] Based on the relevant authorities and the principles that I have gleaned there from, I have concluded the following in relation to the questions posed by issues (c) and (d) :

(i) The mischief that the statute was promulgated to address which was to facilitate the efficient resolution of family

disputes must be examined so that the courts are faithful to the legislative context.

(ii) No useful purpose can be served by adopting an inflexible approach to statutory interpretation, once the court has jurisdiction. Any interpretation should avoid inconvenient outcomes, for instance, unnecessary expense, such as re-filing, re-issue, and re-service of pleadings.

(iii) Section 13 of PROSA does not go to jurisdiction, but is a procedural section setting out the process to access the court and the remedies available. Jurisdiction of the court is conferred in the main by sections 6, 7 and 14.

(iv) As the provision is procedural, and not a condition precedent to the jurisdiction of the court, any irregularity can be remedied by a subsequent order, that is *nunc pro tunc*, in the interests of justice, particularly as the grant of the order is under the court's control through the exercise of its discretion.

(v) The claims could be considered to be irregular or at worst, in a state of suspended validity until the application for extension of time was granted.

(vi) The specific words of the statute are important and must be perused with care. The Legislature must be clear in its intent, and must state specifically if leave is required; if leave is a condition precedent; and what, if any, is the consequence of the failure to obtain it if so required.

(vii) There are no express words used in PROSA requiring that leave be obtained.

(viii) The cases support the principle that even if leave was specifically required before an action is brought, if the leave has not been obtained the omission is not a fundamental irregularity and can be cured *nunc pro tunc.*

(ix) On any study of the language of section 13 of PROSA the focus was on extension, that is, on such longer period as the court may allow, and not on leave.

(x) Section 13 of PROSA was not promulgated to create a limitation bar.

(xi) If the claim is filed outside the 12 month time period set out in the statute, extension of time must be obtained from the court for the matter to proceed, but no leave is required, and so no application for leave and extension is required.

(xii) There are no words indicating that the application for extension of time must be filed before the claim form is filed, if the claim form is filed outside the time limited in PROSA. There is no indication that the application for extension cannot be filed after the claim is filed, and the order granted *nunc pro tunc.*

[87] In the light of all of the above with regard to issue (e), the orders made in the Hoilette claim would have been and remain valid.

Conclusion

[88] As a consequence, the fixed date claim form filed in the Saddler claim would have been irregular but not fundamentally flawed, and could be cured if the application before the court is successful. As indicated earlier in this judgment, that application is still to be heard. I would direct that the application be heard as soon as possible. I would therefore allow the appeal with costs to the appellant to be agreed or taxed.

[89] With regard to the Hoilette claim, the order made by P Williams J was appropriate in all the circumstances, as it recognized the amendment of the claim form to include the claim under PROSA, it ordered the claim as amended to stand, which in effect was also recognizing the power of the court to extend the time for the filing of the claim after the time allotted in section 13, and did so *nunc pro tunc*. That order has not been appealed and so the issue as to whether the learned judge exercised her discretion correctly on the grant of extension of time in keeping with the principles set

out in **Allen v Mesquita** was not before us. In my view, Fraser J was therefore wrong in the approach that he took. I would therefore direct that the fixed date claim form be heard at the earliest possible time, and I would allow the appeal with costs to the appellant to be agreed or taxed.

BROOKS JA

[90] I have read the draft judgment of my sister Phillips JA, and agree with her reasoning and conclusion.

HARRIS JA

ORDER

Appeals allowed. Costs to the appellants to be agreed or taxed.