IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2007 HCV 01844

BETWEEN	**DAVID MCNEIL**	**CLAIMANT**
AND	**PUBLIC SUPERMARKET LTD**	**DEFENDANT**

IN CHAMBERS

David Ellis instructed by Grant, Stewart, Phillips and Company for the Applicant /Defendant

Maurice Long and Lawrence Phillpots-Brown for the Claimant/Respondent.

Application to Dismiss for want of prosecution - abuse of the process of the court - whether there is inordinate inexcusable delay - whether there is or will be incurable prejudice - whether a fair trial is possible - Rule 1.1 - Rule 26.3 of the Jamaica Civil Procedure Rules (CPR).

Heard: 11th December, 2018, and 25th January, 2019

THOMAS, J.

INTRODUCTION

[1] This is an application by the defendant Public Supermarket Ltd. to dismiss the claim for want of prosecution. The main ground is that the defendant would face substantial hardship if the matter were to be tried due to the claimant's delay in

prosecuting the Claim for a period of approximately 10 years. The defendant is asking the court to find that the claimant's delay in prosecuting the claim has been contumelious and will serve to obstruct the just disposal of these proceedings.

[2] In response to this application the claimant Mr. David McNeil filed a notice of Application asking for the dismissal of the defendant's application. He relies on the Supreme ***Court of Jamaica Civil Procedure Rules***, (herein after refers to as the Rules); and in particular **Rule 1.1**.

The other grounds are:

(ii) The court's discretionary powers under Rule 26 .3 must be exercised judicially and with extreme caution

(iii) This is not a plain and obvious case (of abuse of the process of the court).

Background

[3] The Claim form and particulars of claim were filed on the on the 2nd of May 2007 against the defendant Public Supermarket Ltd. a company incorporated under the Companies Act. The claim alleges that the claimant was a visitor to the defendant's supermarket at Shop C.11,195 Constant Spring Road on the 11th of May 2001, for the purpose of shopping when he slipped and fell on a portion of the floor which was wet. He alleges negligence; and breach of (a) common law duty of care, and (b) S.3 of The Occupiers Liability Act.

[4] In the Particulars of Claim, he alleges:

(i) Failure to properly clean the floor of the said supermarket or take steps to prevent it being slippery and dangerous.

(ii) Failure to warn the claimant of the slippery and dangerous nature of the floor, in the premises failing to discharge the common law duty under the Occupiers Liability act.

[5] He claims damages for (a) cerebral concussion and fracture to the lower of his radius (b) medical expenses.

[6] **Chronology of Events**

(i) On the 2nd of May 2007 the claim form and particulars of claim were filed.

(ii) On the 26th of June 2007 the defence was filed

(iii) On the 26th of June 2007 the defendant also filed an Ancillary Claim with particulars against West Indian Alliance Insures, and Thwaites, Finson, Sharpe, Insurance Brokers Ltd (1st and 2nd) Ancillary Defendant seeking indemnity in relation to the claim.

(iv) On the 2nd of July 2007 the 2nd ancillary defendant filed acknowledgments of service.

(v) On the 27th of July 2007 the ancillary defendant filed their defence.

(vi) On the 1st of October 2007, the matter was referred to mediation to be held within 90 days (The mediation was then scheduled for the 18th of August, 2008).

(vii) By letter dated the 19th of July, 2008 Nunes Schofield Deleon and Co. attorneys-at-law for the ancillary defendants wrote to the Dispute Resolution Foundation, copying the said correspondence to the attorneys-at-law for the claimant and defendant, indicating that the scheduled date for mediation was not convenient. They requested that the mediation be rescheduled for a date in September, 2008.

(viii) On the 27th of February 2017 the 2nd ancillary defendant filed a notice of application for the ancillary claim to be dismissed for want of prosecution. The application was set down for hearing for the 20th of January 2018, and further adjourned to the 26th of January 2018.

(ix) On the 30th of January, 2018, the defendant/ancillary claimant filed a notice of discontinuance against the 2nd ancillary defendant in relation to the ancillary claim.

(x) On 28th of December, 2017 the claimant's attorneys-at-law wrote to Grant Stewart Phillips and Company, attorneys-at law on record for the defendant, indicating an intention to have the matter referred to mediation.

(xi) On the 2nd of February 2018 the defendant filed this application.

Evidence in Support of The Application

[7] In affidavit filed and dated the 2nd of February 2018 and affidavit in response file and dated the 18th of July 2018, Suresh Khemlani evidence is as follows:

(i) He is the managing director of the defendant company Public Supermarket Limited. While the company Public Supermarket Limited is still an entity, he has employed minimal staff over the past five years. The supermarket completely ceased its operation on the 30th of March 2017. He is impeded in his ability to defend the action to best of his ability, especially so, given the fact that the respective supervisors and employees who would have been responsible for receiving reports and or supervising the grounds of the supermarket, would not be able to be brought as witnesses to give their account as to whether they received any report of the incident. The supermarket completely ceased operation. There are no records of the events of 2001. He will not be able to trace managers, supervisors or other workers who were working at that time to give their account of the alleged incident.

(ii) The defendant no longer has access to employees' log and schedule in order to verify which employees were present at the supermarket

at the time; which were supposed to be cleaning the floor and which were responsible for receiving reports from aggrieved customers. He has no access to cleaning protocol and standards which the supermarket staff are required to observe, such as leaving warning cones at the area. He has no document showing which guards were patrolling.

(iii) He has little recollection of events between 2008 and 2018. He recalls that he advised his attorney-at-law to file an ancillary claim and particulars of claim against the ancillary defendants to ensure that the supermarket would be covered by insurance if Mr. McNeil's claim was successful. This filing did not cause the delay in claimant taking steps to prosecute the claim.

(iv) Mr. McNeil has been dilatory in pursuing his claim. He alleges that he sustained the injury 2001. He commenced the action on the 2nd of May 2007 right before the statute of limitation barred the commencement of claim. The ancillary defendants, the defendant's insurers are no longer parties to the action.

(v) The matter was referred to mediation the on the 1st of October, 2007, mediation was scheduled for the 18th of August 2008. By letter dated the 19th of July 2008 the attorneys-at-law for the ancillary defendants, Nunes, Schofield, Deleon and Co. wrote to the attorneys-at-law for the claimant and the defendant indicating that the scheduled date for mediation was not convenient. They requested that it be reschedule for a date in September 2008. There is no record of any subsequent correspondence from the claimant's attorney-at-law. For a period of ten (10) years the matter has been in abeyance. The claimant made no efforts to continue the pursuit of the claim. The prejudice that would be meted out to Public Supermarket Ltd which no longer operate the supermarket would far exceed the prejudice to be faced

by Mr. McNeil who has taken very little steps to pursue the claim. If the matter goes to trial the defendant will not be able to afford the opportunity to present its defence fairly and to best of his ability due to the significant delay occasioned in the matter.

[8] As part of the defence, to the claim he asserts that:

No complaint of the alleged fall was submitted to him. No employee witnessed the alleged fall. The floor of the supermarket consisted of non-skid tiles.

The evidence of the Claimant Mr. McNeil

[9] Mr. David Mc Neil in his affidavit evidence dated the 30th of April 2018 and filed on the 4th of May 2018 states the following:

(i) On the 11th of May 2001 he attended the defendant supermarket for the purpose of shopping. He slipped and fell on a portion of floor which was wet. The defendant filed an acknowledgment of service on the 1st of June 2007 indicating an intention to dispute the claim. The defence was filed on the 26th of June 2007. He was informed by his attorney-at-law that a dispute developed between the defendant and its insurers which led to litigation causing the main litigation to stall. By way of ancillary claim the defendant initiated proceedings claiming indemnity. The ancillary defendant denied the allegations.

(ii) The matter was automatically referred to mediation on the 1st of October 2007 which was scheduled for the 18th of August 2008. The ancillary defendant requested the date to be rescheduled to September. No new date was scheduled. He is entitled to institute legal proceedings within six years. He will be severely prejudiced if the claim is struck out. It will have a punitive effect as the limitation period has elapsed, hence he would not be able to bring a fresh

action. Striking out will have the effect of depriving him of having access to the court which would amount to a denial of justice.

The Issues

[10] The issues which arise in this application are:

(i) Whether there is inordinate inexcusable delay on the part of the claimant to pursue his claim, of such a nature and degree that it amounts to an abuse of the process of the court.

(ii) Whether the powers open to the court under the Rules are sufficient to overcome any actual or potential prejudice caused by the delay or whether a refusal to strike out the Claim, would amount to a substantial risk of unfair trial.

The Law

[11] ***Rule 26.3.1*** empowers the court to strike out a party's claim/statement of case for an abuse of the process of the court. This Rule sates***:***

> *"In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -*
>
> > *(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings"*

[12] The Rules do not define "abuse of the process of the court". Therefore, guidance from case law must be sought in this regard. Additionally, in exercising its powers the court is also required to give effect to the overriding objective of the Rules. ***Rule 1.2*** states that:

> *"The court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules".*

[13] **Rule *1.1*** defines the overriding objectives of the rules. It states***:***

> *"(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing justly with a case includes -*
>
> *(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;*
>
> *(b) saving expense;*
>
> *(c) dealing with it in ways which take into consideration -*
>
> *(i) the amount of money involved;*
>
> *(ii) the importance of the case;*
>
> *(iii) the complexity of the issues; and*
>
> *(iv) the financial position of each party;*
>
> *(d) ensuring that it is dealt with expeditiously and fairly; and (of particular importance to these proceedings is)*
>
> *(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to (other cases.*

[14] Therefore in light of the above mentioned rules, the court in exercising its discretion to strike out a claim or a statement of case should be concerned with the expeditious disposal of cases. However, it is of particular importance and in the interest of justice, that in ensuring that the processes are expedited, the court does not lose sight of fairness. It is a balancing act. Additionally, in dealing with cases justly the court should not only be concerned with prejudice to the parties but also other parties, especially as it relates to failure to comply with timeline/delay; and the effect this will have on the time to be allotted to other court users who have to share the court resources. (***See Icebird Ltd v Winegardner*** [2009] UKPC 24; also ***Adelson v Anderson*** [2011] EWHC 2497).

[15] In the case of Branch ***Developments Limited Trading as Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited***. [2014] JMSC Civ. 003, Mc Donald-Bishop J as she then was, stated at paragraph 162 that:

> *"In considering this aspect of the defendant complaint, I note that the case law is replete with instances where delay has been seen as being a wholesale disregard of the court's processes so as to amount to an abuse of process and abases for striking out. It is said however, that delay even a long delay, cannot by itself be categorized as an abuse of power without there being some additional factor which transforms the delay into an abuse of process."*

[16] In the case of ***Vasti Wood v H.G. Liquors Limited and Crawford Parkins etc.,*** [1995*],* 48 WIR 240, Wolfe JA stated*:*

> *"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."*

[17] Further in the case of ***IBC Jamaica Limited and Royal and Sun Alliance***, SCCA 112/2004, Harris J.A, at page, 29 states that: -

> ''*The striking out of a claim is a severe measure. The discretionary power to strike must be exercised with extreme caution. A court when considering an application to strike out, is obliged to take into consideration the probable implication of striking out and balance them carefully as against the principle as prescribed by the particular cause of action which is sought to be struck out. Judicial authorities have shown that the striking out of action should only be done in plain and obvious cases".*

[18] Therefore in order to succeed on his application to strike out the claim on the basis that; the claimant is guilty of activity or inactivity of such a nature and degree to amounts to an abuse of process of court, the defendant must convince the court that:

(i) He has suffered prejudice from the delay, or is likely to suffer prejudice if the claimant is allowed to go forward to trial.

(ii) That the prejudice the defendant has suffered or will suffer, in the exercise of the court's balancing act under the Rules, cannot be cured by the exercise of the court of any other power under the Rules, and as a consequence;

(iii) Allowing the claimant to proceed with his claim would amount to a substantial risk of injustice (that is an unfair trial).

Whether there is inordinate inexcusable delay on the part of the Claimant of such a nature mounts to an abuse of the process of the court.

Submissions on behalf of the defendant

[19] Mr. David Ellis makes the following submission on behalf of the Applicant/Defendant:

(i) The common law gives the court a discretion to strike out a statement of case for want of prosecution. The underlying principle being that the delay occasioned by the claimant is sufficient to cause prejudice to the litigants to the extent that it would prevent a fair hearing and consequently obstruct the just disposal of the proceedings. The common law principle is captured by ***Rule 26.3(1)(b).***

(ii) The claimant has failed to pursue his claim for 10 yrs. Any inordinate delay amounts to an abuse of process of the court. In this jurisdiction once a party defaults to pursue his case due to prolonged inactivity, this amounts to abuse of process which automatically empowers a judge to strike out the claim. ((He refers to ***Keith Hudson and Ors. v. Vernon Smith and Anor***; in the Court of Appeal of Jamaica, Supreme Court Civil Appeal N0: 35 of 2005). In the instant case the matter was commenced 2007 and the last action taken by the claimant and his attorney-at-law was to schedule a mediation in the year 2008. Having received notice one month in advance that the

mediation had to be rescheduled, the claimant did nothing until the 28th of December 2017 when he wrote to the defendant's attorney – at- law indicating that he wished the matter be referred to mediation and that he will be making that request on the 20th of January2018. This does not amount to any proactive step to pursue the matter.

(iii) To date no proactive step has been taken by the claimant for approximately 10 years. This inactivity is inordinate delay which amounts to an abuse of process of the court. The defendant does not need to show prejudice in order for court to strike out the claim. In any event the defendant will suffer prejudice if the court does not dismiss the claim.

<u>On Behalf of the Claimant</u>

[20] Mr. Lawrence Philpot's submissions on behalf of the claimant are as follows:

(i) ***Rule 1.1*** states that the overriding objective of the rules is to deal with cases justly. The discretionary power pursuant to ***Rule 26. 3.1*** to strike out must be exercised judicially and with extreme caution. This claim is not a plain and obvious case which warrants the severe sanction of having the claimant's statement of case struck out at the first and only occasion

(ii) Delay is posited as having inherent power to precipitate a striking out in association with specific proof of prejudice and the substantial risk that there cannot be a fair trial. The earlier cases do not apply. They are no longer of general relevance once the rules apply. (He relies on ***Biguzzi v Rank Leisure*** [1999] 4 All ER 934) .

(iii) The claimant erred in failing to proceed to mediation in the context that the 1st ancillary defendant's attorney-at- law by letter dated the 19th of July 2008 requested to have the mediation date rescheduled

to a date in September 2008 but never fixed a date. The claimant was of the view that the matter may have been settled, evidenced by the 2nd ancillary defendant stating in his affidavit filed that it had been persuading the 1st ancillary defendant to offer indemnity. In the circumstances, an unless order would be appropriate since ***Rule 26.9*** gives the court the power to make an order to put the matter right.

(iv) The defendant has suffered no real prejudice as a result of the delay given that, firstly it is the one that closed the supermarket causing dispersal of its employees and secondly its agents, insurers adjourned the mediation. Prejudice has two sides. The company was sued in 2007. It ceasing operation has nothing to do with the claimant. The defendant was aware of the matter from 2007. In the absence of settlement between the parties it should have taken the necessary steps to have in writing and to address what is necessary to defend its case. The defendant shut down the supermarket and scatter its employees without taking the necessary steps to defend the case. One would have thought that the company would keep its records been fully aware of the suit. It should have documents in place and have access to them. What they chose to do has nothing to do with the claimant. One would have thought that they would have given instructions to their attorney-at-law for statements to be taken.

ANALYSIS

[21] I will commence by examining the history of the matter in order to determine if there was in fact inexcusable inordinate delay on part of the claimant. It is clear from the chronology of events that there was no activity on the claim between the period 18th of August, 2008 and the 28th of December 2017. This is a period of

approximately (nine) 9 years and four (4) months. It cannot be denied that this is a significant expanse of time for a claim to remain inactive. The next question is whether the delay is excusable. The determination of this issue rest in an assessment of the reason proffered for the delay by the claimant.

[22] Mr. McNeil in his affidavit states that he was informed by his attorney-at-law that a dispute developed between the defendant and its insurers which led to litigation, causing the main litigation to stall. He further states that by way of ancillary claim the defendant initiated proceedings claiming indemnity and that the ancillary defendant denied the allegations.

[23] However when I examine the chronology of events, the defence and the ancillary claims were filed on the same date. That is the 26th of June 2007. This was within the time allowed by the rules for the filing of the defence. Additionally, the 2nd ancillary defendant filed its defence on the 27th of July 2007. This was again within the time allowed by the rules for the filing of this defence. In any event the time between the filing of the claim and particulars of claim and the filing of the defence for the 2nd ancillary defendant was only two (2) months and twenty-five days. Therefore, I cannot perceive how the filing of the ancillary claim could have stalled the proceedings.

[24] Additionally, in response to the point taken by the defendant that the claimant waited until approximately one month before the limitation period to file his claim counsel points to the claimant's right to file within six years. Therefore, counsel should also be reminded that it is defendant's right to bring the ancillary claim. This was done within the time and manner stipulated by the rules. The defence to the claim and the ancillary claim were filed promptly.

[25] The claimant admits that the matter was automatically referred to mediation on the 1st of October20 07. He also, agrees that the scheduled date and time for the mediation was August 18th 2008 at 10 am. However, he further points to the fact that on the 19th of July 2008, the attorney-at-law for the ancillary defendants

requested that the date be rescheduled to a date in September and that no new date had been scheduled.

[26] However an examination of the letter dated 10th July, 2008 reveals that it was written well in advance of the time and scheduled date for the mediation. Counsel for the claimant submits that the claimant erred in failing to proceed to mediation in the context that 1st ancillary defendant's attorney-at-law by letter dated 19th of July 2008 requested to have the mediation date reschedule to a date in September2008 but never fixed a date.

[27] A further examination of that letter becomes necessary at this juncture. A closer scrutiny of the reveals the following:

It was addressed to Dispute Resolution Foundation and copied to, "Clough Long and Co"; "Grant Stewart Phillips and Co"; and "Livingston Alexander Levy" (the attorneys-at-law for all the other parties to include those for the claimant). The writer confirmed that the attorney-at-law for the ancillary defendants, was in receipt of advice of the scheduled date for mediation for 18th August, 2008 at 10 am. It further stated; "However *this date is not convenient for the writer and we ask that the mediation be rescheduled to a date in September* ".

[28] In spite of this request from counsel for the ancillary defendants, it was the responsibility of the claimant to ensure that the mediation process did not remain in a state of "limbo". This is against the background that the Rules clearly outline the purpose for mediation. ***Rule 74.1*** states:

> *"This part establishes automatic referral to mediation in the civil jurisdiction of the court for the following purposes:*
>
> *(a) improving the pace of litigation;*
> *(b) promoting early and fair resolution of disputes;*
> *(c) reducing the cost of litigation to the parties and the court system;*
> *(d) improving access to justice;*

> *(e) improving user satisfaction with dispute resolution in the justice system; and*
>
> *(f) maintaining the quality of litigation outcomes through a mediation referral agency appointed out of the"*

[29] Therefore it is clear from the provisions of ***Rule 74.1*** and especially ***74.1 (a) and (b)*** that in crafting these rules the purpose or intention of the framers was to facilitate and encourage the speedy resolution of matters before the court. This view is buttressed by the fact that a time limit is placed within the rules for the completion of the mediation process. ***Rule 74.8*** (2) states;

> *"Every mediation must be completed within 90 days of the date of Referral".*

[30] However, while the ***Rules*** provide for an extension of time to be agreed among the parties for the completion of the process, it is clear that the parties are not entitled to have the process in indefinite abeyance. ***Rule 74.8. (2) and (3) states***:

> *(2) The parties can agree to extend the time for completion by a further 30 days;*
>
> *(3) Where the parties have agreed to an extension of time pursuant to rule 2, they must notify the registrar in writing before the expiration of 90 days from the referral date.*

[31] Therefore within the context of Rule ***74.8(2) and (3)*** the request by counsel for the extension of time for the mediation cannot by any stretch of the imagination be viewed as, stalling the mediation. It was for the parties to respond by agreeing a time in September and notify the Registrar, in accordance with ***Rule 74.8. (2) and (3***). Additionally, if it was in fact perceived by counsel for the claimant that the request for the rescheduling of the mediation was an attempt to stall the proceedings, there were options open to the claimant's attorney-at-law to get the process moving. The ***Rules*** make provision for the dispensing of mediation for good and sufficient reason.

[32] ***Rule,74.4 reads:***

(i) "The court may postpone or dispense with a reference to mediation if it is satisfied that:

(a) good faith efforts to settle have been made

(b) and were not successful

(c) for some other good or sufficient reason, mediation would not be appropriate.

(2) When the court dispenses with mediation, a case management conference should be scheduled, where appropriate.

(3) Applications to postpone or dispense with mediation and all other applications under this Part may be heard on paper."

[33] Essentially, on a proper construction of the rules it is clear that in any event where the parties were unable or unwilling to settle a mediation date the claimant could have approached the court under this Rule.

[34] In the case of ***Gordon Stewart v. Goblin Hill Hotels Limited and Ors***. [2016] JMCC Comm 38. The defendants applied for the claim to be struck out against them on the basis that it has been in court for fifteen years. The claimants argued that the delay was occasioned by the inefficiencies in the court system. They pointed to their inability to; secure a case management date; get reasons for judgment; obtain the perfected order of the judge without delay; and incomplete record of appeal in the Court of Appeal as a consequence of the failure of the Supreme court to furnish reasons for judgment, Sykes J as he then was, stated at paragraph 33 of that Judgment:

> *"There is no doubt that Supreme Court contributed to the delay in hearing this matter. Both sides wrote to the court asking that a case management date be set. There was no response from the court".*

[35] However at paragraph 38 he stated:

> *"…..The procedural rules provide a remedy and attorneys- at-law are expected to use the remedies available to negotiate the obstacles.……If the attorney does not wish to go that route there is nothing preventing the attorney-at-law from filing a notice of application for court orders requesting specific case management orders. The procedural rules have provisions to manage circumstances where it is being alleged that the Registrar either has not acted or refuses to act. The litigant is not without a remedy. The non-exercise of these remedies cannot be relied on as a reason for not pushing forward with the matter. Thus the excuse advanced is really a non-excuse. "*

[36] In the instant case it is apparent that the parties in fact took an extended slumber after the correspondence from the attorney-at-law for the ancillary defendants. There is no evidence of any response to the attorney's request or any attempt to schedule a new mediation date. The claimant seeks to cast the blame for his inactivity at the feet of the other parties to the proceedings. That is, by virtue of his assertions that it is the agents, insurers of the defendant who adjourned mediation. However, that position is not accepted by this court. The attorney-at-law requested a change in the mediation date approximately one month prior to the scheduled date which is perfectly permissible within the ***Rules***. The request specified that they were seeking a date in September, that is the following month. It was for the parties, and in particular the claimant to respond to counsel's request and agree a date change for the mediation. The claimant is the one that initiated the proceedings. It is as a result of his claim that the other parties were brought before the court. He is the driving force behind his claim. Where he demonstrates apathy, the court can take the view that he has no genuine interest in pursuing his claim against the defendant.

[37] With the exception of the assertion that the claimant fell into error the only other excuse, given for the delay is that stated by the claimant's attorney at law Mr. Lawrence Philpot- Brown in his submissions. That is, that the claimant thought the matter was settled. However, this information is not contained in any of the affidavit

evidence of the claimant. This does not have any evidential value having not be stated on oath or affirmation, neither is there any evidence as to how the author of the statement acquired the information, bearing in mind he is saying what someone else other than himself, that is the claimant believed. However even if this information had some evidential value this excuse, is one that is quite incomprehensible. If the claimant was of the view that the matter is settled between the defendant and the ancillary claimant, I can't fathom how that prevented him from pursuing his claim. If he was of the view that the matter was settled in terms of the ancillary claim that was all the more reason he could pursue his claim, since it was the ancillary defendant that was having an issue with the date in August for the mediation. Unless he is saying, the issue being settled on the ancillary claim he was content not to pursue the matter any further.

[38] In any event the blame for the delay cannot be attributed to the filing of the ancillary claim. Therefore, I find that there is inordinate inexcusable delay on the part of the claimant.

Whether inordinate inexcusable delay is a sufficient basis for the striking out of the claim

[39] I must now determine whether this finding of inordinate inexcusable delay is sufficient for the striking out of the claim. In the case of ***Follett, Maria v Bournville Briscoe, etal***. In The Supreme Court of Judicature of Jamaica, Civil Division, Claim No. C.L. F 076 of (1991) delivered; 16.05.2006; Sykes J as he then was reviewed certain authorities to include ***West Indies Sugar v. Stanley Mitchell*** (1993) 30 J.L.R 542; ***Wood V H.G. Liquors Ltd and Anor.*** (1995) 48 WIR 240, and ***Grovit v. Doctor*** [1997] 2 ALL ER417. At paragraph 6 of his judgment, in outlining the relevance of these cases and certain important consideration for this kind of application he made the following pronouncement:

> *"These cases and other cases remain of importance because they identified factors that the court ought to take into account when deciding how to exercise its discretion under the CPR. We no longer speak of prejudice to the defendant alone.*

> *We now speak of disposing of cases justly in which prejudice to the defendant is a factor to be taken into account. Under the CPR the court undertakes a review of all the circumstances of the case; the court looks at the panoply of powers available to it under the Rules and see if the powers can be used judiciously to bring about a just disposition of the matter. The court may vary from the draconian striking out to making an unless order. There is power to deprive the successful party of all or some of the cost which he would normally receive. The court can also deprive the successful party of interest either totally or in part. This does not mean and could never mean that if the just disposition of the case requires that it be struck out the court should find some less than convincing reason to avoid taking that step."*

[40] The cases of **Icebird Ltd v Winegardner** [2009] UKPC 24) and ***Adelson v Anderson*** *[2011] EWHC 2497*, restated and applied the principle, stated below which was expressed by per Latham L.J. in ***Purefuture Ltd v Simmons & Simmons,*** *May 25, 2000, CA).*

> "… were delay to have occasioned prejudice short of an inability of the court to be able to provide a fair trial, then there would be or may be scope for the use of other forms of sanction. But where the conclusion that is reached is that the prejudice has resulted in an inability of the court to deal fairly with the case, there can only be one answer and one sanction; that is for the [proceedings] to be struck out."

[41] In ***The Commissioner of Lands v Homeway Foods and Stephanie Muir***, 2016 [JMCA] Civ 21, McDonald-Bishop JA (Ag.) as she then was, at paragraph 50 of the judgment states:

> "*As Lord Woolf explained in **Bigguzzi** there may be alternatives to striking out, which may be more appropriate to make it clear that the court will not tolerate delay but which, at the same time, would enable the case to be dealt with justly in accordance with the overriding objective. The court in considering what is just...is not confined to considering the effect on the parties but is also required to consider the effect on the court's resources, other litigants and the administration of justice*."

[42] In my reading of the Rules and the cases, I have extrapolated certain principles which I have formulated as follows:

(i) The court will not automatically strike out a party's statement of case in the presence of inordinate, inexcusable delay.

(ii) If there is evidence that the trial can proceed, no injustice being occasioned to the applicant or other users of the court, then the court should exercise its discretion in allowing the trial to proceed.

(iii) The court should apply sanctions, where it finds it necessary to convey to the defaulting party, the court's intolerance of disregard for timelines, orders and essentially, the misuse of the court's resources.

(iv) Where there is evidence of actual or potential prejudice to the applicant as a result of the defaulting party's inordinate delay the court should look to see whether the issue of prejudice can be remedied by any other power available under the rules.

(v) Where it is established that in the exercise of any other power under the rules the issue of prejudice can be satisfactorily address without striking out the defaulting party's statement of case, then the court in the exercise of its discretion can refuse to strike out the statement of case

(vi) Where there is evidence that it will be impossible to obtain a fair trial due to inordinate delay of the defaulting party that is the end of the matter. The statement of case should be struck out.

[43] Therefore despite the fact that I have found that there is inordinate in excusable delay on the part of the claimant, this finding without more is insufficient for me to exercise my discretion to strike out the claim. In light of the authorities discussed it is in fact accepted by this court that striking out is a draconian step.

Consequently, this court will have to decide whether this case is one that is suitable for the application of alternative powers with a view to convey to the defaulting party that the court will not tolerate delay, or for a complete strike out of the claim. That is in keeping with the overriding objective of the Rules to deal with the cases justly. (See also, ***Biguzzi v Rank Leisure***.) In conducting this assessment, I must decide whether at this stage allowing the case to proceed to trial will culminate in an unfair trial to the defendant.

WHETHER THERE IS RISK OF UNFAIR TRIAL

SUBMISSIONS

[44] Mr. Ellis submits on behalf of the defendants that**:**

(i**)** Public Supermarket has been deprived of presenting a defence as the incident occurred the 11th of May 2001 and it is not now able to present records and evidence of former staff. (He refers to case of ***Follett, Maria v Bournville Briscoe, etal*** *(*Supra). Unlike the *Maria* ***Follett*** *case* CMC is not yet scheduled but the defendant has undergone expenses to pursue this application as early as possible in order to obviate any prospective prejudice that he may face if the matter progresses. (He refers to the case **GORDON STEWART V GOBLIN HILL HOTELS LIMITED AND ORS (supra)***. [2016] JMCC 38 IN THE SUPREME COURT OF JUDICATURE OF JAMAICA***)**, There is substantial risk that the supermarket will not receive a fair trial. Their evidence to include but not limited to viva voce evidence is no longer available. That is evidence of the floor attendants, supervisors, security guards working on 11th May 2001. Also documentary evidence of the work schedule of staff; particularly floor attendants, supervisors and security guard;

documentary and viva voce evidence re the supermarket policy with regards to cleaning such as cautionary measures implemented; types of goods stored in various aisle and in particular the aisle that Mr. Mc Neil allegedly slipped; re the use of noon skid tiles in the supermarket; how the supermarket was illuminated.

(ii) Even If Public Supermarket were able to trace these employees there would be an issue as to whether they would be able to recollect details. *(*He refers *to* ***Norris Mclean v. Det. Sgt Williams and Ors*** in The Supreme Court Suit. No. Cl. M215/1993, heard April 9th 2002*)*

(iii) The claimant *has* not produced any acceptable excuse for the delay in pursuing his claim in relation to event of which date back 17 years ago. Due to this expanse of time it would be impossible for the defendant to have a fair trial. The defendant would face severe prejudice in their defence.

[45] Mr. Lawrence Phillpot-Brown made the following submissions on this issue:

(i) The defendant /applicant has not suffered any prejudice from the delay as it commenced ancillary proceedings against the ancillary defendant and was the subject of an application to dismiss those proceedings for want of prosecution. The defendant will in no way be prejudiced.

(ii) The claimant will be severely prejudiced if the order he seeks is not granted as it would have a punitive effect on the claimant as the limitation period has elapsed and hence he would be unable to bring fresh action before the court. It would have the effect of depriving the claimant access to the court which would amount to denial of justice. This would not be in

the best interest of justice and the overall objective of the Rules. The trial will not be affected as no dates have been fixed. (He relies on ***S & T Distributors Limited and S & T Limited v CIBC Jamaica Limited and Royal and Sun Alliance***, SCCA SCCA 112/2004).

Analysis

[46] In the case of ***Keith Hudson and Ors v. Vernon Smith and Anor***; in the Court of Appeal of Jamaica, Supreme Court Civil Appeal N0: 35 of 2005; a period of 20 years had lapsed between the filing of the action to the date it was dismissed for want of prosecution. One of the issues raised by counsel for the applicants in that case was that prospective witnesses who might have been able to furnish one of the applicants with the relevant information for his defence was either deceased or unable to recollect the facts. Therefore, it was no longer possible to have a fair trial of the issues in the action. The court noted that there were two (2) deaths during the period of inactivity. It also noted that there were periods of unexplained inactivity during the period of 20 years. At paragraph 31, it noted that:

> *"It appeared from the records there was an appeal that was not followed up by the appellants. There was no further evidence of the Appellants attorney-at-law having attended any date fixing session for a trial date to be fixed the matter seemed to have gone asleep for almost 4 years".*

[47] There was inactivity for another period of eight (8) and a half year. In relation to the notice of intention to proceed which was filed on November 8, 1999 which was described as a "sudden filing" by K. Harrison JA, at paragraph 35 of the Judgment, he states,

> *"It is the further the view of this Court that delay in prosecuting the claim amounts to an abuse of process. (See* ***Grovit v. Doctor*** *(supra)* ***Arbuthnot Latham Bank v Trafalgar Holding Ltd.*** *[1998] I WLR426). The authorities are very clear that where the defaulting party's conduct is due to prolonged inactivity this amounts to an abuse of the court's process".*

[48] On the face of it, this pronouncement could lend to an interpretation that lengthy delay is sufficient reason to dismiss a matter for want of prosecution. However, I take note of the fact that in this case, "*prospective witnesses who might have been able to furnish one of the applicants with the relevant information for his defence was either deceased or unable to recollect the facts"* Therefore on my reading of the case the decision was based, not only on the length of the delay ,but also on the availability of the defendant's witnesses.

[49] In the case of Norris ***Mclean v Detective Sergeant Williams and Ors.*** in The Supreme Court Suit. No. C.L. M215/1993, heard April 9th 2002, the entire period of delay was five and three quarter ($5^{3/4}$) years. Among the reasons given for the delay were:

(i) the file was lost by the Supreme court registry, and

(ii) The attorney-at-law for the claimant requested the reconstruction of the file. The court took into account the contribution of the Supreme court to the delay. It nevertheless less found the court's contribution to be just below half of the period of delay. At paragraph 17 of that judgment, Jones J stated:

> *"The court finds that the defendant was prejudiced by the long delay and unable to get its witnesses to have the matter tried fairly. That fact taken together with the significant contribution to the delay by the plaintiff himself or his attorneys, lead me to conclude on a balance that in the interest of justice the writ of summons should be struck out…"*

[50] Further, quoting, Wolfe JA in the Jamaica Court of Appeal case of **Vasti *Wood v H.G. Liquors Limited and Crawford Parkins etc*** [1995], 48 WIR 240, he states:

> *"The substantial risk that there cannot be a fair trial because of inordinate delay and prejudice are two separate entities and that the proof of one or the other*

> *entitles a party to have the matter dismissed for want of prosecution. …. once there is evidence that the nature of the delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the court's discretion, prejudice apart, inordinate delay, by itself, makes a fair trial impossible. 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"*

[51] The decision indicates that where ordinate delay makes it impossible to have a fair trial the applicant is entitled to have the claimant's case struck out for want of prosecution

[52] In the case of ***Gordon Stewart v. Goblin Hill Hotels Limited and Ors. (Supra)*** Sykes J, as he then was stated at paragraph 49:

> "*The issue is not the type of case but whether there is evidence to suggest that a fair trial is not possible. ……Further, It depends on the nature of the evidence and not the type of case. The true principle to be derived from the motor-vehicle type of cases is this: where the quality of the evidence available at trial is poor or very likely to be poor (and motor-vehicle cases may be an example in instances where they depend solely or substantially on witness' memories which generally degrade with time) then the longer the time between the event and application for striking out the easier it is for the court to draw the inference that a fair trial is no longer possible*".

At paragraph 50 he further states:

> "The present case is one which turns significantly upon documents. This is not to say that because the evidence comes largely from documents then it necessarily follows that a fair trial is possible...."

Then at paragraph 51, he states:

"No defendant has said that documents are no longer available, or persons to explain the documents, their content and the like, are not available to testify"

[53] In the instance case the affidavit evidence of Mr. Suresh Khemlani managing director of the applicant/defendant company is that: while the company Public Supermarket Ltd is still an entity he employed minimal staff over past five (5) years. The company completely ceased its operation on the 30th of March 2017. He is not able to bring, the managers, supervisors or employees who would have been responsible for receiving reports and or supervising the grounds of the supermarket as he is not able to trace them. He has no records of the events of 2001. He no longer has access to employer's log and schedule in order to verify who was present at supermarket at time; who was cleaning the floor; who had responsibility for receiving reports from aggrieved customers. He has no access to cleaning protocol standards which the supermarket staff is required to observe, such as leaving warning cones at the area. He has no document to show which guards were patrolling at the time in question. This will impede his ability to defend the action to the best of his ability. He himself has little recollection of events between 2008 and 2018.

[54] It is interesting to note that one of the basis on which Sykes J (as he then was) refused to strike out the claim in the case of ***Gordon Stewart v. Goblin Hill Hotels Limited and Ors.*** (Supra) is that there was no contention on the part of the defendants that documents and persons to explain them were not available. This is stated at paragraphs 50 and 51 of his judgment.

[55] However, the very opposite prevails in the instant case. In light of the defence that was filed by the defendant it is apparent that they are mounting a challenge to the very occurrence of the incident. Therefore, the issues of fact, that would no doubt concern the court at trial would include; whether or not the floor was wet; whether the claimant did in fact fall as a result of the floor being wet; whether the claimant did in fact sustain any injury as result of any fall. This is also against the background that the defendant alleges in the defence that no such report was

made by the claimant until after three (3 years) after the alleged incident. Therefore, the evidence of eye witnesses would be very crucial. Additionally, the issue of the credibility of the witnesses is a vital element in the case.

[56] The decision of Sykes J as he then was in the case of ***Gordon Stewart v. Goblin Hill Hotels Limited and Ors.*** can be contrasted with his decision in the case ***Follett, Maria v Bournville Briscoe, etal.*** In The Supreme Court of Judicature of Jamaica Civil Division Claim No. C.L. F 076 OF 1991 Delivery: 16.05.2006. That case involved a motor vehicle accident. The defendants in their application to strike out the claim contended that the witness on which two of the defendants intended to rely could not be found. In paragraph 9 of his judgment Sykes J as he then was stated:

> *"To ask witnesses to recall minute details of an accident, that by that time would have taken place sixteen years before would not be fair to them".*

[57] Mr. Samuda, the attorney-at-law for two of the defendants, had sworn in his affidavit that the witnesses on which the first two defendants intended to rely could not be found. The learned Judge considered the possibility of the Evidence Act being utilized. He, found that:

> "*in the circumstances of (that) case that solution would not be an adequate one. There would not be any cross examination and as the claimant would be able to take advantage of perceived deficiencies in the statement. This would be unfair in a context where the defendants have been ready to proceed to trial since 1991 and the persistent delay by the claimants has deprived the defendants of producing viva voce evidence".*

[58] With regards to whether the defendants had any responsibility, to act at the early stages, during the delay, he made the following point at paragraph 11:

> "*it may be said that the defendant could have acted earlier to have the matter struck out. As one judge said the defendant had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas' if they were to take*

> *out [a notice of application for court orders] to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering. (see Lord Denning M.R.* ***Fitzpatrick V Batger &Co. Ltd*** *[1967]2 All ER, 657,659 C-D)".*

[59] In the case at bar, If the claimant is allowed to proceed with the claim I find that there is evidence that the defendant will be prejudice. The defendant stands in jeopardy of being found liable in relation to the claim, not necessarily because it is in fact liable, but due to the fact that it will not be able to properly, advance its case as result of claimant's delay. To my mind the issue does not only concern the collecting of witness statements. Even if the defendant had collected statements, the fact still remains, unchallenged that the witnesses are not available. The quality of the evidence would still be affected where statements are admitted into evidence and "perceived inconsistencies cannot not be cleared up". That would be unfair to defendant (See ***Follett, Maria v Bournville Briscoe, etal*** (Supra). The scales would be unfairly skewed in favour of the claimant, where his witnesses are present and participate in the trial and the defendant is unable to produce theirs. Such a result would be unjust and, in fact punitive as it relates to the defendant.

[60] The right to a fair trial is a right accorded to defendants as well as claimants. (see ***Maqsood v Mahmood*** [2012] EWCA Civ 251, the Court of Appeal).

[61] In deciding what is just and fair in accordance with the Rules and decided cases the court has to strike a just balance. It was always within the claimant's power to pursue his claim. Defendants have rights to defend themselves. The court has to ensure that, that right is preserved. The claimant should respect that right and proceed with his claim in a manner that does not inhibit the defendant from preserving the nature and quality of their evidence. At this juncture it is simply not that the court is denying the claimant his right. He is the one that chose not to exercise his right for a prolonged period. He having failed to do so, the court must step in where, to now exercise that right will result in detriment and injustice to a party who did nothing to prevent the claimant from proceeding with his claim.

[62] The court agrees that the claimant is entitled to institute legal proceedings within six years. However, it is equally the defendant's right to wait until CMC orders are made to collect witness statements. The defendant had a right to harbour the hope that settlement may be arrived at, at mediation. Therefore, there was no obligation on the part of the defendant to collect witness statements before the CMC orders. I am not saying that the defendant could rely on this excuse where the claimant was always ready and willing to proceed with his case. However, the claimant having done nothing for approximately 9 years, the defendant needed not to have done anything to awake him. In fact, in these circumstances, the defendant is entitled to a reasonable expectation that the claimant has no further interest in pursuing the claim. Therefore, the defendant is entitled to allow the claim to die a natural death.

[63] It is no excuse that if the claim is struck out it will be statute bar, in circumstances where the claimant waited so late to file his claim and then he sat idly by and allowed approximately 9 years to go by without doing anything to move the claim forward. Incidentally, even if the claim would not be statute bar I don't see how the claimant could bring a fresh claim in these circumstances, where unless the defendant's witnesses were to become available and the managing director of the defendant company suddenly begins to recollect the event, the claim would again be successfully struck out for abuse of the process of the court.

[64] Counsel for the claimant suggest that an unless order would be an appropriate order in the circumstances. However, in light of the prevailing circumstances I don't see how an unless order at this time would prevent the injustice of an unfair trial to the defendant. In fact in the case of ***Charmaine Bowen v. Island Victoria Bank Limited and Ors***. [2017] [2017] JMCA Civ 23 Books JA states at paragraph 45, that:

> "*It is in cases such as this, where there is an application to strike out a party statement of case, that the task of striking a balance between these two major principles, becomes most taxing. The aim is to secure a just result and the court*

*should adopt the most appropriate alternatives available to it, in order to secure that result (see **Biguzzi v Rank Leisure Tours**)."*

[65] In the judgment the learned judge of appeal also referred to the case of ***Keith v CPM Field Marketing Ltd*** [2000] TLR 29th August 2000. In reference to the afore mentioned case he states:

> Brooke LJ, with whom the rest of the court agreed, decided that a judge, who was considering whether to strike out a party's statement of case, should consider the provisions of the CPR dealing with relief from sanctions. Such a consideration, the learned judge suggested, should systematically review the provisions of the rule dealing with that relief" (See paragraph 52).

[66] ***Rule 26.8*** outline the conditions that must be satisfied in order for a party to be granted relief from sanctions. The rule read as follows:

> *(1) "An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be -*
>
> *(a) made promptly; and*
>
> *(b) supported by evidence on affidavit.*
>
> *(2) The court may grant relief only if it is satisfied that -*
>
> *(a) the failure to comply was not intentional;*
>
> *(b) there is a good explanation for the failure; and*
>
> *(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.*
>
> *(3) In considering whether to grant relief, the court must have regard to -*
>
> *(a) the interests of the administration of justice;*
>
> *(b) whether the failure to comply was due to the party or that party's attorney-at-law;*
>
> *(c) whether the failure to comply has been or can be remedied within a reasonable time;*
>
> *(d) whether the trial date or any likely trial date can still be*

met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party."

[67] In considering the application under this rule it is clear from the authorities such as **HB *Ramsay and Others v Jamaica Redevelopment Foundation Inc and Another;*** [2013] JMCA Civ that in order to be relieved from sanction the claimant must satisfy all provisions of ***Rule 26.8.1*** and **2** before the court can consider whether it should exercise its discretion under ***Rule 26.8.3***

In that case his Lordship Mr. Justice Brooks. JA at paragraph 9 stated that:

" It is without doubt that the current thinking is that if an application for relief from sanctions is not made promptly, the court is unlikely to grant relief".

[68] In the present case I find that there is nothing close to promptitude in relation to the actions of the claimant. He was not prompt in making this application. In fact, his application was in response to the defendant's application to dismiss the claim for want of prosecution, asking the court to dismiss the defendant's application. Having failed to comply with the Judge's order for mediation he waited approximately nine years to indicate an intention to proceed to mediation. I find that, despite the fact that case law (see ***HB Ramsay and Others v Jamaica Redevelopment Foundation Inc.***

and Another; (supra) indicates that there ought to be some flexibility in relation to the issue of promptitude, depending on the circumstances, this kind of inordinate excusable delay on the part of the claimant is of such that his application fails under ***Rule 26.8.1***.

[69] Additionally, If I were to go on to consider the application under ***Rule 26.8.2***, I find that that no good explanation has been given on the part of the claimant for the failure to comply with the Judge's order to proceed to mediation. Having failed to satisfy ***Rules 26.8.1 and 2*** there is no need for me to consider the application any

further. In ***HB Ramsay and Others v Jamaica Redevelopment Foundation Inc and Another***; (supra) Brooks JA states at paragraph 39 that:

> *"In any event, rule 28.6(2) requires an applicant to comply with all three of its requirements. It states that the "court may grant relief only if it is satisfied that" the three requirements have been satisfied".*

[70] However even in light of ***Rule 26.8.3*** in the interests of administering justice fairly, and balancing the scales justly I find that the effect of granting relief to the claimant, that is allowing the claim to proceed will result in great injustice to the defendant.

CONCLUSION

[71] In the interest of justice I find that the claim should be struck out as an abuse of the process of the court.

ORDERS

In light of the fore going I make the following orders:

(1) Statement of case of the claimant is struck out.

(2) Cost to the Defendant to be agreed or taxed.