THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

MONTSERRAT

CLAIM NO. MNIHCV2023/0011
(formerly MNIHCV2013/0025)

BETWEEN:

[1] PROVIDENCE ESTATE LIMITED
[2] OWEN ROONEY

Claimants

and

[1] JOEL OSBORNE
[2] INGRID OSBORNE
[3] WARRE CASSELL (d.b.a. Cassell & Lewis)
[4] MEREDITH LYNCH
[5] AMELIA DALEY
[6] DAVID BRANT

Defendants

Appearances:

Mr. Khamaal Collymore for the Claimant/Respondent
Ms. Renee Morgan for the 5th Defendant/Applicant

2024: MARCH 25

2024: AUGUST 9

RULING

FITZPATRICK [AG.]:

THE COURT CONSIDERED THE FOLLOWING.

[1] Is there a point where the passage of time serves to bar a civil action from proceeding to trial? The answer must certainly be yes. The only question to determine is whether that line has been crossed in this case.

[2] The Applicant is the 5th Defendant in this action, Amelia Daley ("5th Defendant"). Ms. Daley is a lawyer with a long career in the employ of the government. She was the Registrar of the High Court earlier in her legal career commencing in 2006. The Registrar of the High Court was also then the de facto Registrar of Companies.

[3] The Claimant's allegations against the 5th Defendant arise during her tenure as Registrar. This Defendant joined the office of the Attorney General for Montserrat in 2012 and is now the Senior Crown Counsel. The 5th Defendant is represented in this action by counsel, Ms. Morgan, who is also from the office of the Attorney General.

[4] The Claimants/Respondents are a company incorporated in Montserrat, Providence Estate Limited ("PEL") and its Director, Owen Rooney.

[5] PEL, with Mr. Rooney and Walter Wood III, as the two shareholders and directors, purchased 53 acres of land on Montserrat in 1989 with an apparent intention to develop. That intended development stalled and there was little activity until the early 2000s when parcels were transferred to third party purchasers for suggested value by a purported PEL director successor to Walter Wood III and local lawyer, Warren Cassell.

[6] In or about 2007, PEL and Mr. Rooney became aware of the property transfers orchestrated by Mr. Cassell. PEL and Mr. Rooney then and ever since have alleged that the transfer of these properties was unauthorized, illegal and fraudulent.

[7] Since 2007, PEL and Mr. Rooney have filed approximately 42 separate claims naming 39 parties arising from the property transfers. It may seem odd that we can only estimate the number of actions commenced here. Odd it is but the reality is that the volume of claims commenced along with the underwhelming state of the court records leaves all stakeholders only able to make a best estimate.

[8] The common theme of the numerous claims commenced by PEL and Mr. Rooney is that of fraud perpetrated by various defendants. The claims allege fraud outright, fraudulent misrepresentations, collusion, forgery and misconduct in public office. Mr. Rooney and PEL seek various forms of relief ranging from transfer of the subject properties back to PEL and related rectification of title, to liquidated damages.

[9] Stating the obvious, PEL and Mr. Rooney have undertaken considerable efforts to remedy the wrongs they view themselves to have suffered. The cumulative litigation can only be described as very active, measured both in strict number of actions and steps undertaken therein, traversing all levels of the court.

[10] Initially in advance and then running parallel with these numerous civil proceedings was the uneven but, ultimately, successful criminal prosecution of Mr. Cassell for his fraudulent actions committed within this narrative. Mr. Cassell was sentenced, for the second and final time, on June 23, 2022 to a custodial term of three and one half years for his misconduct.

[11] This action against the 5th Defendant and the others named was commenced October 30, 2013 (the "Claim").

[12] The 5th Defendant brings this application seeking to dismiss the allegations levied against her on the basis of the delay in prosecuting by PEL and Mr. Rooney (the "Defendant's Application").

[13] The parties collectively filed just under 950 pages of materials for the hearing of this Application on March 25th, including affidavits, numerous court filings, submissions and caselaw. To say the least, it has been a considerable undertaking to review and organize all of this.

Litigation History

[14] The allegations forming the subject of the Claim occurred in 2007. The Claim was commenced in October 30, 2013. The Defendant's Application was filed September 27, 2023. 10 years passed in between these two latter events.

[15] As one might suspect where approximately 42 claims have been commenced, the pace of the overall litigation flowing from this narrative could well be described as lumbering. Fortunately, a full forensic report of all proceedings is not necessary for the determination of this Application. The summary below is intended only to highlight the most relevant events.

[16] It would appear that the catalyst for the cascade of civil claims that followed was the original criminal conviction of Warren Cassell for fraud based on his orchestration of the subject land transfers. Mr. Cassell was first convicted by the Montserrat High Court on February 16, 2012.

[17] PEL and Mr. Rooney set the civil litigation ball rolling in 2012. On February 29, 2012, PEL and Mr. Rooney filed an application against the Attorney General for Montserrat and the Registrar of Lands seeking an emergency restraining order (MNIHCV 2012/0008).

[18] Mr. Rooney next filed his application against the other original and majority PEL shareholder and director, Walter Wood III, seeking a declaration of ownership over PEL. Mr. Rooney's application was filed March 20, 2012 (MNIHCV 2012/0013).

[19] The next significant point in this litigation was also in April, 2012 when the third party purchasers commenced claims seeking to confirm ownership of their respective properties. The purchasers no doubt did so in response to the conviction of Mr. Cassell and the applications of PEL and Mr. Rooney. Each of Clifton Cassell (MNIHCV 2012/0014), Kenneth Allen et al. (MNIHCV 2012/0015), Alyn Krause et al. (MNIHCV 2012/0016), Philip Brelsford (MNIHCV 2012/0017), Joel Osborne et al. (MNIHCV 2012/0019) and Clifford West (MNIHCV 2012/0020) commenced claims for title to land against PEL and Mr. Rooney (the "Purchaser Claims").

[20] Next, there was a flurry of litigation launched by PEL and Mr. Rooney over the six-month period commencing in August 2013 to February 2014 including the following:

a) Claim MNIHCV 2013/0020 against various defendants, including the Attorney General of Montserrat, filed on August 22, 2013 containing 76 pages;
b) Claim MNIHCV 2013/0021 against the Registrar of Lands filed on August 22, 2013 containing 29 pages;
c) Claim **MNIHCV 2013/0025** filed on October 30, 2013 containing 27 pages [emphasis mine to note the Claim herein];
d) Claim MNIHCV 2013/0030 against the Registrar of Companies and the Attorney General of Montserrat filed on November 15, 2013 containing 204 pages; and,

e) Claim MNIHCV 2014/0005 against various defendants, including the 5th Defendant herein, filed on February 13, 2014 containing 121 pages.

[21] A review of the 457 total pages of pleadings constituting the above referenced claims absolutely supports the description of "prolix" offered by the 5th Defendant in her affidavit filed September 20, 2023 on this Application. These dilettantish pleadings are a generally meandering mix of narrative, opinion, argument, and statutory and legal references.

[22] The Office of the Attorney General responded to service of the above noted claims by filing Affidavits from each of the Registrar of Companies, the Registrar of Lands and the Comptroller of Inland Revenue on February 27, 2014 in file MNIHCV2013/0020. All three affidavits were filed in answer as permitted by Civil Procedure Rule ("CPR") 10.2.

[23] The 5th Defendant's Affidavit sworn September 5, 2023 attests to the intention that these three affidavits noted above were in answer to the similar allegations contained in twelve related claims filed by PEL and Mr. Rooney referenced below, including this Claim.

[24] The Office of the Attorney General next filed a Notice of Application on April 16, 2014 seeking to consolidate the said twelve related claims, namely MNIHCV2012/0020, 2012/0029, 2012/0030, 2012/0035, 2013/0021, **2013/0025** [emphasis mine to note the Claim herein], 2013/0026, 2013/0027, 2013/0028, 2013/0034, 2014/0002 and 2014/0005.

[25] Stating the obvious, these twelve claims all arose from the common narrative of the sale of the PEL properties. It would appear that this application to consolidate was never heard or determined amidst the Court's efforts to bring some rationality to the management of these multiple, interwoven actions. Had the consolidation been granted then it seems probable that the three affidavits noted above would have stood in answer to the similar allegations contained in these related claims.

[26] The Purchaser Claims were consolidated (MNIHCV 2012/0035) and tried before Justice Bristol of the Montserrat High Court in April, 2016. The Judgment of Justice Bristol made April 28, 2016 restored PEL as the registered owner of the subject lands and directed that title be rectified to reflect PEL as the proprietor, excepting for the parcels purchased

by Clifton Cassell and Clifford West where their respective title was confirmed for reasons not germane to this Application. Notably, there was no finding of fraud against Warren Cassell or anyone else.

[27] Justice Bristol's Judgment was appealed by the unsuccessful third-party purchasers to the East Caribbean Supreme Court in the Court of Appeal.

[28] By Order made October 24, 2016, Justice Bristol stayed this Claim (MNIHCV 2013/0025) awaiting the outcome of the then pending appeal of his Judgment.

[29] The Court of Appeal released its Judgment in February, 2018. The Court of Appeal did allow the appeals in part although by the Court's own description "the victory of the appellants may be no more than pyrrhic" (see: Court of Appeal Judgment at paragraph 69) given that rectification of title was set aside but with PEL retaining an equitable interest in the properties. Again, there was no finding of fraud made against Warren Cassell or anyone else.

[30] The Court of Appeal Judgment was unsatisfactory in one way or another to all of the parties. The third-party purchasers appealed to the Privy Council with leave to appeal being granted on May 16, 2018. PEL and Mr. Rooney also appealed parts of the Court of Appeal Judgment to the Privy Council.

[31] By Order made July 19, 2018, Justice Morley stayed this Claim (MNIHCV 2013/0025) along with 14 other High Court claims awaiting the outcome of the then pending appeal before the Privy Council.

[32] The Privy Council released its Judgment on December 1, 2022 setting aside the ECSC Court of Appeal decision by directing the rectification of title to reflect PEL as the proprietor of the subject lands.

[33] Counsel for the 5th Defendant, on December 1, 2022, filed a global, general Defence for this Claim and the multiple other cases that the Office of the Attorney General was named in or otherwise engaged.

Analysis

[34] The Defendant's Application seeks a dismissal of the Claim due to delay in prosecution that she says amounts to an abuse of process and also violates her right to have a trial within a reasonable time as guaranteed by section 7(8) of the Montserrat *Constitution*.

[35] Counsel for PEL made submissions that the issue of the 5th Defendant's right to a trial within a reasonable time under the *Constitution* was not properly before this Court noting that any claim for such relief must be made by a fixed date claim form pursuant to CPR 56.3 and be served upon the Office of the Attorney General. The 5th Defendant filed her Application here instead. PEL did not identify any prejudice to it from these form and service failings.

[36] Regarding service, the 5th Defendant is Senior Counsel for the Office of the Attorney General and her counsel in this matter is Attorney General's Principal Counsel. The point of service is notice. Clearly, the Office of the Attorney General is well aware of this Application.

[37] The simple response to this argument on whole is to note that the court has the obligation to ensure all constitutional issues before it are identified and addressed regardless of whether any party makes a formal or informal application or whether rules or other mandated process were followed. Specifically responding to PEL's submission, a constitutional right would be hollow if it could be defeated by the failure to follow a procedural rule.

[38] If required to, this Court would rely on its inherent jurisdiction and obligation to permit the issue of the 5th Defendant's constitutional right to be heard despite not filing a fixed date claim. In addition to inherent jurisdiction, this Court could and would do so relying on its powers to remedy defects provided by CPR 26 in furtherance of the overriding objective set forth in Part 1.

[39] The parties agree that the court has an inherent jurisdiction to address delay. Here, this Court can and does rely on its inherent jurisdiction to address the delay issue raised in the Defendant's Application independent of any related right under the *Constitution*. That said, it is worth noting that determining the issue of delay pursuant to the court's

inherent jurisdiction and case management function must engage similar factors to any analysis of the constitutional right to a timely trial arising out of the same narrative.

[40] The entitlement to a timely adjudication of a court actioned dispute is not a new principle or a creation of statutory or constitutional pronouncement. In 1868, British Prime Minister William Gladstone said "justice delayed is justice denied". The phrase has often since been repeated as the rallying cry of those who quite correctly seek efficiencies.

[41] The point being that timely resolution of disputes has long been recognized as a core component of the philosophical bedrock upon which the justice system is built and at the very heart of the court's case management function. Unfortunately, timeliness has also proved elusive. To confirm this, one need only embark on a cursory review to find the courts grappling with this issue going back through the centuries to the present.

[42] The long-standing concern with litigation efficiency is demonstrated here by the fact that counsel in this Application agreed that the applicable test where the court is determining whether to engage its inherent discretion to dismiss an action for delay was presented by Lord Diplock's Judgment nearly fifty years ago in *Burke v. James* [1978] A.C. 297 at pages 318, 322 and 323 where he stated:

> The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; or (2) (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party.
>
> To justify dismissal of an action for want of prosecution the delay relied upon must relate to the time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it more incumbent upon the plaintiff to proceed with all due speed and a pace which might have been

> excusable if the action had been started sooner may be inexcusable in light of the time that has already passed before the writ was issued.
>
> To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by the rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by the rules of court for taking that step.

[43] The Court's focus on this Application is on the second branch of Lord Diplock's test.

[44] The issue of delay by necessity demands consideration of two values, sometimes competing, namely the interests of litigants, the court and the public at large in avoiding delay towards ensuring timely and efficient justice on the one hand, and on the other the desire to have disputes determined on the merits. There is no rigid checklist. Excepting limitations deadlines, there is no bright line beyond which no case may continue. The particular circumstances of each case need to be considered objectively and with some flexibility by the court.

[45] What are the factors that a court should consider? As noted, the court has wrestled with the issue of delay repeatedly thereby generating a range of possible considerations. The Irish case of *Comcast International Holdings Inc. & Ors. v Ministry for Public Enterprise & Ors.* [2007] IEHC 297 offered the following helpful list of possible factors when considering the issue of delay:

a) The nature of the claims;
b) The probable issues to be determined, in particular whether there will be factual issues to be determined or only legal issues;

c) The nature of the principal evidence, in particular whether there will be oral evidence;
d) The availability of relevant witnesses;
e) The length of the relevant lapse of time; and,
f) Whether the applicant has contributed to the lapse of time.

[46] In addition to the above, the following factors may also warrant consideration:

a) The stage of the litigation when the application to dismiss is filed and expected timing for a trial to commence;
b) The prejudice the defendant will suffer in defending the case at trial in addition to any witness concerns [hereinafter globally along with witness concerns referred to as "litigation prejudice"]; and,
c) The impact of the delay on the defendant's professional, business, and/or personal interests [hereinafter globally referred to as "individual prejudice"].

[47] Where along the spectrum does the circumstances of this action fall?

[48] PEL's fundamental argument is that it bears no responsibility for the delay in this matter. None. Accordingly, there is neither inordinate delay or inexcusable delay. That argument is simply untenable.

[49] As noted, ten years have passed since the Claim was filed to the date the 5th Defendant filed her Application. Inordinate is another word for unreasonable or excessive. There can be no other credible finding except that ten years delay is inordinate. There are many cases that have found shorter delay to be inordinate. For example, Lord Denning in *Wallersteiner v. Moir* [1974] 3 All ER 217 found a delay of seven years to be inordinate. No meaningful argument has been advanced suggesting that a ten year delay is not so.

[50] Finding the ten year delay to be inordinate, this Court now turns to whether the inordinate delay is excusable. Again, the argument by PEL is it bears no blame for any of this delay.

[51] The first point to note is that the onus is on a claimant to move his/her action forward in a timely manner. This is a matter of common sense and logic. A claimant commences

an action seeking relief for the wrong pleaded. Clearly then it is the claimant who has the responsibility and, one would think, the primary interest in having the claim heard and relief awarded.

[52] The onus being on a claimant to move an action forward in a timely manner is also well established in law. Lord Diplock in *Allen v. Sir Alfred McAlpine and Sons Ltd.* and Another [1968] 2 Q.B. 229 at 257-258 confirmed that our adversarial system and related rules place the onus on the claimant "in bringing his action for trial". Lord Diplock in *Burke v. James* further acknowledged the claimant's obligation to progress an action noting that a late start placed enhanced emphasis on that onus making "it more incumbent upon the plaintiff to proceed with all due speed".

[53] Conversely, there is no reciprocal obligation and often little incentive for the defendant to move an action forward. This was acknowledged by Lord Diplock in *Allen v. Sir Alfred McAlpine* in the same passage referenced above and by Lord Salmon's judgment, agreeing with Lord Diplock, in *Burke v. James* at page 329 where Lord Salmon stated:

> Defendant's solicitors might have no doubt taken out applications to dismiss for want of prosecution or for peremptory orders to compel plaintiffs to get on with their actions. Not unnaturally, they rarely did so, relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to believe that a dog which had remained unconscious for such long periods of time might well die a natural death at no expense to their clients; whereas, if they were to take the necessary steps to force the action to trial, they would be merely waking up a dog for the purpose of killing it at great expense to their clients which they would have no chance of recovering. Accordingly, it was unusual for summonses to dismiss actions for want of prosecution or for peremptory orders to be taken out. I do not think that defendants' solicitors can be blamed for this practice nor that the plaintiffs or their solicitors should be entitled to derive any benefit from it.

[54] PEL and Mr. Rooney made the choice to focus exclusively on their interests and relief relative to the Purchaser Claims. They did nothing to pursue the multiple claims they more or less simultaneously commenced. Instead, they waited six years until December

1, 2022 when the Privy Council Judgment was released to return their gaze to their then well aged actions, including this Claim.

[55] What could PEL and Rooney have otherwise done to progress this Claim?

[56] The starting point here is to acknowledge that the outcome of the Purchaser Claims did not, in and of itself, preclude PEL and Mr. Rooney from pursuing this Claim.

[57] The essence of this Claim is that the conspirators, including the 5th Defendant, created and filed false documents unlawfully transferring properties belonging to PEL to third parties, Joel and Ingrid Osborne, and that the conspirators retained all related proceeds from such transfer.

[58] Whether the subject property was adjudged to be legally owned by Joel and Ingrid Osborne or PEL could impact the quantum of the various liquidated damages sought, but not the determination of liability for the alleged fraudulent conspiracy. We know this given that PEL has presented a Draft Amended Claim Form and Statement of Claim (the "Draft Pleadings") in this Application where Joel and Ingrid Osborne are no longer named parties with the action otherwise continuing against the 5th Defendant and her alleged co-conspirators. The Osbornes were never alleged co-conspirators.

[59] Said differently, PEL and Mr. Rooney could have pursued the other elements of this Claim unrelated to whether Joel and Ingrid Osborne retained ownership to the land and while that issue was being determined in separate proceedings. This is exactly what the Draft Pleadings now present.

[60] Did PEL and Mr. Rooney challenge the stay order(s) when initially before the High Court for consideration? It seems obvious to state that a litigant who has commenced a barrage of claims should have opposed any attempt to impose a stay knowing that the obligation for progressing all claims rested upon them. I have no evidence that they did oppose the stay(s) in whole or part.

[61] PEL and Mr. Rooney could have come before this Court seeking to lift any stay to permit them to move forward with the other claims, including this action, to the full extent possible. At the very least, the pleadings could have been finalized and documents relevant to the alleged fraud identified and produced as the foundation for oral

examinations. Following this, it is quite possible that the oral examinations could have been completed as well. These steps in the claim against the 5th Defendant in fraud did not need to await the outcome of the Purchaser Claims. Did PEL and Mr. Rooney return before the High Court seeking to have the stay(s) vacated? I have no evidence they made any such attempt.

[62] PEL and Mr. Rooney could have contacted the ECSC Court of Appeal and subsequently the Privy Council to advise of the urgency to have the appeals for the Purchaser Claims heard on an expedited basis given that numerous other claims were thereby being held in abeyance. This request became particularly pressing as the appeals in the Purchaser Claims were moving at a seemingly sluggish pace. I have no evidence that PEL and Mr. Rooney undertook any such communications.

[63] PEL and Mr. Rooney could have simply contacted counsel for the 5th Defendant towards progressing this Claim. Again, I have no evidence that PEL and Mr. Rooney sent any such communications until counsel for PEL wrote to counsel for the 5th Defendant on September 6, 2023 proposing a meeting. This was ten years after the Claim was filed.

[64] The obligation for timely progress by PEL and Mr. Rooney required them to take all reasonable steps to advance all of their multiple claims. I have no evidence that any such efforts were undertaken by PEL and Mr. Rooney. As noted by Lord Diplock, it was "more incumbent" on PEL and Mr. Rooney to meet their obligation given the six years that had elapsed from the time the subject events came to their attention and the filing of the Claim.

[65] It is simply not sufficient for PEL and Mr. Rooney to suggest that their enhanced responsibilities were satisfied by prioritizing the Purchaser Claims litigation to the exclusion of all other actions, including this Claim against the 5th Defendant. This applies with equal force to any reliance by PEL and Mr. Rooney on the stay(s) related to the Purchaser Claims to shield their failure to progress all actions. Surely this is not what Lord Diplock had in mind when describing the more incumbent onus on a late starting claimant to proceed with all due speed or what this Court can or should accept.

[66] The 5th Defendant, albeit more recently, acted contrary to the "maxim that it is wise to let sleeping dogs lie" referenced by Lord Salmon in *Burke v. James*.

[67] Counsel for the 5th Defendant emailed the Privy Council on September 9, 2021 seeking to ascertain the status of the Purchaser Claims appeal given leave to appeal was granted three years prior. Counsel's September 9th email noted that the 5th Defendant was not a party to that appeal but was making inquiry on the status given the "several matters in the High Court here which have been stayed awaiting the decision of the Privy Council".

[68] Counsel for the 5th Defendant also filed an application on September 13, 2021 seeking to have PEL and Mr. Rooney "take all necessary steps to progress the appeal in the Privy Council" among other relief claimed. It is unclear whether this application was ever listed and determined.

[69] Counsel for the 5th Defendant next telephoned and then emailed the Privy Council Registrar on September 14th. Counsel's email confirmed the earlier telephone discussion and asked what steps "need to be taken for the appeal to be progressed" while again noting that "some 15 matters involving [PEL and Mr. Rooney] in the Montserrat High Court have been stayed pending the outcome of the captioned appeal."

[70] The Registrar of the Privy Council emailed counsel for the 5th Defendant in response on September 14th to advise that the Purchaser Claims appeal had not yet been listed as "there is a dispute about the necessary documentation". The Registrar also advised that she "until recently was unaware of the claims which had been stayed". The Registrar undertook to then "find a way in which the appeal here can be progressed". In other words, the Registrar undertook to expedite the then lingering appeal in response to the inquiry from the non-party, 5th Defendant's counsel who was trying to thereby progress this Claim.

[71] The point of the above is that there was no acquiescence or tacit agreement by the 5th Defendant to the delayed prosecution of the Claim against her by PEL and Mr. Rooney. There is no evidence that the 5th Defendant has contributed in any meaningful way to the delay in this action progressing.

[72] Based on all of the above, this Court finds that the inordinate delay was inexcusable.

[73] Next, this Court must assess whether the inordinate and inexcusable delay gives rise to a substantial risk of an unfair trial of the issues or is such as is likely to cause or to have

caused serious prejudice to the 5th Defendant. There are a number of factors to consider.

[74] The starting point is to reference the comments of Lord Diplock in *Burke v. James* focusing the analysis on the "prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ". Again, this is relevant given that PEL and Mr. Rooney allowed six years to lapse before filing this Claim.

[75] PEL retained counsel in March 2023 to represent it for the various ongoing proceedings before the Montserrat High Court. That was an important step forward. However, counsel have inherited files in much need, including this Claim against the 5th Defendant. The degree of progress here can only be described as embryonic despite the passage of the subject ten years since filing the Claim.

[76] The pleadings in this action against the 5th Defendant remain incomplete. The deficiencies in the Claim filed by PEL and Mr. Rooney were highlighted by this Court in Justice Morley's ruling released on August 9, 2023 at paragraph 66 where he stated that "the next phase in the litigation shall be: …c. Identification of precisely who is being sued for fraud and why, and in particular among the defendants who in 2007 were government employees; and, d. Identification per defendant of what realistically is sought from each by PEL".

[77] Beyond identifying the need for better pleadings, Justice Morley's decision permitted the personal claimant, Mr. Rooney, to discontinue all actions where he is named personally. This is progress only in the very limited sense that it removes a claimant who was asserting claims similar to PEL but who lacked any standing to do so. This was recognized by Justice Ellis of the ECSC Court of Appeal clearly suggesting abuse of process where stating in *Weekes v. Providence Estate Limited et al/Brandt v. Rooney* [2024] ECSC COA at paragraph 2. "that Mr. Rooney maintained his claims notwithstanding they were obviously ill-founded as he had no legal interest in the subject matter of the claim".

[78] Following upon the August 9th ruling, counsel for the 5th Defendant emailed counsel representing the remaining claimant, PEL on August 25, 2023 to obtain the particulars identified as missing by Justice Morley.

[79] Counsel for PEL responded to Justice Morley's ruling and, presumably, counsel's August 25th email by filing a Notice of Application on September 14, 2023 to amend the Claim. This is a clear acknowledgement by PEL that the Claim in its present form lacks details and is otherwise deficient.

[80] The Claim deficiencies were subsequently and proudly acknowledged by counsel for PEL where attesting to raising "the need for amendments to the pleadings at the first hearing where [PEL counsel] were on the record, in late March, 2023" (see: First Affidavit of Camisha Ashton affirmed September 14, 2023 at para. 8).

[81] Given the above, all attempts by PEL counsel on this Application to deny or at least temper the previously acknowledged need to amend the Claim and provide particulars is simply not credible.

[82] Even if permitted, the Draft Pleadings presented by PEL, frankly, offer limited particulars of the 5th Defendant's alleged fraud.

[83] The Draft Pleadings allege that the 5th Defendant, in her role as Registrar of Companies, "caused or permitted" a Notice of Directors to be and remain filed "at a time when PEL was ostensibly struck off the Register of Companies". The 5th Defendant is also alleged to have "witnessed various documents including affidavits, agreements and transfers executed by [co-defendants] Cassell and Lynch". Notably, there are no particulars provided respecting the 5th Defendant's knowledge of falsity or intent, which are the fundamental elements of a fraud.

[84] The only other particular(s) offered by the Draft Pleadings are unspecified and unknown to PEL. PEL asks to proceed based on speculation that relevant particulars will become known "after disclosure and inspection, including but not limited to inspection of the findings of an investigation (of which the date of reporting is currently unknown to PEL) into Daley's role in the disposal of the Land and Daley's refusal to cooperate in good faith in the criminal prosecution of Cassell". Investigation and report undertaken when and by who? Unknown by the Draft Pleading. This admitted information void and lack of process some 16 years after the subject events offers yet another penetrating view into the nascency of this action.

[85] The deficient PEL pleadings also speak directly to the submission of counsel about whether the 5th Defendant formally defended the Claim first in 2014 or 2022. There is no meaningful doubt that the 5th Defendant, through counsel, was part of a global response filed in 2014 and 2022 against the torrent of overlapping litigation launched by PEL and Mr. Rooney against various government departments and employees. Regardless, counsel's attempt to cast aspersions in this regard misses the point.

[86] The Claim was not and is not finalized. It lacks particulars and has been deficient since it was filed in 2013. The Defendant is entitled to have a particularized pleading before being obligated to provide a response. The Claimant bears the obligation to provide a pleading with sufficient particulars. That obligation remained unsatisfied over the entire delay period here scrutinized.

[87] In terms of any other steps, there has been no documentary disclosure/discovery by PEL. There has been no oral examination/discovery. PEL on August 25, 2023 filed another application seeking permission for Mr. Rooney's oral examination as the company representative to take place in the United States where he resides. The 5th Defendant has made it clear she will oppose that request, in particular given that the Claim remains unfinished. Obviously, no examination can occur until the pleadings are finalized and documentary productions completed.

[88] Simply stated, a trial for this action is not realistic before 2026 given that not even the seminal pleading, namely PEL's Statement of Claim, has been finalized. This timeline may well be optimistic given the need and intention of PEL to bring applications seeking pleading amendments in the various other remaining claims that all must occur before any oral examinations can, practically, be scheduled (see: Owen Rooney Affidavit sworn September 14, 2023 at para. 6 and 7).

[89] In summary, this action has not progressed in any meaningful way since the Claim was filed in October, 2013. The overall prejudice to the 5th Defendant from PEL's and Mr. Rooney's delayed prosecution of this action is obvious, significant and irreparable.

[90] The litigation prejudice here is that the 5th Defendant has not been provided with the full particulars of her alleged fraudulent acts necessary to allow her to draft her pleading and

otherwise organize her defence to those allegations 10 years after the Claim was filed marked to the date of her Application. How could she/can she be expected to focus her mind on events from her professional history sixteen years in the past and ten years following the filing of the Claim when still not having the full particulars of her alleged misconduct? How could she/can she know what information and documentation to search for and preserve where these particulars are absent? The simple answer is she cannot.

[91] Credibility of the 5th Defendant will be a central issue at any trial. This shall require oral evidence from her, the other named parties and, presumably, third party witnesses for the determination of this and other factual and legal issues. Without full particulars, how could/can the 5th Defendant know what witnesses to contact and ensure these witnesses are available? Again, she cannot.

[92] Given that memories diminish over time, can the 5th Defendant realistically expect that witnesses, even if available, can recollect these past events when alerted to his/her need to testify at a future trial? The simple answer again is no she cannot.

[93] The passage of time since the Claim was filed has impacted the expected participation of one known witness, namely an alleged co-conspirator, David Brandt. Mr. Brandt is currently in custody serving a lengthy criminal sentence for unrelated offences. However, Mr. Brandt is now 81 years old and in failing health. He is presently resident at the Glendon Hospital with serious health issues. The expectation that he will be available to meaningfully participate in any future discoveries and/or trial is guarded.

[94] The individual prejudice to the 5th Defendant's flowing from the ten year delay has been nothing short of devastating.

[95] The Claim was filed in October, 2013 when the 5th Defendant was a lawyer called to the Montserrat bar employed in the Office of the Attorney General. She has remained there practicing to the present where her current title is Senior Crown Counsel. It is not difficult to understand how being accused of fraud while a lawyer and Registrar would cast a very dark cloud over the 5th Defendant's professional integrity and reputation. This is especially so given her legal career since the Claim was filed has been within the one

government department having the primary responsibility to maintain the function and integrity of the justice system in Montserrat.

[96] The 5th Defendant attests to the similar damage to her personal reputation. This is hardly surprising when allegations of dishonesty are made over an extended period against an individual with a relatively high profile in a small island community where these public allegations would be widespread.

[97] The 5th Defendant has attested to the impact on her health that she believes has been caused by the stress of the subject allegations commencing with the filing of the Claim in 2013 and continuing over the ten years since. She attests to and documents significant heart issues requiring urgent surgical intervention in 2017 following the Claim filing and ongoing treatment without any other precipitating cause.

[98] This Court has little difficulty in finding that the ten year delay under scrutiny here has made it impossible for the 5th Defendant to have a timely, fair trial of the issues and has caused serious, irreparable prejudice to the 5th Defendant.

[99] In closing and clearly in obiter, the determination of the delay issue under the rubric of the court's inherent jurisdiction by necessity here requires consideration of the prejudice to the Defendant caused by the delay, which would include consideration of the impact of such delay on the Defendant's ability and right to have a timely, fair trial.

[100] Whether one argues on the basis of the court's inherent jurisdiction to address prejudicial delay or upon the right to a timely, fair trial now enshrined in section 7 of the Montserrat *Constitution* there is bound to be considerable overlap in the factors relevant to that determination. Acknowledging this and with consideration to the common factors detailed above, this Court would arrive at the same conclusion on either basis.

Conclusion

[101] The Claimant had the obligation to prosecute this Claim on a timely basis. This obligation was enhanced given that six years lapsed between when PEL and Mr. Rooney became aware of the alleged misconduct and when the Claim was issued.

[102] Ten years have passed between the Claim being filed and the 5th Defendant's Application. This delay is most certainly inordinate.

[103] No acceptable excuse has been provided for this delay and there is no satisfactory excuse otherwise available on the evidence before this Court.

[104] PEL and Mr. Rooney did not discharge their responsibilities to prosecute with due speed by prioritizing the Purchaser Claims litigation to the exclusion of all other actions, including this Claim against the 5th Defendant. This conclusion applies with equal force to any reliance by PEL and Mr. Rooney on the stay(s) related to the Purchaser Claims in answer to their obligations to prosecute on a timely basis.

[105] PEL's and Mr. Rooney's submission that they bear no fault for the delay here ignores the obligation on a claimant to move all actions forward in a timely manner. This litigation is embryonic with not even PEL's Statement of Claim yet being finalized. PEL and Mr. Rooney had the opportunity and enhanced obligation to prosecute this Claim with due speed and failed to do so.

[106] By failing to prosecute this Claim in a timely manner, the 5th Defendant has been deprived of anything approaching due or fair process. The delay has caused serious, irreparable litigation and individual prejudice to the 5th Defendant. The delay has made it impossible for the 5th Defendant to have a timely, fair trial of the issues.

[107] Dismissing a claim prior to adjudication on the merits is an option of last resort. The circumstances here permit no other outcome. Forcing the 5th Defendant to proceed would be unfair and an affront to the administration of justice.

[108] In conclusion, this Court is compelled to grant the 5th Defendant's Application to dismiss the Claim against her on the basis of the inordinate, inexcusable and prejudicial delay in prosecuting this action since the Claim was filed in October, 2013.

IT IS HEREBY ORDERED THAT:

1. The 5th Defendant's Application seeking to dismiss the Claim and allegations levied against her on the basis of the Claimants' delay in prosecuting is granted.

The Hon. Dale Fitzpatrick
(Ag) High Court Judge

By the Court

Registrar