REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

H.C.A. C.V. 2006-03379
S-1559 of 2005

BETWEEN

ROOKMIN DULARIYA CLAIMANT

AND

VERMA RAMDASS DEFENDANT

Before the Honourable Mr. Justice V. Kokaram

Appearances:
Mrs. M. Maharaj-Mohan for the Claimant
Mr. D. Cowie instructed by Mrs. V. Badri-Maharaj for the Defendant

JUDGMENT

1. Introduction:

1.1 This case highlights the importance of case management with trial date certainty being at the cornerstone of the new civil landscape. In this matter the Court explored with the parties an amicable resolution of this claim at the case management conference. When that failed the Court made it clear that the trial will be set to proceed unless the matter was settled. On the first day of the trial the Court acceded to the Claimant's application

for an adjournment to facilitate settlement discussions between the parties. However, the Court made it clear that on the second day allocated for the trial, the matter will proceed unless a consent order is entered. On the second day allocated for the trial, 13th July 2009, the Claimant made another application for an adjournment of the trial. This was refused and as the Claimant was not in a position to proceed with the claim, the matter was dismissed with prescribed costs in the sum of $81,000.00.

1.2 Adjournments of trials must now be a rarity under the Civil Proceedings Rules ("CPR"). This Court will not encourage the rolling back of the clock to more lax times where the pace of litigation lingered at the leisure of the litigant and as a consequence the expectations of the public of the delivery of justice in the civil system was diminished by frequent delays in the adjudicative process. The reasons for this decision are set out herein.

2. **The Proceedings**

2.1 These proceedings were commenced under the Rules of Supreme Court 1975 by writ of summons and statement of claim dated and filed 1st September 2005. In this action the Claimant, Rookmin Dulariya, claims against the Defendant, Verma Ramdass, the Claimant's grandson, damages for breach of contract. Alternatively the Claimant seeks an order setting aside a Deed of Conveyance dated 30th July 2004 and registered as No. DE 200402472788, which conveyed the premises known as LP 4 Fourth Street West, Five Rivers, Arouca ("the said premises") from the Claimant to the Defendant. She also seeks a declaration that the deed is null and void and an injunction restraining the Defendant from evicting and/or displacing and/or removing her from the said premises.

2.2 By her statement of claim, the Claimant contends that the parties entered into an agreement whereby the Claimant would convey the said premises to the Defendant upon a number of conditions. The Claimant contends that the Defendant breached the agreement and that the consideration for the said agreement had totally failed.

2.4 The Defendant denied that there was any breach of contract and in an extensive defence, set out the improvements and financial contributions made by the Defendant to the home. There was no counter claim.

3. The Management of the case

3.1 On 13th November 2006 this matter was converted to be dealt with under the CPR pursuant to Part 80.3(1) CPR and was docketed to the Honourable Mr. Justice Moosai. The procedural history of this action is important:

- On 5th February 2007 the Case Management Conference ("CMC") was adjourned as parties were engaged in discussions.
- On 5th March 2007 the CMC was again adjourned.
- On 30th April 2007 directions were given by the Court for the filing of a bundle of documents, the exchange of witness statements and the filing of statements of issues.
- On 28th May 2007 parties indicated to the Court that negotiations had broken down. Leave was granted to the Claimant to extend the time for her to file an agreed bundle of documents.
- On 8th October 2007 further directions were given by the Court for the filing of an agreed bundle of documents and the filing of a statement of facts and issues. A trial was set for 29th April 2008 to 2nd May 2008.
- The trial was rescheduled to 10th June 2008 when it was adjourned.
- The matter was thereafter adjourned pending settlement on several occasions, 8th December 2008, 11th December 2008, 19th December 2008, 30th January 2009 and 22nd February 2009.
- On 16th April 2009, the matter was rescheduled and transferred to my docket and a pre trial review was scheduled for hearing on 22nd April 2009.

3.2 At a pre-trial review the Court exercises the powers of case management and is required to deal with cases justly by actively managing cases.[1] This includes encouraging parties to use the most appropriate form of dispute resolution to settle their disputes and

[1] See Rule 25.1 CPR

"*actively encouraging and assisting parties to settle the whole or part of their case on terms that are fair to each party***."** I took the opportunity at the case management conference on 22nd April 2009, to explore with the parties a resolution of this matter. The parties had appeared in person and were represented by their attorneys at law. They engaged in further discussions on that day, however, those discussions did not result in a settlement of part or whole of the case and accordingly I gave directions fixing the matter for trial on 10th July 2009 and 13th July 2009. I also warned the parties that the trial having been fixed, it will proceed unless a consent order was being entered, there will be no adjournments.

3.3 The culture of civil litigation has been changed by the introduction of the CPR. Under the CPR although all attempts must be made to explore options for early resolution, this is done so as to keep trials to a minimum. After a trial is fixed, parties must know that they have been assigned court days and courtrooms for the resolution of their matter by trial.

4. The Trial

4.1 At the trial on 10th July 2009 the Advocate attorney-at-law for the Claimant, applied for an adjournment with a view to continue discussions to settle the matter. This application arose in the following circumstances.

4.2 Initially the Claimant herself seemed reluctant to start the case due to an injury sustained by her earlier in the month. The Claimant was however present in Court and no medical evidence was tendered to support any disability in giving evidence. Additionally the Claimant's advocate attorney-at-law had for the first time seen an application to strike out portions of the Claimant's witness statement and appeared reluctant to commence the trial. I asked the Claimant's advocate attorney at law certain preliminary questions concerning the action and the strengths of the respective cases and she candidly indicated that it was her desire that this matter could be settled. The Court ordered that the first order of business was to deal with the striking out application, however I stood the matter

down to facilitate discussions with the warning that if the discussions did not prove fruitful that the matter will proceed.

4.3 When the matter was recalled, however, an application for an adjournment was made to facilitate further discussions between the Claimant and her own instructing attorney-at-law over the weekend. The instructing attorney-at-law was not present at the trial. The Court was reluctant to adjourn the matter further having regard to the history of the matter and the number of times the parties had engaged in discussions prior to trial. However, having discussed the case with both advocate attorney-at-law and narrowing the issues for determination, the cross examination of witnesses could have been completed on the next day of trial. Given the assurance by the Claimants advocate attorneys that this might achieve a resolution I granted the adjournment. However, I made it clear in no uncertain terms to both parties that on the next day allocated for trial, 13th July 2009, either a consent order is entered or the matter will proceed.

4.4 In hindsight even this indulgence should not have been granted to the Claimant and the matter should have proceeded on day one, as on the next day of trial a very unusual application was made. On 13th July 2009, Advocate attorney for the Claimant indicated that the Claimant did not want her to represent the Claimant as her advocate. Upon enquiries being made by the Court of the client herself, it appeared that the reason that the Claimant was adopting this position was that she "wanted Mr Ramnath" (instructing attorney-at-law) and that it did not make sense to pay for "two lawyers," an instructing attorney and advocate attorney and she preferred to have one attorney represent her in this case, the instructing attorney-at-law. This was a baffling turn of events as there was nothing which indicated to me that there was a difficulty between advocate and her client, save for this unusual request to be represented by one attorney instead of two, nor was there any reason offered as to the absence of her instructing attorney-at-law.

4.5 The Court indicated to the Claimant herself that the Court's intention was to proceed with the trial on that day, but she insisted on having her instructing attorney-at- law represent her and not to, as she put it, "pay for two lawyers". Both counsel at that stage agreed that the client had discharged the services of her advocate and I gave advocate

attorney leave to withdraw. Advocate attorney at law before withdrawing indicated to the Court that instructing attorney was fully apprised of the matter and the dates of the trial. The matter was stood down on two occasions to await instructing attorney's arrival. Upon his arrival it was clear that he too was taken by surprise by the request of his client. What was more baffling was that instructing attorney did not have any papers at all in relation to his client's case as he indicated that advocate attorney had taken all the papers with her. This was indeed shocking as either advocate attorney-at- law should have passed the file to instructing attorney-at-law or at the very least instructing attorney-at-law had a duty to maintain copies of his client's file. Indeed instructing attorney at law is on record as the attorney for the Claimant and as such his duty is to his client to represent her zealously and to the best of his ability.

4.6 Instructing attorney attempted one last effort to settle the matter. When this failed he applied for an adjournment of the trial. It could not be the case that the attorney was unfamiliar with the case, or did not know that the matter was listed for trial for two days, or that the litigant was unaware that the Court was not going to adjourn the case beyond the last day of trial. Stuck with the dilemma of starting the case, in which case the attorney could have taken a note of the cross-examination and then renewed the application to reflect on it, the application for an adjournment was made. The Defendant was at all times ready to proceed with the trial.

4.7 It was an unfortunate application having regard to the history of the proceedings and the warnings issued to the parties on several occasions. The Court had no alternative but to dismiss the trial with costs.

5. Adjournments of trials and trial date certainty:

5.1 It is within the Court's discretion to adjourn a trial on such terms as "he thinks just" pursuant to rule 40.4(1) CPR. In exercising that discretion the Court must deal with the case justly and in so doing give effect to the Overriding Objective.

5.2 The trial is the centerpiece of litigation. Matters are actively case managed and monitored by the Court, with a view to resolving cases at an early stage or at the dates set for trial. It cannot be overemphasized that in this new landscape, the importance of maintaining trial date certainty is critical for the proper working of the CPR. In doing so parties are guaranteed of a date by which a dispute comes to an end. Parties are able to allocate their similarly scarce resources to engage in a battle for that limited period of time, a period which causes a dislocation in their daily lives. Attorneys are guaranteed that their private and office lives are managed around these dates. A system of calendaring can now be established and be relied upon for the orderly conduct of cases and the allocation of the Court's resources. The anxieties caused by the uncertainty that a trial will start is no longer a feature of civil litigation.

5.3 In refusing the application for the adjournment, the Court considered the relevant factors to give effect to the overriding objective against this backdrop.

Parties on an Equal Footing:

In ensuring that the case is dealt with justly the Court must ensure fair play. No party should have an unfair disadvantage in the presentation of their case. In this case the Defendant was ready to proceed with the matter. Another adjournment again puts the Defendant at a disadvantage. The Claimant still had her attorney of choice but he must now recover his files and one is unsure as to whether or how long that process may take.

Saving expense:

Another set of trial dates would only generate additional costs for both parties. Even if the trial was adjourned the Claimant herself would have been penalized in the costs of the aborted trial which, if assessed would have been substantial. Another adjournment would further prejudice the Defendant's rights to the said premises. The Court also noted the relief for an injunction against the Defendant's occupation of the premises. The evidence revealed that the Defendant was in fact evicted from the home. This will linger as the litigation continues.

Proportionality:

The case was prepared and ready for trial. A brief examination of the merits of the case demonstrated that the litigation was not one in which the Claimant was guaranteed success. It was not a strong case. Indeed her only witness was herself with no corroborating evidence on a matter where there are hotly contested facts. Several parts of her paragraphs in her witness statement would have had to be struck out as new allegations were now being made of non-est factum and fraud, which advocate frankly accepted were not part of the pleaded case for the Claimant. Advocate attorney nonetheless indicated that she was constrained by her instructions to pursue such an unmeritous application. The Court formed an impression from the Claimant herself that this litigant was unmanageable. The Defendant's evidence revealed substantial sums expended including the payment of a mortgage for the said premises. The refusal of the adjournment was a proportionate response in the circumstances.

Expedition and Fairness:

Clearly the matter could not have been expedited had it been adjourned. It would have resulted in yet another adjournment of a trial which could not be the purpose of the new culture of litigation. Indeed, the trial was scheduled for hearing in the final stages of the final law term when trial dates are at a premium. No date could have been set in that side of the term and parties would have to linger for the earliest, the latter part of the new term or early 2010 for a trial date. This against the backdrop of a first trial date being set as far back as 2008 was in this Court's view unacceptable. This track record sounds ominously reminiscent of the litigation style of the pre CPR and in my view the Court would be wrong to perpetuate this agony of litigation. The Claimant had ample opportunities to either get on with her case or have it resolved.

Appropriate Allocation of the Court's Resources:

The Court's resources are managed by the Court and are not to be dangled on strings in the hands of litigants. If an application for an adjournment must be made it must be made promptly, preferable before the trial date and with consultation with the attorney on the

other party. Such applications should be made in sufficient time so that the Court may consider the options for the further management of the case. Such applications ought not, under this new culture to be made at the date of the trial unless there are exceptional reasons. In any event the editors of Blackstone's Civil Practice 2009 observed: "*Litigants and lawyers must be in no doubt that the court will regard the postponement of a trial as an order of last resort.*" It is also noted that the Court's resources was engaged in the management of the case over 2007 when the matter was converted under the CPR to 2009 when many other matters in the Judge's bourgeoning docket is demanding and deserving of urgent attention. There comes a point in such a case to say enough is enough.

6. Attorney-client duty:

6.1 It is noted that the "choice" of the Claimant of her attorney to conduct the trial was in fact the attorney who was on "record". It is not the case that she requested a new attorney who was recently retained, or unfamiliar with the file or in need of instructions. Instructing attorney was fully appraised of the dates of trial and the position of the Court. He also participated in negotiations on behalf of his client, settled the pleadings and all the documents filed in this action for the Claimant. It was not a case of changing horses in the middle of the race. She simply decided inspite of the warnings of the Court, to proceed with one instead of two. There was no allegation made by the Claimant that the advocate was not doing her duty, or not carrying out her instructions, or that she was otherwise guilty of some misconduct. She instead chose, knowing full well that the Court's position was to start the case, to strategically place instructing attorney at law in an embarrassing position.

6.2 This is no excuse, however, for instructing attorney not having his papers. The instructing attorney having been retained by his client owes a duty to the client to properly attend to her case. The many duties and obligations imposed by common law equity and the Code of Ethics require that the instructing attorney at law should be in

possession and maintain his client's files. His overriding obligation is to protect and pursue his client's interests.[2]

6.3 Additionally, under the CPR the instructing attorney at law has a duty to assist the Court in the management of the case. Rule 1.2 states that: "*the parties are required to help the court to further the overriding objective.*" The Court will not allow its resources to be utilized by litigants who do not genuinely wish to resolve their matters either consensually or by adjudication in the time set by the Court. In this case the Claimant was frustrating the Court's efforts in dealing with the case justly and the duty falls to both the party and her attorneys to help the Court in dealing with cases justly. I formed the impression that this party was refuting my attempts to get on with her matter and I am satisfied that the failure to maintain the trial date was a result of her own doing.

7. Costs:

7.1 Attorney for the Claimant submitted that he could not resist an order for costs in favour of the Defendant and that costs will follow the event. In this case the costs that are to be awarded are prescribed costs. These costs are based on the value of the claim. Counsel for the Defendant submitted that the value of the claim was in the sum of $600,000.00 as disclosed in the witness statements as the value of the said premises.

7.2 Rule 67.5 (2) provides:

"In determining such costs the "value" of the claim is to be decided- (b) in the case of the Defendant:

(i) by the amount claimed by the claimant in the claim form; or

(ii) if the claim is for damages and the claim form does not specify an amount that is claimed, such sum as may be agreed between the parties entitled to, and the client liable to, such costs or if not agreed, a sum stipulated by the court as the value of the claim; or

(iii) if the claim is not for a monetary sum it is to be treated subject to rule 67.6 as a claim for $50,000.00."

[2] See Donsland Limited v Van Hoogstraten [2002] EWCA Civ 253

7.3 In this case, there is no amount claimed in the claim form per 67.5(2) (i). The claim is for damages. This is a claim for a monetary sum which has to be assessed per 67.5(2) (ii). There is no sum agreed between the parties as the value of the claim although attorney at law for the Claimant did not object to using $600,000.00 as the value of the claim. There are no guidelines prescribed for valuing the claim. The Court therefore valued the claim as the value of the said premises, as claimed by the Claimant in her Statement of Claim and in her witness statement. This was the value which was at stake in the dispute. With regard to 67.5 (2) (iii) it cannot be said in this case that the claim was not for a monetary sum as firstly the claim is for "an unspecified monetary sum," damages for breach of contract and falls under 67.2 (2) (ii). Second on the face of the claim a breach of the contract will sound in damages and not setting aside the deed of conveyance. In any event 67.5(2) (iii) CPR captures those cases in which no monetary claim is being made whether specified (67.5 (2) (i) or unspecified (67.5 (2) (ii). Therefore claims for declaratory or injunctive relief, detention of goods, possession of land, accounts and enquiries, pronouncements of wills and other non monetary claims will be captured under 67.5(2)(iii). It is doubtful whether the wording of 67.5(2) (iii) captures what was previously described explicitly under the RSC as "mixed claims" See O.19 r6 RSC.

7.4 Prescribed costs were awarded on this value in the sum of $81,000.00. In evaluating these costs the Court also took into account whether the sum was reasonable. A substantial amount of work was done by the Defendant as appears from the filed proceedings in this trial and this figure is not inconsistent with an order for costs had the costs been assessed.

8. Conclusion

8.1 The Claimant advanced a poor reason for the adjournment of this trial. She adopted a course knowing fully well the adverse consequences that will follow. The claim is dismissed with costs to be paid by the Claimant in the sum of $81,000.00. There will be a stay of execution of this order of 21 days from the date hereof.

8.2 Even though the Court exercised its discretion in this manner, it still holds out the hope that both parties even at this stage can arrive at a resolution of what is fundamentally a family dispute.

Dated this 13th day of July 2009

Vashiest Kokaram
Judge