

**EASTERN CARIBBEAN SUPREME COURT
SAINT LUCIA**

IN THE HIGH COURT OF JUSTICE

CLAIM NO. SLUHCV 2013/1014

BETWEEN:

VENICE AMSTRONG

Claimant

and

CD INVESTMENTS LIMITED

Defendant

Appearances:

Mr. Alvin St. Clair for the claimant

Mrs. Petra Jeffrey-Nelson for the defendant

2017: October 16

JUDGMENT

- [1] **ACTIE, M.:** The court is to determine as a preliminary point, whether the claimant's cause of action is prescribed and who, in any event, is entitled to enforce any breach of the **Physical Planning and Development Act**.

Background

- [2] By Deed of Sale executed on 17th October 2000, Ms. Armstrong, purchased a lot of land at La Clery, Castries from the defendant's development where she constructed her dwelling house. Ms Armstrong avers that it was an implied term of the agreement for sale that the defendant would have provided the appropriate infrastructure in accordance with the survey plan and conditions approved by the Development Control Authority (DCA).

- [3] Ms Armstrong in a letter dated 30th January 2007 requested Mr Cyril Dornelly, the defendant's director, to complete the infrastructure works which he has failed or refused to comply. Ms Armstrong contends that as a result of the defendant's breach, she was unable to move into her home and had to undertake some of the infrastructural works which were the defendant's responsibility.
- [4] On December 4, 2013, Ms. Armstrong filed a claim form with a statement of claim seeking an order that the defendant complete the infrastructural works in the subdivision in accordance with the DCA approval granted under the **Physical Planning and Development Act**¹ (The **Act**) and for damages.
- [5] The defendant filed a defence denying the claim. It contends that the deed of sale did not make reference to any undertaking to provide any of the infrastructure asserted by the claimant. The defendant further contends that the claimant lacks locus standi to bring the claim and, in any event, the matter is prescribed.
- [6] It is expedient that I first deal with the issue of locus standi followed by the issue of prescription.

Does the claimant have locus standi to enforce any breach of the approval granted by the DCA under the Physical Planning and Development Act?

- [7] Counsel for the claimant submits that the claimant has locus standi to bring the claim against the defendant for its failure to develop the land in accordance with the conditions in the DCA approval. Counsel avers that the defendant having failed to comply with the conditions has committed a breach of its statutory duty under the **Physical Planning and Development Act**. In support, counsel cites the locus classicus case of **X (Minors) v Bedfordshire CC [1995] 2 AC 633**, which defines a breach of statutory duty as:-

¹ No 29 of 2001

"Breach of a duty imposed on some person or body by a statute. The person or body in breach of the statutory duty imposed by legislation is liable to any criminal penalty imposed by the statute, but may also be liable to pay damages to the person injured by the breach if he belongs to the class for whose protection the statute was passed. Not all statutory duties give rise to civil actions for breach. If the statute does not deal with the matter expressly, the courts must decide whether or not Parliament intended to confer civil remedies.'

[8] Counsel avers that Sections 3 and 27 of the **Act** give the claimant an unfettered right to bring an action against the defendant. Counsel submits that the defendant as a developer owed a duty to persons having an interest in the development or who were directly affected by its failure to comply with the DCA's approval. Counsel avers that Ms. Armstrong, as a purchaser of one of the lots from the development, forms part of the class of persons contemplated by the **Act** and is accordingly has locus standi to bring the claim.

[9] Counsel for the defendant denies the alleged breach but contends, in any event, that the claimant does not have locus standi to bring the claim. Counsel contends that an action for an alleged breach of the provisions of the **Act** can only be brought by the Head of the Physical Planning Division, who is the only body/authority empowered to enforce or persecute any alleged breach of the **Act**.

Law and Analysis

[1D] A defendant commits a statutory breach where it is under a statutory duty to perform an act and fails to perform the act in accordance with the terms of the statute. The statutory breach can give rise to 'a private right of action' depending upon parliament's intention as expressed in the statute.

[11] Lord Browne-Wilkinson in **X (Minors) v Bedfordshire CC** [1995] 2 AC 633, states:-

"A private law cause of action will arise if it can be shown, as a matter of construction of the statute, that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty."

[12] Lord Browne-Wilkinson postulates that the breach of statutory duty can be derived where the statute does not expressly rule out a civil remedy and outlined six (6) prerequisites to satisfy the elements of the tort of breach of statutory duty, namely:-

- (1) The statute imposed a statutory duty, or obligation on the defendant;
- (2) Parliament intended to confer a private law right of action for damage if the duty was breached;
- (3) The statute was enacted for the benefit of a particular class of persons, of whom the claimant was one;
- (4) The defendant breached the duty;
- (5) The breach caused the claimant damage;
- (6) The relevant loss was of a kind which the statute protected the claimant against.

[13] An analysis of the **Physical Planning and Development Act** is necessary to determine whether the guidelines espoused by Lord Browne-Wilkinson in **X (Minors) v Bedfordshire CC.** are met in order to clothe the claimant with the locus standi to bring a private cause of action. Firstly, the **Act** does not expressly rule out a civil remedy. The **Act** proscribes the commencement of any development without the approval of the Physical Planning Division. The **Act** mandates that the development or subdivision of property is to be made in accordance with the approved plans.

[14] Section 3 of the **Act** outlines the objects and purposes as follows:-

- (a) ensure that appropriate and sustainable use is made of all public and privately owned land in the public interest.
- (b) maintain and improve the quality of the physical environment including its amenity.
- (c) Provide for the orderly sub division of land and the provision of infrastructure and services in relation thereto.

[15] It is evident that the **Act** requires sustainable development with the appropriate infrastructure and services for the benefit of individuals, society and future generations. The **Act** seeks to ensure that permission is first obtained for any development of land. The development must be conducted aesthetically with all the necessary amenities for the benefit of the public and private persons interested in the development. It is obvious that the **Act** imposes a statutory obligation on a developer as contemplated by Lord Browne-Wilkinson in **X (Minors) v Bedfordshire CC**.

[16] Section 37 of the **Act** provides a mechanism for enforcement by the Head of the Physical Planning and Development Division and reads as follows:-

Enforcement Notices

37. 1 - (1) Where it appears to the Head of the Physical Planning and Development Division that-

- (a) any development of land has been carried out after this Act comes into force without the grant of permission required under Part 111; or
- (b) the developer has not complied with any of the condition subject to which the permission was granted in respect of any development:

The Head of the Physical Planning and Development Division may, if it appears to be expedient to do so having regard to the provisions of the development plan for the area, if any, and any other material considerations-

- (i) in a case to which paragraph (a) applies, within four years of the development being carried out; or

- (ii) in a case to which paragraph (b) applies within four years of the alleged failure to comply with the condition;

serve an enforcement notice on the owner and the occupier of the land and any other person who has a registered interest in the land

[17] Section 39 of the **Act** gives the Head of the Physical Planning and Development Division the right to serve a stop notice where an enforcement notice has been served in accordance with Section 37. Section 41 of the **Act** makes it a criminal offence with a fine of \$10,000.00 on summary conviction for the non-compliance with the enforcement and/or stop notice. In the case of a continuing breach, the section provides a further fine of Two Hundred and Fifty dollars, for every day after the first day when the requirements of the enforcement notice is not met.

[18] The defendant contends that the claimant cannot maintain a claim against the defendant as the breach of any conditions granted, although not admitted. can only be enforced by the Head of the Physical Planning and Development Division in accordance with sections 37 and 39. The defendant cites in support the general rule laid down by Lord Tenterden C.J in *Doe d Bishop of Rochester v Bridges* (1831) 1 B & Ad 847,859 where he states:-

"where an Act creates an obligation, and enforces the performance in a specified manner,..that performance cannot be enforced in any other manner'. The defendant relying on this general contends that it is for the head of the Physical Planning division to enforce the provisions of the Act and not the claimant.

[19] Counsel for the claimant is of the contrary view and cites the authority in **Lonrho Ltd. and Another v Shell Petroleum Co. Ltd. and Another (No. 2)**² where Lord Diplock advocated two exceptions to the general rule laid down by Lord Tenterden CJ in **Doe d Bishop of Rochester v Bridges**. Firstly, where the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals, and

²[1982] AC 173

secondly, where the statute creates a public right and an individual member of the public suffer particular, direct and substantial damage other and different from that which was common to all the rest of the public.

[20] Counsel relies on Section 51 which makes it a criminal offence for any contravention of the Act and reads as follows:-

No person shall contravene any provision of this Act or of any Regulations or the terms and conditions of any permission granted or agreement made hereunder.

Unless a different or penalty or punishment is specifically prescribed, a person who contravenes subsection (1) commits an offence against this Act and shall be liable on summary conviction to a fine not exceeding ten thousand dollars, and in the case of continuing offence to a further penalty of Two Hundred and Fifty dollars for each day during which the offence is continuing.

Analysis

[21] Section 37 of the Act confers a discretion on the Head of the Physical Planning and Development Division to issue an enforcement notice on a recalcitrant developer who either commenced a development without permission or failed to comply with the conditions of the planning permission. This discretionary power is to be exercised only if (my emphasis) the Head of the Physical Planning and Development Division considers it expedient to do so having regard to all the circumstances. A person who may have suffered damage over and above the public or other persons cannot direct the enforcement of section 37 as the power to issue enforcement notices is solely within the discretion of the Head of the Physical Planning and Development Division, after taking into consideration all the necessary facts and circumstances.

[22] Section 51 of the Act goes contrary to the defendant's arguments that any breach can only be enforced by the Head of the Physical Planning and Development Division in accordance with Section 37. Section 51 makes it a criminal offence with a fine where there is a contravention of any of the provisions of the Act. The fact

that the Act makes it a criminal offence does not prevent a private right of action. It is always necessary to decide whether or not Parliament contemplated a private cause of action.

- [23] The Court of Appeal dealt with a similar issue in **Carl Baynes V Ed Meyer**³. Pereira, CJ. applying with approval, the principles enunciated in **Lonrho Ltd. and Another v Shell Petroleum Co. Ltd. and Another (No. 2) and X (Minors) v Bedfordshire County Council** states :-

"The general rule is that where an Act creates an obligation, and enforces the performance of this obligation in a specified manner, that performance cannot be enforced in any other manner. However, where the only manner of enforcing performance for which the Act provides is prosecution for the criminal offence of failure to perform the statutory obligation or for contravening the statutory prohibition which the Act creates, there are two classes of exception to the general rule. The first is where upon the true construction of the Act it is apparent that the obligation or prohibition was imposed for the benefit or protection of a particular class of individuals. In this instance, there may be a private right of action since there is otherwise no method of securing the protection of the limited class of individuals, which the statute was intended to confer. The second exception is where statute creates a public right and a particular member of the public suffers what may be described as particular, direct and substantial damage, other and different from that which was common to all the rest of the public."

- [24] Pereira CJ continued at Paragraph 18 and states:-

³ ANUHC VAP2015/0026

"[18] "Parliament clearly intended some protection to third parties. Indeed, the entire purpose of the Act is to provide some protection to third parties who would also be lawful users of the road, to protect such parties against the risk of suffering damage while so doing by a person of straw and being unable to recover any compensation in such event. Further, Parliament viewed this obligation as such a serious one that it imposed a criminal sanction for breach of it. But it could not thereby be that this must be seen as the sole remedy available particularly in light of the object and purpose of the Act. Why couldn't a harmed party seek to recover from the wrongdoer compensation in an amount which the wrongdoer, by his breach of the Act, has made unavailable to the harmed party in frustration of the very object of the Act? To my mind there could be no reason for this, either as a matter of policy or principle having regard to clear scope and purpose of the Act.".....
(Emphasis added)

- [25] The **Physical Planning and Development Act** creates an obligation on developers to first obtain permission to develop land and to provide orderly subdivisions of land with the necessary infrastructure and services in accordance with the conditions in the DCA approval. The **Act** seeks to maintain a high quality in the development of land and to provide the necessary amenities for the benefit of persons purchasing land from a developer or otherwise affected by the development.
- [26] The prima facie inference to be drawn from the scope and intent of the **Physical Planning and Development Act** is that it was passed for the benefit of an ascertainable class of individuals to bring it within the exceptions laid down in **Lonrho Ltd. and Another v Shell Petroleum Co. Ltd. and Another (No. 2) and X (Minors) v Bedfordshire County Council**.

[27] The prescribed conduct provided by the Act is to be observed by developers in the interests of purchasers or other persons who may be affected by the nature of a liability against which is intended to protect. Section 51 is a broad provision which covers all breaches of the Act. Had parliament intended for the Head of the Physical Development and Planning Division to be the sole authority to bring an action against a developer for any breach of the Act, it would have expressly so stated in section 51 as in section 37.

[28] In my view, the **Physical Development and Planning Act** confers a private right of action in favor of a person who is directly affected by a developer's breach of its obligations to comply with the approval granted by the DCA. The **Act** imposes a duty on the developer to provide the necessary amenities in a development for the benefit of a purchaser of lot of land forming part of the development. Ms Armstrong, as a purchaser of a lot of land from the defendant's development, falls within the class of persons protected by the **Act**. Accordingly, Ms Armstrong has the necessary locus standi to bring the claim against the developer for the alleged breach of the statutory duty imposed by the **Physical Development and Planning Act**.

Whether the claim is prescribed?

[29] Counsel for the defendant contends that the claim was filed in 2013, some thirteen (13) years after the deed of sale was executed in 2000. Counsel avers that the claimant cannot enforce the alleged breach as the **Act** itself stipulates a limitation period of four (4) years within which the Head of the Physical Planning and Development Division can bring an action against a developer.

[30] Counsel for the claimant in response contends that the tort of breach of statutory duty is a continuing breach as long as the developer fails to complete the necessary amenities. Counsel avers that a new breach occurs every day that the development remains incomplete in relation to the persons directly affected by the

developer's failure to develop the land in accordance with the DCA approval. Counsel contends that the four (4) year period in section 37 of the **Act** does not affect the right of persons who are directly affected by the developer's breach. Counsel further avers that Section 51 of the **Act** is a clear intention of Parliament to make the breach of any of the provisions a continuous offence and accordingly the limitation period is 30 years.

Analysis

- [31] The breach of a statutory duty is a tort and is subject to the limitation period of six (6) years unless otherwise provided in statute. Both sections 37 and 51 of the Act make the commencement of a development without permission and failure to comply with an approval a continuing breach.
- [32] The developer's failure to put the necessary infrastructure is a continuous breach of the claimant's inability of the enjoyment of her property. In ***Larking v Great Western (Nepean) Gravel Ltd***, Dixon J considered the notion of a continuing obligation, as follows:
- "If a covenantor undertakes that he will do a definite act and omits to do it within the time allowed for the purpose, he has broken his covenant finally and his continued failure to do the act is nothing but a failure to remedy his past breach and not the commission of any further breach of his covenant. His duty is not considered as persisting and, so to speak, being forever renewed until he actually does that which he promised. **On the other hand, if his covenant is to maintain a state or condition of affairs**, as, for instance maintaining a building in repair, keeping the insurance of a life on foot, or affording a particular kind of lateral or vertical support to a tenement, **then a further breach arises in every successive moment of time during which the state or condition is not as promised, ...**"
- [33] Section 3 (2) requires that a purposive, liberal construction and interpretation as best ensures the attainment of its objects and purposes of the **Act**. The Act

imposes an obligation on developers to first obtain permission to commence any development and to comply with all the conditions granted in the DCA approval. Developers must comply with their contractual obligations undertaken in the development of land as approved by the DCA. The obligation is intended for the protection and benefit of all persons who may acquire an interest in the development or affected by it.

[34] Sections 37 and 51 of the Act created a continuing breach with a penalty for each day after that the developer remains in breach. Section 37 provides a limitation period of four (4) years within which the Head of the Physical Development Division can exercise his or her discretion to issue an enforcement notice. The developer is liable to pay a fine for every day after the first day when the requirements of the enforcement notice is not met. However, Section 51 does not provide the similar four (4) year period as contended by the defendant, but makes it an offence and a continuing breach for each day during which the developer is in contravention of the provisions of the Act. Had parliament intended to impose a four (4) a limitation period. it would have expressly said so as was stipulated in Section 37.

[35] I am of the view that a liberal and purposive interpretation of the Physical Development and Planning Act leads to the inescapable conclusion that a developer who fails, to obtain permission to commence a development or to comply with any permission granted by the DCA, is in continuing breach of its obligations imposed by the Act. The continuous nature of a breach of the statutory duty created by Section 51 of the Act takes the tort outside of the four (4) years limitation under section 37 and six (6) years limitation period for an ordinary tort. A fresh cause of action accrues on each day that the breach continues until the developer performs its obligation under the Act. I am of the view that the continuing nature of the breach under the Act takes the tort in the realm of the thirty year rule under the Civil Code. A defaulting developer is liable for each day it fails to comply with the requirements of the Act and is still duty bound to do all that is

necessarily required to discharge its duty, unless it can be established that the duty to remedy the omission has ceased.

(36] Counsel for the defendant contends that the deed of sale is silent on the provision of any of the infrastructure works as alleged by the claimant. The short answer is that a term which has not been expressed in a contract may be implied if it was so obviously a stipulation in the agreement that the parties must have intended it to form part of their contract and needed not be expressed. The common intention of a transfer of a parcel of land is in the knowledge that a subdivision shall be conducted with the required amenities as stipulated in the DCA approval. The land register for the block and parcel is subject to all appurtenances and dependencies as evidenced in the Deed of Sale and the survey plan.

(37] The remedy for a tortious loss is compensation in damages or money. However, in cases of a continuing tort, the court can make an order for specific performance to ensure that the defendant carries out its legal obligations. The difficulty in the present case is that the claimant has not furnished the reason for the filing of the claim some 13 years after the deed of sale was executed. The claimant avers that the defendant failed to complete the infrastructure although it obtained assistance from the Government. Further evidence will be required for the trial to prove the conditions approved by the DCA together with the date and extent of the assistance granted by the Government in order to determine whether the defendant is still under an obligation to provide and complete the infrastructure works as alleged. The evidence in the statement of claim is insufficient at this point to determine the claim summarily. Accordingly, the matter shall be listed for further case management directions for trial.

Agnes Actie
High Court Master

By the Court
Registrar

