[2023] **JMSC Civ 03**

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2017 HCV02283

IN THE MATTER of ALL THAT parcel of land part of **GREEN POND** in the parish of **SAINT JAMES** being the Lot numbered **ONE THOUSAND TWO HUNDRED AND NINETY** on the Plan of part of Green Pond (Phase 5) aforesaid deposited in the Office of Titles on the 24th day of August 1999 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 1343 Folio 978 of the Register Book of Titles

A N D

IN THE MATTER OF Restrictive Covenants numbered "5" endorsed on the Certificate of Title affecting the user thereof

A N D

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

Re: Lot #1290 Green Pond, St. James

IN CHAMBERS (Considered on Paper)

Janel A. Thompson instructed by Watson Mendes &Co. for the Claimant

HEARD: January 10, 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

D. STAPLE J (AG)

BACKGROUND

[1] On the 14th July 2017 the Claimants filed the instant claim, commenced by Fixed Date Claim Form and supported by their joint affidavit also filed on the 14th July 2017. The Claim is for the modification of Restrictive Covenant number 5 endorsed on the certificate of title registered at Volume 1343 Folio 978 in the Register Book of Titles.

[2] The claim was served on the St. James Municipal Corporation and the National Environment and Planning Agency. At the first hearing of the Fixed Date Claim Form on the 27th October 2017, the matter was adjourned to the 16th February 2018. The endorsement on the minute order was that the Applicant was to submit the comments of the Local Planning Authority (LPA).

[3] On the 16th February 2018, the matter was again adjourned for the Applicant to submit the comments of the LPA. This time, it was adjourned to the 15th June 2018.

[4] On the 15th June 2018, the Applicant was then to submit approved building plans and/or favourable comments from the LPA if they could not get the approved building plans. The matter was adjourned to the 28th September 2018.

[5] The next date, the 28th September 2018, the matter was again adjourned in order for there to be compliance with the comments of the NEPA, that is, they needed to submit the comments of the LPA regarding the approved building plan.

[6] On the 14th December 2018, no parties attended and the matter was adjourned for a date to be fixed by the Registrar. The comments from the LPA were still outstanding.

[7] Two events happened that had a significant impact on this matter that cannot be ignored by the Court. Firstly, the Claimants had been represented in this matter by Messrs Watson & Watson Attorneys-at-Law. Both counsel in that firm died. Mr. Huntley Watson passed on in 2019.

[8] Secondly, according to the submissions of the Claimants' present Attorneys-at-Law filed on the 6th January 2023, the St. James Municipal Corporation requested that the Claimants get "as built approval" of the building on the property comprised in the title. According to counsel, it was the National Housing Trust that was responsible for providing the "As-Built" plans. This was only secured in June 2022.

ISSUES BEFORE THE COURT

[9] 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.

[10] Counsel rightly identified, in her submissions at page 2, the principles from the case of ***MSB Ltd et al v Thomas***[1], where the Court is exercising its powers to dismiss a matter for want of prosecution.

[11] So the Court, before it can make such an order must be satisfied as follows:

(1) 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

[1] [2020] JMCA Civ 4

(2) 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).

DISCUSSION OF THE LAW

[12] I note counsel's reference to the authority of ***Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al***[2] concerning the principles relating to when a Court would exercise its discretion to strike out a statement of case. However, the Court is not seeking to strike out a statement of case. It is seeking to make an order to dismiss a case for want of prosecution. There are therefore different principles involved, in my view, and so this case was not considered.

[13] I noted as well the authority submitted of ***Vasti Wood v H.G. Liquors Limited et al***[3]. 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.

[14] 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

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[2] [2014] JMCA App 14

[3] (1995) 48 WIR 240 per Wolfe JA (as he then was).

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.

[15] 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 attorneys at law is the primary ground for dismissal of an action for want of prosecution."*

[16] Even in these pre CPR days, Gordon JA recognised[4] 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.

[17] 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.

[18] 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.

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[4] See N3 at page 252

[19] However, in this Court's view and in the view of Wolfe JA (as he then was) in the ***Vasti Wood*** decision[5], 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 individual case, has a ripple effect throughout the entire judicial landscape. A Court's resources are finite. We are seeing this more and more.

[20] 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?

[21] I find that there was inordinate delay in the prosecution of this case. This is a claim for modification of a restrictive covenant. These are, by and large, routine matters that are not complex and often uncontested. They are handled by Masters in Chambers except in the odd case where there is a contest and it goes to a Judge.

[22] If handled properly and with due expedition, these matters can be resolved in a matter of months and not years.

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[5] 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."

[23] There is no indication that this particular claim will fall into the exception rather than the rule. The covenant with which we are concerned stated as follows:

> *5.Save and except along any boundary on which a building wall common to Two (2) lots within the subdivision has been erected, no building wall or structure shall be erected within Four (4) Feet from any other boundary fence adjoining a walkway or within four (4) Feet from any boundary fence on the said land provided that for purposes of this covenant the eaves of any building on the said land shall not be considered as part of any building wall or structure.*

[24] The proposed modification was set out in the Fixed Date Claim Form as follows:

> *5.Save and except along any boundary on which a building wall common to Two (2) lots within the subdivision has been erected, no building wall or structure shall be erected within Four (4) Feet from any other boundary fence adjoining a walkway or within Four (4) Feet from any boundary fence on the said land provided that the existing building may remain 0.2 metres from the North Western Boundary and provided further that for the purposes of this covenant the eaves of any building on the said land shall not be considered as party of any building wall or structure.*

[25] It is therefore what is known as a "breach specific" modification. Hence the request by the Municipal Corporation for "as built" approval. This is not generally a contentious modification.

[26] What is the case, from the reading of the file, is that from the first hearing in October of 2017, this position was known to the Claimants and Mr. Watson (of blessed memory) as he attended some of the hearings. Over a year passed and still there was no evidence of any effort by the Claimants or their Attorneys-at-Law to get the "As Built" approval. The Affidavit of Ms. Thompson that accompanied her submissions, contains no letters from Watson & Watson to indicate that they had been trying, but without success, to get something out of the National Housing Trust from 2017 or throughout 2018. All we have is a series of adjournments for resolution of the same issue.

[27] I noted that in exhibit JAT 1, there is a reference to an October 2021 correspondence from Watson and Watson to the National Housing Trust concerning the instant claim. The Court is not in possession of this letter. But what the letter does confirm is that Messrs Watson & Watson, in October of 2021, were in the process of handling this matter in some fashion even after the death of counsel. So what accounts for the delay in putting the matter back before the Court?

[28] Exhibit JAT 2 is a letter from the National Housing Trust to Messrs Watson & Watson dated June 14, 2022 indicating that the NHT had in their possession the "As Built" plan and that they would be submitting same to the Municipal Corporation.

[29] Then we have JAT 1, a letter dated December 29, 2022 from the National Housing Trust to Messrs Watson & Mendes indicating again that the Trust had the plan and would be submitting same to the Municipal Corporation.

[30] I must say that the conduct of the Trust leaves much to be desired. Why would there be a six-month gap between the June 2022 letter (when they first indicated they had the "As Built" Plan) and the December 2022 letter without delivering the "As Built" plan to the Municipal Corporation?

[31] But this still does not account for the delay between October 2017 and December 2018. Nor does it account for the delay up to October of 2021 when Watson & Watson were clearly in communication with the Trust. Was Watson & Watson earnestly writing to the NHT to get the plans from them from October 2017? Was the NHT stalling Watson & Watson despite being written to? What steps was counsel taking between October 2017 and December 2018 to get the plans from the NHT? I have no idea. There is no evidence provided.

[32] Even now, as at the 6th January 2023, the date of filing of counsel's affidavit, there is no evidence that the NHT has submitted the plans to the Municipal Corporation.

[33] In my view I am satisfied that there has been inordinate delay in the processing of this claim.

WAS THERE A SUFFICIENT EXPLANATION FOR THE DELAY?

[34] For the reasons discussed above, I am not satisfied that there has been sufficient explanation for the delay of 5 years in the prosecution of this claim. In my view, such a claim as this need not take up more than 1 year of the Court's time if properly prepared and prosecuted.

[35] In my view, proper preparation of this claim would have required the Claimants to have obtained at least the "As Built" plan before pursuing the application. Ideally, they would have gotten even preliminary approvals of the "as built" plan and proposed modification prior to making the application as it would significantly reduce the delays. Counsel who practice in this area know the requirements and Watson & Watson were no strangers to these applications.

[36] Proper prosecution requires diligence, persistence and even seeking judicial intervention to compel third parties to perform certain actions as appropriate. There is no evidence of any of this diligence, persistence or seeking of the Court's intervention in this case.

[37] For the above reasons, I am not satisfied with the explanations for the delay.

THE QUESTION OF PREJUDICE

[38] 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 Corporation to consider the plans and approve them. Hence, I am not in a position to say how much more resources will be required to dispose of this matter.

[39] 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.

[40] 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

[41] In the circumstances, I am satisfied that this matter should be dismissed for want of prosecution. At this stage, there is still no evidence that the St. James Municipal Corporation has even received the plans, let alone commenced the process of reviewing and approving same.

[42] 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.

[43] 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)