**[2022] JMCA App 7**

**JAMAICA**

**IN THE COURT OF APPEAL**

**BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP P (AG)**
**THE HON MR JUSTICE D FRASER JA**
**THE HON MRS JUSTICE G FRASER JA (AG)**

**SUPREME COURT CIVIL APPEAL NO COA2020CV00090**

**APPLICATION NO COA2021APP00131**

| | | |
|---|---|---|
| **BETWEEN** | **KAREEN JOHNSON SHIRLEY** | **APPLICANT** |
| **AND** | **COURTNEY GEORGE SHIRLEY** | **RESPONDENT** |

**AND**

**APPLICATION NO COA2022APP00016**

| | | |
|---|---|---|
| **BETWEEN** | **COURTNEY GEORGE SHIRLEY** | **APPLICANT** |
| **AND** | **KAREEN JOHNSON SHIRLEY** | **RESPONDENT** |

**Gordon Steer instructed by Ms Vinette Grant for Courtney George Shirley**

**Curtis Cochrane for Kareen Johnson Shirley**

**23 February 2022**

**MCDONALD-BISHOP P (AG)**

[1] These proceedings concern two applications:

(1) a notice of application for court orders filed on 12 July 2021 by Mrs Kareen Johnson Shirley ('Mrs Shirley') seeking to

strike out Mr Courtney George Shirley's ('Mr Shirley') notice of appeal (application no COA2021APP00131); and

(2) a notice of application for court orders filed on 28 January 2022 by Mr Shirley seeking an extension of time and a declaration that the skeleton submissions and chronology of events, filed on his behalf, stand as filed in time (application no COA2022APP00016).

[2] The parties were husband and wife, whose marriage was dissolved on 10 August 2017. On 2 January 2019, Mrs Shirley filed a fixed date claim form in the Supreme Court in which she sought an order that the property situated at Lot 117, 19 Johnson Crescent, Tryall Estate, Spanish Town in the parish of Saint Catherine, being the family home of the parties, be declared to be owned equally by them in law and equity and that the said property be divided pursuant to section 6 of the Property (Rights of Spouses) Act ('the Act'). Section 6(1)(a) of the Act provides that subject to sections 6(2), 7 and 10, each spouse shall be entitled to one-half share of the family home ('the equal share rule'). Section 7 of the Act empowers the court to vary the equal share rule upon application by an interested party, where the court is of the opinion that it would be unreasonable or unjust for each spouse to be entitled to a one-half of the family home.

[3] Mr Shirley opposed the orders sought by Mrs Shirley in his affidavit in response, primarily on the basis that he solely acquired the property before the marriage and the marriage was of short duration. Consequently, he prayed that the court should refuse the orders sought in the fixed date claim form for the property to be divided in equal shares.

[4] The matter was heard by Barnaby J (Ag) (as she then was) ('the learned judge'). She opined that Mrs Shirley is entitled to a 50% share of the property as claimed. This finding was based on the rationale that the general prayer of Mr Shirley that Mrs Shirley's claim of 50% in the property be refused did not amount to an application for variation of the equal share rule under section 7 of the Act without more. She found the circumstances

of the case to be distinguishable from those in **Marie Graham v Hugh Anthony Graham** (unreported), Supreme Court, Jamaica, Claim No 2006HCV03158, judgment delivered 8 April 2008 ('**Graham v Graham**'), and **Carol Stewart v Lauriston Stewart** [2013] JMCA Civ 47 ('**Stewart v Stewart**'). Accordingly, the learned judge concluded that there was no proper application before her, which would invoke section 7 of the Act. The learned judge also found that in the absence of such an application, Mrs Shirley's share in the family home must be determined in accordance with section 6 of the Act. She proceeded to make consequential orders based on her decision that Mrs Shirley is entitled to a 50% share of the property.

[5] Mr Shirley has challenged the learned judge's decision by filing notice and grounds of appeal in this court on 8 December 2020. However, Mrs Shirley applied to strike out the notice and grounds of appeal on the basis that Mr Shirley had failed to file skeleton arguments and written chronology of events in compliance with the Court of Appeal Rules ('the CAR'). Spurred into action by Mrs Shirley's application, Mr Shirley applied for an extension of time to have his skeleton submissions and chronology of events stand as filed in time. He objects to Mrs Shirley's application for his appeal to be struck out for non-compliance with the rules of court.

[6] Although Mrs Shirley's striking out application is first in time, it is considered prudent to treat first with Mr Shirley's application for extension of time as the determination of this application would inevitably determine the striking out application. The parties did not object to this approach.

[7] It is a well-established principle that the court is empowered to exercise its discretion, where necessary, to extend the time for compliance with any rule even if the application for an extension is made after the time for compliance (see rule 1.7(2)(b) of the CAR). In deciding whether to exercise this discretion, the court must consider: (i) the length of the delay; (ii) the reason for the delay; (iii) whether there is an arguable case for appeal; and (iv) any prejudice that may be suffered as a result of the grant of the extension of time (see **Leymon Strachan v Gleaner Company Limited and Dudley**

**Stokes** (unreported), Court of Appeal, Jamaica, Motion No 12/1999, judgment delivered 6 December 1999 ('**Leymon Strachan**').

[8] Mr Shirley based his application on the following grounds:

> "(a) The skeleton submissions were filed within time.
>
> (b) The delay in filing the chronology was not inordinate.
>
> (c) [He] has a good and arguable appeal which ought not to be dismissed.
>
> (d) [Mrs Shirley] would suffer no hardship if the orders herein are granted."

[9] In support of the application, Mr Shirley relied on the affidavit evidence of Ms Vinette Grant sworn to on 27 January 2022. Ms Grant deposed that she is the attorney-at-law on record for Mr Shirley and that, on or about 14 July 2021, she called the Court of Appeal registry to make enquires about the appeal. She was informed that notice to the parties was sent to her by post. However, to the date of swearing the affidavit, she had not received the said notice by post. After this conversation, on the same day, she was sent a copy of the notice to the parties by email. A copy of this email was exhibited to her affidavit.

[10] Rule 2.6(1) of the CAR requires Mr Shirley to file and serve a skeleton argument within 21 days of receiving the registrar's notice to the parties. The skeleton argument on behalf of Mr Shirley was filed and served on 22 July 2021, eight days after Mr Shirley's attorney-at-law would have received the registrar's notice to the parties sent by the court registry. Based on Ms Grant's affidavit and, as conceded by Mr Cochrane for Mrs Shirley, the skeleton submissions were filed within time, and this court so finds.

[11] Accordingly, Mr Shirley's skeleton arguments would have been filed and served in time. Thus, no order for extension of time is required from the court for the filing and serving of Mr Shirley's skeleton arguments.

[12] With regard to the filing and serving of the written chronology of events, rule 2.6(5) of the CAR stipulates that Mr Shirley's skeleton argument must be accompanied by a written chronology of events relevant to the appeal and cross-referenced to the core bundle or record. On Mr Shirley's admission, the chronology of events was filed several months out of time. I, therefore, find Mr Shirley's contention that the delay in filing the chronology of events was not inordinate to be on very weak footing, especially given the reminder contained in the registrar's notice as to the date when the chronology of events would have been due. I find the length of the delay to be inordinate, given the nature of the delay and the type of document that should have been filed.

[13] Concerning the reasons for the delay, Ms Grant, in her affidavit, deposed that she had instructed another law firm to argue the appeal, and as such, she was of the view that the firm had prepared the chronology of events. It was after a discussion with the firm that she discovered that the chronology of events had not been prepared. Upon discovering this, steps were taken to have the chronology of events prepared, filed and served. Ms Grant is understood to be saying that the delay in filing the chronology of events might have been due to an oversight or a miscommunication with the firm she had instructed to argue the appeal.

[14] While Ms Grant's explanation is plausible and cannot be said to be inexcusable, we have no affidavit evidence from counsel whom she instructed explaining the reasons for the lapse. For that reason, the court is not in a position to say that this was not inexcusable oversight, and the court should, therefore, treat it as such. As counsel by now would be well aware, inexcusable oversight is not a good explanation for non-compliance with the rules (see **The Attorney General v Universal Projects Limited** [2011] UKPC 37, and **The Commissioner of Lands v Homeway Foods Limited and Stephanie Muir** [2016] JMCA Civ 21). Accordingly, in my view, Mr Shirley has not provided a good reason for the relatively inordinate delay through the sole affidavit of Ms Grant.

[15] The highest the court will take the explanation given by Ms Grant is to note that the delay was not due to Mr Shirley's fault but of his legal representatives. This will be weighed in the balance with other factors because I am cognizant that, notwithstanding the length of the delay or absence of a good reason for the delay, the court is not bound to reject an application for an extension of time, as the overriding principle is that justice is done (see, for example, **Jamaica Public Service Company Limited v Rose Marie Samuels** [2010] JMCA App 23). Part of the consideration of what justice demands is that the court must carefully determine how far and under what circumstances the sins of the lawyer should be made to visit upon the litigant to deprive the litigant of his day in court. The oft-cited words of Lord Denning MR in **Salter Rex & Co v Ghosh** [1971] 2 All ER 865 at page 866f ('**Salter Rex**'), that "we never like a litigant to suffer by the mistake of his lawyers", resounds loudly in matters of this nature. However, that view cannot be used to maintain a case without merit (as Lord Denning himself held in **Salter Rex**) and to the prejudice of the other party that is not in default.

[16] Therefore, the decision on Mr Shirley's application turns on the consideration of whether he has a meritorious case for appeal, which ought not to be dismissed, and whether Mrs Shirley would suffer any prejudice if the extension of time being sought is granted.

[17] With regard to the consideration of whether Mr Shirley has an arguable appeal, I note there is authority that suggests that slightly different considerations may apply in cases where the non-compliance is during the course of the appeal rather than at the stage of the filing of the notice of appeal to access the court. In **George Ranglin and others v Fitzroy Henry** [2014] JMCA App 34, Phillips JA made the distinction between cases involving an application for the extension of time to access the court (for example, an application for extension of time to file a notice of appeal), and those dealing with a procedural default during the course of the appeal (for example, an application for extension of time to file skeleton arguments, chronology of events and record of appeal). Phillips JA endorsed the views expressed by Mangatal JA (Ag) (as she then was) in

**Shurendy Adelson Quant v The Minister of National Security and The Attorney General of Jamaica** [2014] JMCA App 23. At paras. [44] and [45] Phillips JA stated:

> "[44] Mangatal JA (Ag) took the view agreeing specifically with paragraph 29(3) in [**United Arab Emirates v Abdelghafar** [1995] IRLR 243] that 'whilst the merits of the appeal are relevant, this court ought not, on an application for extension of time in relation to procedural default, to investigate in detail the strength of the appeal. This is because one wants to avoid the danger of the application being turned into a 'mini-hearing of the substantive appeal'.
>
> [45] **It seems clear to me that the cases do make a distinction, as I stated earlier, in emphasis in relation to the prospects of success on appeal, between the cases dealing with extension of time to access the court and those dealing with procedural applications once the appeal is being processed through the court. In the former, greater emphasis is placed on the merit and success of the appeal whilst in the latter the focus is on the length of the delay, the explanation for the delay and the prejudice to the other party**." (Emphasis added)

[18] Accordingly, in dealing with applications for an extension of time in relation to a procedural default during the course of the appeal, the emphasis now is not so much on a detailed examination of the merit of the appeal but on the other factors: the length of the delay; the reason for the delay; and any prejudice that may be suffered as a result of the grant of the extension of time. This court, in any event, has examined whether there is merit in the appeal given the corresponding application that the appeal be struck out on the basis that it is unmeritorious. Therefore, a finding that the appeal has merit may be treated as weighing heavily in favour of the grant of an extension of time rather than striking out. However, the weight to be ultimately accorded to the merit of the appeal will depend on the countervailing weight of other competing factors that must all be weighed in the equation in the court's determination of the outcome that will best serve the interests of justice.

[19] In seeking to establish the merit of the appeal, Mr Steer, counsel on behalf of Mr Shirley, submitted that the learned judge was plainly wrong in law in finding that there was no application under section 7 of the Act. He relied on the case of **Stewart v Stewart** in submitting that in applications under section 7 of the Act, what is required is that the documents, as filed, made it clear to the court and to Mrs Shirley the relief that Mr Shirley was seeking. Counsel argued that there was evidence adduced by Mr Shirley of the fact that the property had been acquired in his sole name and of the short duration of the marriage. This, according to Mr Steer, made it clear that the section 7 factors exist, which would have led to a consideration of the variation of the equal share rule. He further contended that based on the evidence contained in various affidavits, Mrs Shirley would have been well aware and not taken by surprise that Mr Shirley was seeking to invoke section 7 of the Act, even though no formal application was made to do so.

[20] Mr Cochrane, in his written submissions on behalf of Mrs Shirley, submitted that Mr Shirley's appeal is frivolous, misconceived and a misinterpretation of the learned judge's judgment. He argued that the learned judge did not depart from **Stewart v Stewart** as she made it clear that the case was distinguishable. Counsel contended that in the circumstances of the case, the learned judge gave a judgment that was fair and reasonable and one that ought not to be disturbed.

[21] In **Stewart v Stewart**, this court approved the observations made in **Graham v Graham**. At para. [46], Brooks JA (as he then was) stated the following:

> "[46] Similarly, as was carefully explained by McDonald Bishop J in paragraphs 20-24 of **Graham v Graham**, **there is no necessity for a party, who is seeking, by virtue of section 7, to dispute the application of the equal share rule, to proceed by way of a formal notice of application for court orders.** In assessing the complaint in that case, that there was no formal application in place, the learned judge noted that in the Acknowledgement of Service of the Claim Form, the defendant, Mr Graham, had stated that he did not admit any part of the claim and that he intended

> to oppose it. She went on to say at paragraph 21 of her judgment:
>
> > '...There is no formal written application by the defendant saying in exact terms that he is applying for the court not to grant 50/50 pursuant to section 7 of the Act in respect of [the disputed property]. That, however, is a matter of form. The substance of his response to the claimant's case amounts to an application for the court not to apply the equal share rule in respect of [that property] and for the court to make an order in the circumstances that is 'fit and just'. This, in my view, is tantamount to him asking the court to vary the equal share rule within the provisions of section 7.'
>
> **In applications under both section 7 and section 13, what is required is that the documents, as filed, make clear to the court and to the applicant, the relief that the respondent seeks**. The learned judge pointed out in Graham v Graham that the claimant in that case would have had ample notice from the defendant's affidavit that he was applying for a variation of the equal share rule. She is correct in her assessment that his application was one in substance, if not in form." (Emphasis added)

[22] When the emphasised portion of Brooks JA's pronouncements above is considered, it is clearly saying that the learned judge ought to have looked at the documents as filed in response to the claim to see whether it was made clear to Mrs Shirley that Mr Shirley was seeking the relief that the equal share rule be varied pursuant to section 7. More particularly, **Stewart v Stewart** makes it abundantly clear that notice to the court and Mrs Shirley that Mr Shirley was applying for a variation of the equal share rule could have come from his affidavit.

[23] In light of the principles established in **Stewart v Stewart** regarding the requirement for an application to be made under section 7 of the Act, for a variation of the equal share rule, the question does arise whether the learned judge fell in error in confining her analysis to the adequacy of the prayer in Mr Shirley's affidavit? This court

will have to investigate whether she erred in doing so in the light of all the documents filed by both parties and the case presented by Mr Shirley in response to the claim.

[24] It is our view that Mr Shirley has a good and arguable appeal with regard to the learned judge's finding that the general prayer in his affidavit asking that Mrs Shirley's claim of a 50% in the property be refused did not amount to an application for variation of the equal share rule, without more. Furthermore, he has an arguable appeal, worthy of investigation by this court, concerning the learned judge's ultimate finding that in the absence of an application for the equal share rule to be varied, Mrs Shirley's share in the family home must be determined in accordance with section 6 of the Act.

[25] With regard to whether Mrs Shirley would suffer any prejudice if the orders herein are granted, Mrs Shirley did not aver to any prejudice that she would suffer if this court were to extend the time for the filing of the chronology of events. In any event, I fail to see what prejudice could result from such an order as it does not affect the hearing of the substantive appeal. The appeal has not yet reached case management and, therefore, is not at a stage where any prejudice would result to Mrs Shirley. Also, the content of the chronology of events is not new to Mrs Shirley and is, more so, for the benefit of the court. In any event, I am fully satisfied that any prejudice to Mrs Shirley, although I have not seen any of note, could be remedied by an award of costs.

[26] Furthermore, there is no history of serious or contumelious non-compliance with the rules of court on the part of Mr Shirley. I have noted that Mr Cochrane sought to argue that the notice of appeal ought to be struck out as Mr Shirley has also failed to file a record of appeal and a supplementary record of appeal in compliance with the CAR. This can be disposed of quite briefly. Counsel's submissions are at variance with the grounds on which the application to strike out was brought. Further, Mr Shirley's response is in answer to the grounds advanced by Mrs Shirley on her application to strike out. Therefore, fairness dictates that the court should not entertain any belated arguments regarding further non-compliance that were not part of the application. In any event, the filing of a supplemental record of appeal would not have fallen due.

[27] For these reasons, I am satisfied that the court ought to grant the application for extension of time and dismiss the application for striking out as the nature and extent of the breach do not warrant such a draconian measure.

[28] Accordingly, I would extend the time for the filing of the chronology of events and grant the order sought by Mr Shirley for the chronology filed on 25 January 2022 to stand as filed in time.

[29] In the circumstances, costs of both applications ought to be allowed to Mrs Shirley. I would also permit taxation of the costs, if not agreed, before the determination of the substantive appeal as the remedy granted for Mr Shirley's failure to comply with the rules of court that prompted the striking out application.

**D FRASER JA**

[30] I agree with the reasoning and conclusion of McDonald-Bishop P (Ag).

**G FRASER JA (AG)**

[31] I, too, agree with the reasoning and conclusion of McDonald-Bishop P (Ag).

**MCDONALD-BISHOP P (AG)**

**ORDER**

1. The application of Mr Shirley for an extension of time filed on 28 January 2022 (application no COA2021APP0016) is granted.

2. Time is extended to 25 January 2022 for the filing of the chronology of events by Mr Shirley.

3. The chronology filed on 25 January 2022 shall stand as filed in time.

4. The application of Mrs Shirley filed on 12 July 2021 seeking to strike out the notice of appeal filed on 8 December 2020 (application no COA2021APP00131) is refused.

5. Costs of the hearing of both applications to Mrs Shirley to be taxed if not agreed. Permission is granted for the taxation of costs, if not agreed, before the determination of the substantive appeal.