[2023] JMSC Civ 05

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV02297

IN THE MATTER of ALL THAT parcel of land part of **PEMBROKE HALL** in the parish of SAINT ANDREW being the Lot numbered **ONE HUNDRED AND EIGHTY EIGHT** on the Plan of Pembroke Hall aforesaid deposited in the Office of Titles on the 29th day of November 1961 of the shape and dimensions and butting as appears by the said plan and being all of the land comprised in Certificate of Title registered at Volume 977 Folio 87 of the Register Book of Titles

A N D

IN THE MATTER OF the Restrictive Covenants (Discharge and Modification) Act

Re: Lot #188 Pembroke Hall, St. Andrew

IN CHAMBERS (Ruling on Paper)

Ms. Stacey-Ann Mitchell instructed by Frater Ennis & Gordon for the Claimants

HEARD: January 11, 2023 & January 17, 2023

Restrictive Covenant – Part 26 Civil Procedure Rule- Rule 26.1(v) – Notice to Parties of the Court's intention to make orders of its own volition at a hearing – breach

specific modification – inordinate delay – explanation of delay – the question of prejudice

DALE STAPLE J (AG)

BACKGROUND

[1] On the 17th July 2017 the Claimants filed the instant claim, commenced by Fixed Date Claim Form and supported by their joint affidavit also filed on the 17th July 2017. The Claim is for the modification of Restrictive Covenant number 6 endorsed on the certificate of title registered at Volume 977 Folio 87 in the Register Book of Titles.

[2] The claim was served on the Kingston & St. Andrew Municipal Corporation (KSAMC) and the National Environment and Planning Agency (NEPA). At the first hearing of the Fixed Date Claim Form on the 10th October 2017, the matter was adjourned to the 8th December 2017. The endorsement on the minute order was that the Applicant was to submit the comments of the Local Planning Authority (LPA) which would be the KSAMC in this case.

[3] On the 8th December 2017, the matter was again adjourned for the Applicant to submit the comments of the LPA. This time, it was adjourned to the 18th May 2018.

[4] On the 18th May 2018, the endorsement was that the Applicant/Claimants were to comply with comments from the NEPA and the matter was adjourned to the 26th October 2018.

[5] The next date, the 26th October 2018, the matter was again adjourned in order for there to be compliance with the comments of the NEPA and for the comments of the LPA to be submitted. The matter was adjourned to the 12th February 2019.

[6] On the 12th February 2019, the matter was adjourned sine die (without a date set). The comments from the LPA were still outstanding.

[7] On the 8th December 2022, the Court served upon the Claimants a notice of its intention to dismiss the claim for want of prosecution on its own motion. The Claimants were given time to respond in writing which they did by filing submissions on the 6th January 2023.

ISSUES BEFORE THE COURT

[8] The Court is seeking to make an order of its own motion to dismiss the matter for want of prosecution pursuant to its case management powers under Rule 26.1(v) of the Civil Procedure Rules.

[9] The Court is guided by the principles set out in the decision of ***MSB Ltd et al v Thomas***[1], where the Court is exercising its powers to dismiss a matter for want of prosecution.

[10] Before it can make such an order, I must be satisfied as follows:

> *That there was a default on the part of the person bringing or defending the Claim that was "intentional and contumelious" or;*
>
> *(1)(b) That there has been inordinate and inexcusable delay on the part of a Claimant or his/her lawyers; and*
>
> *The delay in (1)(b) is such that it will give rise to a substantial risk that it is not possible to have a fair trial or that the delay is likely to have caused serious prejudice to the Defendant(s).*

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[1] [2020] JMCA Civ 4

DISCUSSION OF THE LAW

[11] I considered as well the authority of ***Vasti Wood v H.G. Liquors Limited et al***[2]. In that case there was a fatality arising from a motor vehicle collision. The Appellant issued a writ of summons in February of 1987 claiming damages on behalf of the near relations as well as the Estate of the Deceased. The Respondents (Defendants in the Court below) consented to an extension of time for the filing of the Statement of Case in June 1988 (a year and a 1/3rd since the issue of the writ). However, no further steps were taken by the Appellant and the 1st Respondent applied for the dismissal of the action for want of prosecution. In January of 1993, a Master dismissed the action for want of prosecution and the Appellants appealed. The Attorney-at-Law for the Appellants accepted responsibility for the delay in the prosecution of the Claim.

[12] The Appeal was dismissed (majority decision with Carey JA dissenting). Carey JA's point in the dissent was that the Respondents had failed to establish that there was prejudice suffered by them as a consequence of the delay. In his view, the mere fact of the inordinate delay was not sufficient to warrant the matter being dismissed for want of prosecution. There must be established prejudice suffered on the part of the Defendant.

[13] However, the majority took a different view. Gordon JA expressed himself as follows at page 251 of the judgment,

> *From the above extracts it is discerned that while it is desirable that the defendants should 'show that they would suffer more than minimal prejudice as a result of the post writ delay' (***Department of Transport v Chris Smaller (Transport) Ltd** ***[1989] 1 All ER 897****), inordinate and inexcusable delay on the part of a plaintiff or his*

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[2] (1995) 48 WIR 240 per Wolfe JA (as he then was).

attorneys at law is the primary ground for dismissal of an action for want of prosecution.

[14] Even in these pre CPR days, Gordon JA recognised[3] that it is the duty of the Court to deal with matters expeditiously. This is now explicitly directed in the Civil Procedure Rules by the overriding objective.

[15] The core principle in the interpretation and application of the Civil Procedure Rules is to deal with cases justly. Rule 1.1(1) makes this pellucid. So what was once a common law principle, is now expressly enshrined in the Civil Procedure Rules. This ensures that it be given the gravitas it rightly deserves.

[16] Wolfe JA made the point as well that inordinate delay, in and of itself, without a reasonable explanation for the delay, can be sufficient reason to dismiss a case for want of prosecution even where no prejudice is suffered by a party.

[17] However, in this Court's view and in the view of Wolfe JA (as he then was) in the ***Vasti Wood*** decision[4], the prejudice need not be actual, but also potential. When one looks at CPR Rule 1.2(e), it is clear that prejudice does not only relate to a party in the matter before the Court, but other current and potential Court users. Rule 1.2(e) states that dealing with a case justly includes allotting to it an *appropriate* (emphasis mine) share of the Court's resources [human and physical] while taking into account the need to allot resources to other cases. It was recognised by the same Wolfe JA (as he then was) when he became Chief Justice and championed the Civil Procedure Rules, that the delay in dealing with an

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[3] See N3 at page 252

[4] See N3 at page 256 where he says, "Prejudice, in my view, includes not only actual prejudice but potential prejudice which in the instant case would be the possibility of not being able to obtain a fair trial because of the passage of time."

individual case, has a ripple effect throughout the entire judicial landscape. A Court's resources are finite. We are seeing this more and more.

[18] So the Rules have made it clear that prejudice is no longer just in relation to the parties in the instant claim before the Court, but other parties in other matters that are being dealt with by the Court.

WAS THERE INORDINATE DELAY?

[19] I find that there was inordinate delay in the prosecution of this case. Counsel has candidly conceded this point and so I will not delve much further into same.

WAS THERE A SUFFICIENT EXPLANATION FOR THE DELAY?

[20] I am not satisfied that there has been sufficient explanation for the delay of 5 years in the prosecution of this claim. There was no accompanying affidavit in support of the submissions. So I had to scrutinize the submissions to get a gist of the basis for the delay.

[21] The understanding I got from the submissions from paragraphs 10-12 of same is that the Claimants simply were not (and still are not) in a financial position to secure the retroactive building approval that the KSAMC requires for their consideration of the proposed modification. Indeed, from the submissions, it appears as though the KSAMC did indeed respond to the Claimants request for comment on the modification proposed. Their response was, on its face, a rejection of the proposed modification. The recommendation was that retroactive building approval was to be obtained from the KSAMC for their further consideration of the proposed modification.

[22] Now, there is no indication as to exactly when this position was communicated to and received by the Claimants. There is certainly no clear indication on the Court's record that this position by the KSAMC was ever explicitly communicated to the

Court as the adjournments were repeatedly for the comments from the LPA to be submitted. This strongly suggests that the comments from the KSAMC were never communicated to the Court. But what is clear is that they became available to the Claimants at some point.

[23] Giving the Claimants the benefit of the doubt, let us say that the KSAMC's position was communicated to them **after** the matter was adjourned *sine die* in February of 2019. In my view, the obligation of the Claimants would have been to have the matter relisted and the response of the KSAMC communicated to the Court so as to allow the Court to decide what course to take. This would have saved valuable time and resources instead of keeping the matter in abeyance.

[24] It may seem like a good idea to have the matter simply inactive. After all, it appears that it is not clogging up a list and not taking up the time of a judicial officer. However, that is not the case in my view. It is consuming the physical resources of the Court to keep and maintain the file. It is also still consuming the Court's time as it remains on the Court's docket. Matters are not filed in Court just to linger there. They are filed to be resolved in some way. So each matter before the Court, active or inactive, is consuming the Court's time as it represents an unresolved matter.

[25] Now, if it were otherwise, that is, the Claimants received the communication from the KSAMC from **before** the matter was adjourned sine die and they did not disclose the refusal from the KSAMC and their inability to fulfil the recommendation from the KSAMC, then that would give even greater grist to the position for dismissal for want of prosecution.

[26] I have noted the contents of paragraph 11 of the submissions by counsel. I could be wrong, but it appears, on its face, that the Claimants are balking at the fact that the KSAMC is requiring them (the Claimants) to undertake the process and assume the costs of submitting the application for building approval. They indicate

that the Pembroke Hall Housing community was a project of the then Ministry of Housing and the houses were built “under the aegis of the Ministry”. Whether this is so or not, is not relevant in my view. The house now belongs to the Claimants.

[27] At the time of purchase by the Claimants in or around 2016 (as evidenced on the title exhibited to the Affidavit in Support of the Fixed Date Claim Form), they surely would have known of the breach. They still went ahead and purchased thereby assuming responsibility for regularizing same as a condition for the mortgagee giving them the mortgage. If they did not wish to take on this task, they ought not to have purchased the property in such a state or expressly given the duty to regularize to the vendor.

[28] There is no evidence of what actions the Claimants took between February 13, 2019 to date to put themselves in a position to advance the Claim. As such, the Court is not in a position to say that the Claimants have been acting with any real earnest in the prosecution of this matter.

THE QUESTION OF PREJUDICE

[29] In my view, more than appropriate resources have been allocated to this matter. Indeed, but for the Court’s intervention, this matter would have just lingered in the system clogging it up. I also have no idea how much longer it will take for the Claimant to ready themselves to even get the plan let alone to submit same for approval to the KSAMC. Then there is the further uncertainty of when the KSAMC will get around to considering same. Hence, I am not in a position to say how much more resources will be required to dispose of this matter.

[30] Other Court users would have already been put out by the days and times already allocated to this case where the parties were clearly not ready for the presentation of their Claim. In my view, breach specific modifications usually require an “as built” plan and for same to be submitted for review by the LPA. So to approach the Court

for such specific relief without at least such a plan (let alone the approval) is asking for delay.

[31] In my view, the question of prejudice is expanded by the Rules to take into account not just the parties before the Court, but other Court users (current and potential). I note counsel's submissions that there is no defendant affected in this particular case. But that does not mean that other litigants were not potentially affected. When a case comes before a judicial officer, that judicial officer has to spend time to prepare the case. This takes time away from the preparation of other cases where the parties are actually ready to proceed. So I can safely infer that there is prejudice to other litigants by the taking away of Court resources from them.

DISPOSITION

[32] In the circumstances, I am satisfied that this matter should be dismissed for want of prosecution.

[33] I find that more than sufficient of the Court's resources have been expended on this relatively simple claim and there has been no sufficient evidence to justify what I have found to be the inordinate delay in the prosecution of this matter.

[34] Accordingly, the matter is dismissed for want of prosecution.

ORDER:

1. **The Claim is dismissed for want of prosecution.**
2. **No Order as to costs.**

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Dale Staple
Puisne Judge (Ag)