



[2012] JMSC Civil 8

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. HCV 04276 OF 2011

| | | |
|----------------|---|---------------------------------|
| BETWEEN | THE PROPRIETORS STRATA PLAN NO. 210A | CLAIMANT |
| A N D | KEITH BYLES | 1ST DEFENDANT |
| A N D | COLEEN BYLES | 2ND DEFENDANT |

Mr. Kent Gammon for Claimant.

Mr. Oraine Nelson instructed by K. Churchill Neita & Co. for Defendants.

Heard: 11th November 2011 & 25th January 2012

Coram: Anderson, K, (J).

[1] This Claim was instituted by the Claimant with the filing then, of a Fixed Date Claim Form, on July 4, 2011. The primary Orders being sought by the Claimant are numbered 1-4 therein, as follows:-

1. That there be vacant possession of ALL THAT parcel of land of **NUMBER NINETEEN SEYMOUR AVENUE** known as **THE RETREAT** in the Parish of **SAINT ANDREW** being the Strata Lot Numbered **THIRTY-NINE** in Strata Plan Numbered Two Hundred and Ten A and Twenty undivided 1/1019th shares in the common property therein and being part of the land comprised in Certificate of Title at registered at Volume 1161 Folio 693 of the Register Book of Titles ('Subject Property').

2. That the duplicate Certificate of Title Volume 1161 Folio 693 be cancelled and a new Certificate of Title issued in the name of the Claimant herein.
3. That the Claimant be permitted to sign an instrument of transfer as Transferor of ALL THAT parcel of land part of **NUMBER NINETEEN SEYMOUR AVENUE** known as **THE RETREAT** in the Parish of **SAINT ANDREW** being the Strata Lot Numbered **THIRTY-NINE** in Strata Plan Numbered Two Hundred and Ten A and Twenty undivided 1/1019th shares in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1161 Folio 693 of the Register Book of Titles.
4. In the alternative the Registrar of the Supreme Court of Judicature of Jamaica be permitted to sign an instrument of transfer as transferor of ALL THAT parcel of land part of **NUMBER NINETEEN SEYMOUR AVENUE** known as **THE RETREAT** in the Parish of **SAINT ANDREW** being the Strata Lot Numbered **THIRTY-NINE** in Strata Plan Numbered Two Hundred and Ten A and Twenty undivided 1/1019th shares in the common property therein and being part of the land comprised in Certificate of Title registered at Volume 1161 Folio 693 of the Register Book of Titles.

[2] The Claimants also, on same date, filed an Affidavit in Support of Fixed Date Claim Form. That Affidavit was deposed to by Shelly-Ann Weston.

[3] The Defendants filed an Acknowledgement of Service of Fixed Date Claim Form, through their Attorneys – Messrs. Churchill Neita & Company. In that Acknowledgement of Service, they indicated that they intended to defend the Claim and that they did not admit any part of the Claim. That Acknowledgement of Service was filed on August 19th, 2011 and therein, it was stated by the Defendant's counsel, that the Defendant's received the Fixed Date Claim Form on August 14th, 2011. On that Acknowledgement of Service, where it is asked

whether the Defendants received the Claimant's Particulars of Claim and if so, when was same received, the response was 'N/A' which no doubt signifies – 'not applicable.' However, I must firstly point out that insofar as the Claimant's Claim was filed by means of a Fixed Date Claim Form as it relates to a claim for possession of land (See Rule 8.1 ((4) (b) in this regard), the Claimant's 'Particulars of Claim' as it were, would be set out in the Affidavit in Support of Fixed Date Claim Form as was filed on the same date that the Fixed Date Claim Form was filed. Thus, the Affidavit took the place of Particulars of Claim. Whilst the Civil Procedure Rules do not require that the Affidavit in Support of a Fixed Date Claim Form (which is to take the place of Particulars of Claim), must be filed either at the same time, or even on the same date as the Fixed Date Claim Form in all cases , nevertheless, what is clear from Civil Procedure Rule 8.2, read along with Rule 5.2, is that as a general rule the Claimant's Particulars of Claim must be served with the Claim form. In order for this not to be done, the Court would have to give its approval and certain specific requirements must be met by a Claimant who seeks the exercise of this Court's discretion in his/its favour, in that regard.

[4] Thus, all in all, in a case such as this, the Defendant's counsel ought to have stated in the Acknowledgement of Service, which was filed on the Defendant's behalf, whether they were served with the Affidavit in Support of Fixed Date Claim Form and if so, when they were served with same. Having not done this, when this matter came before me for First Hearing of the Fixed Date Claim Form on November, 2011, I had to enquire as to when the Affidavit in Support of Fixed Date Claim Form was served on the Defendants and was then informed that the same was served on the same date as the Fixed Date Claim Form was served. Notably, there apparently may exist some discrepancy between what I was told during the hearing of this matter in my Chambers, as to what was the date of service of the Fixed Date Claim Form and Affidavit in Support, this being August 26th, 2011 as against the date of service of same which has been recorded on the Acknowledgement of Service, this being –

August 14th, 2011. The date of August 26th, 2011 as being the date of service was provided to this Court, in Chambers, by counsel for the Defendants – Mr. Nelson and there was then, no dissent thereto, forthcoming from the Claimant's counsel. Nonetheless, as there exists a discrepancy in this regard, which must of necessity, be resolved, for reasons which will become clear below, this Court has chosen to resolve the same by relying on the information as provided in the Defendant's filed Acknowledgement of Service, rather than on the information as was provided to me orally in Chambers, by the Defendant's counsel on this point. Presumably, this apparent discrepancy only arose because of mere human error, either of this Court in recording what was stated to me by counsel in Chambers, or of the Defendant's counsel in terms of that which he stated to me in Chambers. If it is the latter, it is to be noted that to err is human and I, of course, attribute no improper motives whatsoever, to Mr. Nelson in this regard. In advance, I would wish to sincerely apologize to counsel if the error on this point, is solely mine. In any event, I will regard August 14th, 2011 as being the date of service upon the Defendants of both the Fixed Date Claim Form and Affidavit in Support.

[5] By virtue of Civil Procedure Rule 10.3, read along with Rule 10.2, the Defence, in the form of an Affidavit in Response should have been filed and served no later than forty-two (42) days (in the manner in which such days vis-à-vis service of documents are required to be calculated by the Rules of Court), after the service upon the Defendants of the Claimant's Fixed Date Claim Form. If one takes, as I believe this Court ought to, the Acknowledgement of Service as filed by the Defendant as having correctly set out therein that the Claimant's Claim Form was served on the Defendants on August 14th 2011, bearing in mind that the 42 day period is to be calculated as 42 clear days (see Rule 3.2 (1), 3.2(2) and 3.2 (3) on this point), by my calculation, this would mean that if there was to have been compliance with the Rules of Court by the Defendants in terms of the date by which the Defendants' Defence or Defences was/were to have been filed, in the form of an Affidavit or Affidavits in response, same ought to

have been filed and served by or before September 26th, 2011. Even if the date of service upon the Defendants of the Fixed Date Claim Form, was in fact not August 14th, 2011 but rather August 26th, 2011, as was stated to me in Chambers by the Defendants' counsel, then even so, the Defendant's Affidavit or Affidavits in response, ought to have been filed by or before October 10th, 2011. Instead however, the Defendants' Affidavit in Response was not filed until November 8, 2012 and thereafter, the same was served on November 10th, 2011. Thus, in either event, the Defendants' Defence, in the form of an Affidavit in response, was filed at least three (3) weeks later than is required by the Rules of Court.

[6] This matter came before me in Chambers, on November 11th, 2011, being the date set for the First Hearing of the Fixed Date Claim Form herein. Up until November 11th, 2011 there had been no Application for an extension of time vis-à-vis the filing of a Defence, ever filed by either of the Defendants.

[7] This Court is empowered by virtue of Rule 27.2 (8) of the Civil Procedure Rules, upon the First Hearing of a Fixed Date Claim Form, to treat the same as the Trial of the Claim and dispose of the Claim summarily, if it is not defended or the Court considers that the Claim can be dealt with summarily.

[8] This Court brought that provision to the specific attention of the respective parties' counsel, when this matter came before me in Chambers. Having brought the same to the parties' attention, I then enquired of the Defendants' counsel as to whether he would be making an Application for an extension of time, to which, Mr. Nelson responded that he would so do. Mr. Gammon for the Claimant then made it clear to this Court that he would be strenuously opposing the making of any Order by this Court granting an extension of time to the Defendants, so as to enable their Defence which was filed out of time, to be otherwise regularized by this Court.

[9] At that stage, it became clear to me that, prior to my deciding upon

whether the Fixed Date Claim Form as filed should be dealt with summarily, in accordance with Rule 27.2 (8), I would first have to attend to the oral Application which was then about to be made to me by counsel for the Defendants, for an extension of time vis-à-vis the filing of a Defence. This to my mind was so because, if I were to be minded to deal with the Fixed Date Claim Form summarily, arising from there not being before the Court any Defence to the Claim, then such could only properly be done in a circumstance wherein I had heard the Application for an extension of time and decided against the grant of the time extension as was then to be sought, since the time extension as sought were to be granted, then it would be palpably unjust to deal summarily with the Fixed Date Claim Form at the First Hearing, if such were to be Ordered on the basis that there existed at that time, no Defence to the Claim. The granting of an extension of time to the Defendants' in a circumstance such as that, would have been not only palpably unjust but also, clearly, a useless exercise.

[10] Thus, I then entertained the Defendant's Application for an extension of time to be afforded to them, within which to file their Defence.

[11] In making that Application, the Defendants' counsel – Mr. Nelson, suggested to this Court that the Defendant had not filed his Defence within the allotted time as prescribed by the Rules of Court, because further information from the Claimant was required, in order to have enabled the Defendants to have properly responded to the Affidavit in Support of the Fixed Date Claim Form. It was suggested by Mr. Nelson that his office had had some difficulty in locating that which he said was the new office address of the Claimant's counsel – this apparently not having been the address on record. In any event though, no Affidavit giving evidence of the allegedly unsuccessful efforts made by the Defendants to serve that Request for Information, was ever filed with this Court. Nonetheless, what is not in dispute between the parties, is that the Defendants' Request for Information was filed on September 22nd, 2011 – this being quite some time – at least some weeks after service upon the Defendants of the Fixed

Date Claim Form. The same was not served until October 11th, 2011. By this date (October 11th, 2011), the Defendants' time for filing a Defence had, even on the most favourable interpretation (i.e depending on when service of the Fixed Date Claim Form was in fact effected), expired.

[12] With that in mind, the Defendants ought to have sought the agreement of the Claimant, to an extension of time for the filing of a Defence. This Court has not been made aware that any such extension of time by consent of the parties, was ever even so much as discussed between the parties. This ought to have been done from as of the time when the Defendants' Request for Information was served on the Claimant.

[13] The Claimant's, 'Replies to Request for Information' was filed on October 21st, 2011 and the same was served on October 24th, 2011. With this in mind, it is extremely difficult to comprehend why it would have been either necessary or justifiable for the Defendants, having, through their counsel, obtained the information being sought by them, from as of October 24th, 2011, yet still, no Affidavit of either Defendant or of both collectively was filed in response to the Fixed Date Claim Form and Affidavit of the Claimant in Support, until November 8th, 2011. That Affidavit of the Defendants in response to the Claim was not transmitted to the Claimant until November 10th, 2011 when the same was transmitted via facsimile correspondence, to Attorney Gammon's office. This matter that came before me, was an adjourned First Hearing of Fixed Date Claim Form, scheduled before me on 11th November, 2011. Even by that date no written Application for an extension of time, nor any Affidavit evidence in support of such an Application, had by then or ever at all, been filed by the Defendants, or either of them. This to my mind, evinces a callous disregard for the Rules of Court and the importance of adhering to time limits as set by the Rules of Court.

[14] Whilst this Court does have a discretion to extend time in circumstances

such as these such an extension is not to be considered by any party as being a matter of entitlement. A Court ought not to be expected to exercise its discretion in a vacuum. Both parties' situations have to be carefully considered by the Court, so as to ensure that whether or not the extension of time is granted, it is the objective of justice which is achieved. In that regard, it is incumbent upon a party who seeks to rely on the exercise by a Court of its discretion, to place before the Court, in a form which can be accepted by the Court, evidence which provides the basis for the exercise by the Court, of its discretion in that party's favour. No such evidence was ever placed before this Court vis-à-vis the Defendants' oral application as was made before me in Chambers on November 11th, 2011, for an extension of time. Added to that, even based on the submissions as were made to me orally by the Defendants' counsel, in an effort to explain the Defendant's delay in filing an Affidavit in Response, I must conclude that no plausible reason for the delay was proffered to this Court. I have taken this approach following upon the Court of Appeal's Judgment as rendered in the **Delsie Allen & Trevor Mesquita case – Supreme Court Civil Appeal No. 8 of 2011**, which although it primarily pertained to a different legal issue than the one which is pertinent to the case at hand, nonetheless, has provided useful guidance to this Court and practitioners alike, as to the approach which should be taken by a Court vis-à-vis an application for an extension of time and the exercise by a Court of its discretion in that regard .

In the circumstances, I treated the Fixed Date Claim Form as filed by the Defendant as being undefended and in accordance with the provisions of Rule 27.2 (8) of Civil Procedure Rules decided to dispose of the matter summarily. I also refused leave to appeal my decision in that regard, as the Defendants have not, through their counsel, been able to satisfy me that an Appeal of my decision in that regard, would have any real chance of success – See the requirements of Section 1, Rule 1.8 of the Court of Appeal Rules, in this regard.

[16] The Claimant's Amended Fixed Date Claim seeks by means thereof, to

obtain vacant possession of a strata lot numbered 39, in strata plan 210A and twenty undivided 1/1019th shares in the common property therein and being part of the land comprised in the Certificate of Title registered at Volume 1161, Folio 693 of the Register Book of Titles. This property's address is No. 19 Seymour Avenue, known as "The Retreat" in the parish of Saint Andrew and is occupied by the Defendants. The Claimant is also seeking to have the duplicate Certificate of Title registered at Volume 1161, Folio 693, cancelled and a new Certificate of Title issued in the name of the Claimant.

[17] From the Request for Information and Replies to Request for Information as filed by the Claimant and Defendants respectively, it is clear that the Defendants owe maintenance contributions pertaining to the apartment which they own and currently occupy. It has been alleged that the sum which they owe as maintenance contributions for the premises, up until October 14th, 2011, was one hundred and sixty-two thousand, two hundred and seven dollars and thirty-nine cents (\$162, 207.39).

[18] Ms. Shelly Ann Weston, who is the Claimant's Property Manager, in the Affidavit which she has deposed to in support of the Fixed Date Claim Form, has deposed therein, to there having been, on the 8th December, 2010, a Certificate of Power of Sale granted by the Commission of Strata Corporations, with respect to the strata premises which is the subject matter of this Claim. A copy of that Certificate has been appended as an exhibit to Ms Weston's Affidavit.

[19] **The Registration (Strata Titles) Amendment Act, at Section 5 (c) (4), provides that – “Where the commission is satisfied that the corporation has taken all reasonable steps in accordance with Section 5A (2) for the purpose of – (a) obtaining payment of amounts owing to the corporation and (b) notifying the proprietor of the proposed sale, it shall issue a certificate in the prescribed form to that effect. “I find that this is precisely what has been done by the commission of Strata Corporations with respect**

to the relevant strata premises in this case. Section 5(D)(3)(2) of this same Act of Parliament, also provides that “The corporation shall ensure that two separate valuations of the strata lot are obtained, each to be determined by duly qualified person appointed by the corporation with the approval of the registered mortgagee, if any.” Two valuations of the relevant strata premises in this case, have been obtained by the Claimant, one from Tavares Finson Realty Co. Ltd. and the other from Valerie Levy & Associates Ltd. Unfortunately however, these valuations were not appended as exhibits to any Affidavit evidence adduced by the Claimant in support of their Claim. This ought to have been done. This Court does know however, that no mortgage on the relevant strata premises exists. This Court knows this arising from a perusal of the Certificate of Title which has been appended as an exhibit to Ms. Weston’s Affidavit. However, this Court does not know the exact identities of the persons who conducted the respective valuations and whether each such person was a duly licensed valuator as at the time when each such valuation was rendered. This Court ought to have been provided with such information, because, without such, this Court cannot be assured that any if the other persons granted to the ‘corporation’ vis-à-vis the sale of that premises can properly be effected.

[20] The Registration (Strata Titles) Act as amended, provides at Section 4 (1) thereof, that – “The proprietors of all the strata lots contained in any strata plan shall, upon registration of the strata plan, become a body corporate (hereafter referred to as “The corporation”) under the name “The Proprietors Strata Plan No....” (With the appropriate number of the Strata Plan inserted in the blank space.” Section 4 (2) provides that – “The corporation shall have perpetual succession and a common seal and be capable of suing and being sued in its name.” With these provisions in mind, it is clear to me that the Claimant has appropriately brought this Claim before this Court, seeking the reliefs as aforementioned.

[21] The relevant strata premises, after having been valued by two valutors,

was placed up for sale by public auction. The Corporation is empowered by the relevant Act of Parliament to do this – see Section 5 of the Registration (Strata Titles) Amendment Act 2009, in this regard. The reserve price for the strata premises was set at \$3,600,000.00 and that premises was placed on public auction on March 24th, 2011. A bid was submitted for the reserve price of the premises and the same was accepted by the public auctioneer of May 5th, 2011. On May 11th, 2011 the successful bidder paid a deposit of 10% on the reserve price.

At this stage therefore, the corporation, being the Claimant herein, wishes to be able to complete the sale by transferring the strata premises to the intended purchaser. The Defendants have not been co-operating with them in this regard. Thus, the Claimant has understandably sought this Court's intervention, so that the relevant premises can be transferred. In order for this to happen, the duplicate Certificate of Title, which is presently in the Defendant's name would first have to be cancelled and then the Claimant would have to be able to sign an instrument of Transfer as Transferor, of Strata Lot numbered 39 in Strata Plan numbered 210A, this being the premises currently owned and occupied by the Defendants.

[22] **Section 5 (E) (5) of the Registration (Strata Titles) Amendment Act, provides that – “For the purposes of executing its powers of sale under Section 5 (2) the corporation shall be entitled to execute all such relevant instruments and documents necessary, pursuant to the Registration of Titles Act, to transfer ownership of the strata lot.”** Section G (1) the Registration (Strata Titles) Amendment Act sets out the circumstances in which the corporation may apply to the Court – this being the Supreme Court, as per the definition of ‘Court’ in the Registration (Strata Titles) Act, for vacant possession of a strata lot. One of these circumstances arises wherein, for a period exceeding sixty days, contributions have not been paid in respect of that strata lot. It is unclear from the evidence presented to this Court, whether or not

this is the circumstance being relied upon as the basis for the Court ordering vacant possession of the lot in question and once again, it is my view that such evidence ought to have been provided to this court. Nonetheless, this Court is of the view that it is necessarily implicit in the statutory provisions of the Registration (Strata Titles) Amendment Act, which authorize the corporation to exercise a power of sale in circumstances such as exist here, that in order for such power to be either usefully or effectively exercised, vacant possession of the relevant strata lot would have to be provided by the proposed transferor, this being the corporation, to the proposed transferee – this being the proposed purchaser who has successfully bid to purchase the relevant strata lot.

[23] All in all therefore, I am of the view that this Court should grant the Orders as sought, except that, because I am not entirely certain of the appropriateness of the valuations done, this Court will make its Orders subject to there being compliance with Section 5(D)(3)(2) of the Registration (Strata Titles) Amendment Act, insofar as the valuations must be provided by two licensed valuers and the reserve price to be accepted as the same price for the property, should be no lower than the lowest of those two valuations, insofar as the forced sale value of the relevant strata lot is concerned.

[24] Subject to this having been complied with, It is Ordered as follows:-

(1) That there be vacant possession of ALL THAT parcel of land part of Number 19 Seymour Avenue, known as THE RETREAT in the parish of Saint Andrew, being the strata lot numbered 39 in Strata Plan Number 210A and twenty undivided 1/1019th shares in the common property therein and being part of Title registered at Volume 1161 Folio 693 of the Register Book of Titles.

(2) That the duplicate Certificate of Title Volume 1161 Folio 693 be cancelled and a new Certificate of Title issued in the name of the Claimant.

(3) That the Claimant is permitted to sign an instrument of transfer as transferor of ALL THAT parcel of land part of Number 19 Seymour Avenue, known as THE RETREAT in the parish of Saint Andrew, being the strata lot numbered 39 in Strata Plan numbered 210A and twenty undivided 1/1019th shares in the common property therein and being part of the land comprised in the certificate of Title registered at Volume 1161 Folio 693 of the Register Book of Titles.

(4) The costs of this claim be the Claimant's with, such costs to be taxed if not agreed upon.

[25] Solely for the sake of completeness, I must mention that I reject the contention of the Claimant's counsel as advanced in their Skeleton Arguments that the corporation is to be treated in equal terms vis-à-vis Section 5 (E) (5) of the Registration (Strata Title) Amendment Act, as a mortgagee under Section 106 of the Register of Titles Act. This contention as I understood it, was made based on the wording of Section 5 (E) (5) of the Registration (Strata Titles) Amendment Act. However, I do not agree with this suggestion because I am of the view that if this were in fact to be legally so, the Amendment Act would have had to have expressly so provided. Such has not in fact been provided though, either in that Amendment Act, or any other Act. Accordingly, the reference by the Claimant in its Skeleton Arguments, to Section 106 of the Register of Titles Act has played no role whatsoever, in my decision making process vis-à-vis any of the Orders that I have made. Otherwise though , I am thankful to both counsel for the respective arguments advanced on various aspects of law pertaining to this Claim. The same have been useful to me in providing this Judgment as was reserved.

.....

Honourable Kirk Anderson (J.)