[2016] JMSC Civ.13

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2007 HCV 00921

BETWEEN	**BALLANTYNE, BESWICK & COMPANY (A FIRM)**	**CLAIMANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY**	**DEFENDANT**

IN CHAMBERS

Novia Cotterell and April Grapine-Gayle instructed by Ballantyne, Beswick & Company for the Claimant

Tana'ania Small-Davis, Joshua Sherman and Kathyrn Williams instructed by Livingston, Alexander and Levy for the Defendant

11th January 2017 & 27th January 2017.

Application to strike out claim – Delay – Exercise of discretion

CRESENCIA BROWN BECKFORD, J.

BACKGROUND

[1] This application was brought by the Defendant due to the delay in prosecuting a claim brought against it approximately 8 years ago by the Claimant. On February 23, 2007, the Claimant, Ballantyne, Beswick and Company, a firm of Attorneys, filed a claim against the Defendant, Jamaica Public Service Company Limited, the main provider of electric services in Jamaica seeking the following relief:

(a) A Declaration in relation to the Defendant's delivery of electricity supply to the Claimant's office;

(b) Damages for breach of statutory duty ;

(c) Damages for breach of contract;

(d) An account of electricity delivered to the Claimant and recalculation and adjustment of the Claimant's account with the Defendant; and

(e) Repayment of overcharges on the Claimant's account with the Defendant.

[2] The claim arose out of an allegation by the Claimant that it suffered financial loss due to unnecessary consumption of electricity which was caused by a slack connection in the Claimant's breaker panel. The Claimant further alleged that this was a direct result of the voltage fluctuations in the Defendant's provision of electricity. The Defendant in its defence denied being responsible for the voltage fluctuations. After the close of pleadings, on October 3, 2007, the case was automatically referred to mediation.

[3] While the Defendant took steps for mediation to take place, writing to the Dispute Resolution Foundation requesting a list of mediators for consideration, the Claimant wrote to the Dispute Resolution Foundation refusing to comply with the Court's compulsory referral to mediation. The Claimant further requested that the Dispute Resolution Foundation advise the Registrar of the Supreme Court that it is declining to mediate the claim. In the letter dated the 6th of December 2007 the Defendant stated inter alia that:

> *"…we believe that as a responsible organization, you should assess the circumstances of each case and not blindly demand that each and every litigant proceed through the mediation process where it is clear that the process would serve only to waste litigants' resources and increase the time to the total resolution of the matter.*
>
> *We therefore now request that you advise the Registrar of the Supreme Court that you are declining this mediation since no purpose will be served by proceeding.*

[4] At no time did the Claimant apply to the Court to dispense with mediation. Neither has it taken any further steps to advance its claim against the Defendant. As a result of this, the claim has fallen into prolonged hibernation with

approximately eight (8) years having passed since the claim was filed. This is in stark contrast to the Claimant's stated reason for refusing to participate in mediation.

[5] In light of this, the Defendant has now applied to have the Claimant's case dismissed for want of prosecution or in the alternative, that the matter be struck out as an abuse of the process of the Court on account of the delay. The Defendant bases its application on the following grounds:

> *"The delay by the Claimant in prosecuting the matter is inordinate and inexplicable and this demonstrates that it has no intention or interest in pursuing the claim to its conclusion.*
>
> *The Claimant unreasonably refused mediation on the basis that it was a waste of time and ironically has since then not taken any steps in prosecuting the claim. Further the onus was on the Claimant to make an application to the court to dispense with mediation pursuant to CPR Rule 74.4(1).*
>
> *The Defendant will suffer severe prejudice as a result of the delay in having the action hanging over his [sic] head indefinitely, not knowing when it is going to be brought to trial."*

[6] The Claimant accepts that its failure to advance the matter is inexcusable but contends that the striking out of its statement of case would be too harsh a penalty for its tardiness.

ISSUE

[7] The issue to be dealt with is whether or not the Court ought to exercise its discretion in this case in favour of the Claimant or Defendant where the Claimant has been guilty of inexcusable delay.

THE APPLICANT'S CASE

[8] The Defendant argues that the claim has been inactive for over seven(7) years and following the Claimant's written rejection to the Dispute Resolution Foundation of the Court's referral to compulsory mediation, the Claimant took no further steps to proceed with the matter. In arguing that the delay of more than seven (7) years is inordinate, the Defendant relied on the case of ***Spurgeon***

Reid v Corporal Lobban and the Attorney General of Jamaica *Suit No. C.L 1989/R-014 (unreported)*.

[9] It was further noted that CPR Rule 74.4 (1) provides that an application may be made for mediation to be dispensed with and this application must be made to the Court and not the Dispute Resolution Foundation. The Defendant relied on the case of ***Margarette Macaulay v Harold Brady & Bruce Golding*** *[2014] JMSC Civ 33* in support of this argument. However, since the Claimant unreasonably failed to agree to mediation and declined to make an application to the Registrar of the Supreme Court to dispense with mediation, the matter has "fallen into hibernation in the anteroom of the registry archives".

[10] The Defendant also argued extensively that the Claimant has shown no interest in prosecuting the claim. Though the Claimant cited the need to save resources and time as the reason for refusing mediation, it has taken no further actions whatsoever to prosecute the matter since the letter was sent to the Dispute Resolution Foundation.

[11] Counsel for the Defendant further argued that the Defendant has been prejudiced by the claim hanging over its head for an indefinite period since this requires that it is reported on an annual basis as a contingent liability to its shareholders and insurers. The Defendant relied on ***Tabata v Hetherington, Guradian Newspapers and Raynor*** *Royal Courts of Justice Transcript of December 12, 1983* and ***Keith Hudson, Clandale Sheckleford, Winston Letts & Carmen Letts v Vernon Smith and Alwyn Smith*** *SCCA No. 35 of 2005* to bolster its argument that although the Defendant did suffer prejudice, it was not necessary that the Defendant show actual prejudice or a risk of a fair trial being impossible as a result of the delay

THE RESPONDENT'S CASE

[12] The Claimant argues that in spite of its conduct in the matter, the circumstances of the case require that the matter be properly ventilated so that justice may be

done. Therefore, the draconian sanction of striking out the Claimant's statement of case ought not to be taken in this instance since the Court has other tools in its arsenal to enforce compliance.

[13] The Claimant grounds its argument on the wide powers of the Court to protect its processes from abuse, especially in cases where the Claimant lacks diligence in prosecuting the case as was noted in the well known case of ***Grovit v Doctor*** *[1997] 1 WLR 640* which was approved and applied by the Privy Council in ***Icebird Ltd v Winegardner (The Bahamas)*** *[2009] UKPC 24.*

[14] Counsel for the Claimant in her submissions accepted that the Claimant erred in failing to proceed with mediation as was ordered by the Court. She further acknowledged that compounding this error, the matter fell into dormancy. However, she submitted that the claim is not a *"plain and obvious"* case which warrants the severe measure of having it struck out at the first and only occasion. The Claimant relied on the case of ***S&T Distributors Ltd. V CIBC Jamaica Ltd et al*** *SCCA No. 112/04 (unreported) delivered 31st July 2007* to support its argument that the discretionary power to strike out a claim must be exercised with extreme caution.

[15] It was also submitted that in the circumstances, an *'unless order'* would be more appropriate since Rule 26.9 (3) gives the Court the power to make an order to put matters right where there has been an error or failure to comply with a rule, practice direction or court order. The Claimant relied on the case of ***JMMB Merchant Bank v Winston Finzi and Mahoe Bay Company Ltd*** *[2014] JMCCCD 10* to support this point.

[16] The Claimant, relying on ***Canada v Aqua-Gem Investments Ltd*** *[1993] 2 425*, asserted that the Defendant has suffered no serious prejudice as a result of the delay. It noted that all monies which were requested by the Defendant in relation to the Claimant's electricity consumption was promptly paid. The Defendant has not been kept out of its monies.

[17] The Claimant also argued that it would be prejudiced financially if its statement of case is struck out since, if successful, the Defendant would have to recalculate its electricity charges and give credit for over-consumption caused by its improper delivery of electricity or to recalculate the Claimant's electric consumption and pay the amount owing on such recalculation. The Claimant also relied on the analysis of the Court in ***Aqua-Gem*** of the cases ***Birkett v James*** *[1978] AC 297 and* ***Department of Transport v Chris (Smaller) Transport Ltd*** *[1989] AC 1197 (HL)* to highlight the fact that the prejudice which will be caused by the expiration of the limitation period must be borne in mind. The Claimant submitted that:

> *"as the limitation period has passed in the present case and there can still be a fair trial and the Defendant has suffered no prejudice, to strike out the case at this stage would have punitive effect on the Claimant who would not be able to pursue their claim and would be unable to bring a fresh action before the Court, in a case where the Claimant has a great likelihood of successfully bringing its claim."*

THE LAW

[18] Rule 1.1(1) of the Civil Procedure Rules of Jamaica 2002 states *that "these Rules are a new procedural code with the overriding objective of enabling the Court to deal with cases justly."* Rule 1.1(2) (d) notes further that dealing justly with a case includes *"ensuring that it is dealt with expeditiously and fairly."*

[19] Rule 1.2 declares that the Court must seek to give effect to the overriding objective when interpreting these rules or exercising any powers under these rules.

[20] One way in which the Court is able to further its overriding objective is through the exercise of the power given to it under Rule 26.3 (1) which gives the Court the authority to strike out a party's statement of case or part of a statement of case. Rule 26.3 (1) provides that:

> *"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 –*

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(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;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10."

[21] When considering the effect of the CPR on the powers of the Court to protect its process from abuse, it is useful to examine the case of ***Biguzzi v Rank Leisure Plc*** *[1999] 4 All ER 934* which concerned the exercise of the Court's powers under Rule 3.4(2)(c) of UK's Civil Procedure Rules (the equivalent of Rule 26.3(1)). Lord Woolf MR. pointed out at page 940 that:

"Under r 3.4(2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.

There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result."

[22] In the case of ***Branch Developments Limited (t/a Iberostar Rose Hall Beach Hotel v The Bank of Nova Scotia Jamaica Limited*** *[2014] JMSC Civ 003* McDonald-Bishop J (as she then was) also noted at paragraph 29 that:

"Striking out of a party's case is the most severe sanction that may be imposed for non-compliance with the orders of the court under the court's coercive powers. It is draconian and so the power to do so must not be hurriedly exercised as it has the effect of depriving a person access to the courts which could result in a denial of justice. ***Therefore, the authorities have established that it is reserved for the most serious and repeated breaches or defaults.*** *The ultimate question should, therefore, be whether striking out will produce a just result having regard to all that the achievement of the overriding objective entails."(emphasis mine)*

[23] It is therefore clear that though the Court does have the discretion to strike out a statement of case for non compliance with an order of the Court or delay; it is not

an unfettered discretion. It must be exercised subject to the Court's mandate to deal with cases justly.

[24] In considering whether the Court should exercise its discretion to strike out a statement of case, several factors should be taken into consideration to determine whether there is sufficient reason to justify it in doing so. ***Strachan v The Gleaner Company*** *Motion No 12/1999 delivered 6 December 1999* and approved in ***Charmaine Bowen v Island Victoria Bank Limited , Union Bank Limited et al*** *[2014] JMCA App 14*, noted the factors which a Court takes into consideration in determining whether or not to exercise its discretion to strike out a statement of case. In ***Charmaine Bowen***, Phillips JA specified:

> *(a) "the length of the delay;*
>
> *(b) the reasons for the delay;*
>
> *(c) the merit of the case*
>
> *(d) whether any prejudice may be suffered by the opposing side."*

[25] It was also noted in **Strachan** that:

> *"Notwithstanding the absence of a good reason for delay, the court is not bound to reject an application for a extension of time, as the overriding principle is that justice has to be done."*

Each prong of the test will now be considered individually.

ANALYSIS

A. *LENGTH OF THE DELAY*

[26] As was noted previously, since the filing of the claim on February 23, 2007, almost eight (8) years have passed without any further steps being taken. In fact the Claimant was only spurred into action when it was served with the Defendant's application. The Claimant's actions by any measure is unacceptable and in these circumstances it ought not to be allowed any further indulgences. Furthermore, any future order which is made against the Claimant should be

such that it is disgorged of any benefits which may accrue to it as a result of the delay.

B. *REASON FOR THE DELAY*

[27] In has been noted in the case of ***Peter Haddad v Donald Silvera*** *SCCA No 31/2003 and delivered on 31 July 2007* at page 12 of the judgement that

> *"… the absence of a good reason for delay is not in itself sufficient to justify the court in refusing to exercise its discretion to grant an extension. But some reason must be proffered."*

[28] Further, in the case of ***Sylvester Dennis v Lana Dennis*** *[2014] JMCA App 11* it was noted that where there is merit in the appeal, the Court will grant an indulgence despite the fact that the explanation for the delay, in conforming to the Court's rules, was not a good one. Mangatal JA (Ag) (as she then was) pointed out at paragraph [52] of the judgement that:

> *"notwithstanding the absence of a good reason for delay, in my view the proposed appeal has merit…"*

[29] The Claimant has submitted that its failure to proceed with the matter does not reflect a disinterest in pursuing litigation but rather is a grave oversight on its part, the Claimant's explanation being that it forgot about its own case as it pursued it's clients' cases. In my view this is not a good explanation for its failure to take any further steps following its decision to decline mandatory mediation. The Defendant is correct in its submissions that as a firm of Attorneys-at-Law, they ought to know the importance that the Court places in promoting the early resolution of disputes. Furthermore, given the reason for refusing to comply with mediation, the Claimant should have moved with greater alacrity to ensure the matter was resolved as quickly as possible. The Claimant had cited the need to save the litigant's resources and time yet allowed almost eight (8) years to pass without taking any further steps.

[30] The reason advanced by the Claimant is wholly unsatisfactory and is of such nature that the Court is required to show its displeasure and disapproval.

However, in light of the principle in ***Haddad,*** the inadequacy of the Claimant's reasons should not be determinative. The merits of each party's case must be examined before a decision can be made as to how the Court should exercise its discretion.

C. *MERITS OF THE CASE*

[31] It is the Claimant's case as set out in its pleadings that by letter to the Defendant it claimed that the usage of 2344/kwh for which it was billed, was due to the Defendant's default. In response to the claim, by way of letter, the Defendant accepted responsibility. This letter reads in part that:

> *"An investigation was conducted on the premises on September 8, 2006 in the presence of your electrician., Mr. J. Bonnick, and it is observed that the neutral connection within your breaker panel is slack. This is a direct result of the voltage fluctuation you have been experiencing."*

[32] The Claimant has based its case on the interpretation of the letter which it claims is an admission that the Defendant's provision of electricity for whatever reason was characterized by voltage fluctuations which adversely affected the Claimant's office and its consumption of electricity. It is the interpretation of this correspondence between the parties which is the gravamen of the Claimant's case.

[33] On the other hand, the Defendant in its Defence entirely denies liability and has stated that the voltage fluctuation could not and did not cause the slack connection with the breaker. Rather it was the slack connection with the breaker that caused the voltage fluctuations.

[34] On an examination of the correspondence between the parties, it appears that the Claimant does have an arguable case. If the Court were to accept the interpretation offered by the Claimant, the result will be a finding that the Defendant is liable and should repay to the Claimant the excess which has been charged on its account.

D. *PREJUDICE TO EACH PARTY*

[35] In ***Costellow v Somerset County Council*** *[1993] 1 W.L.R 256* at pg 264 H it was noted that :

> *'Saving special cases or exceptional circumstances it can rarely be appropriate, on an overall assessment of what justice requires to deny the plaintiff an extension, (where the denial will stifle his action) because of a procedural default, which, even if unjustifiable, has caused the defendant no prejudice for which he cannot be compensated by an award of costs.*

Though ***Costellow*** was dealing with the issue of extension of time in which to file an appeal, the principles relating to *"prejudice"* are applicable in this situation.

[36] This position was accepted in the case ***of Hugh Bennett and Jacqueline Bennett v Micheal Williams*** *[2013] JMSC Civ 194* where it was further noted that:

> *"the term 'prejudice' ought not to be considered in a narrow way. It is a term which ought to be considered, just as this application, in a practical and holistic (sic) way. Thus, whilst of course, there could be no real prejudice to the respondent/defendant if it would be overall, in the interests of justice, to grant the applicants'/claimants' application, nonetheless, what this court must determine, in deciding on whether such real prejudice exists or not, is, when looked at holistically, whether such prejudice would be, in a very practical sense, substantial in nature".*

[37] The Defendant in its submissions relied on the case of ***Biss v Lambeth, Southwark and Lewisham Health Authority*** *[1978] 2 All ER 125, 131* where Lord Denning MR noted that:

> *"the prejudice to a Defendant by delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial."*

[38] It must be conceded that delay, especially delay of the nature found in this case, will lead to the prima facie presumption of prejudice. In these circumstances, the Defendant has submitted that it is prejudiced by the claim continuously hanging over its head indefinitely as it must annually report the claim as a contingent liability to its shareholders and insurers. It has also highlighted the expenses which have been incurred in having to retain Counsel to represent its interest.

[39] While it is accepted that these reasons are prejudicial, the question still remains as to whether, when examined holistically, the prejudice is substantial. It has already been stated that the prejudice which both parties will face must be balanced and considered in light of the need to deal with cases justly. The Defendant is a large company. It is likely to have a number of contingent liabilities. The requirement to make yearly reports to shareholders will in no way influence the outcome of the trial; neither does the affidavit evidence presented by the Defendant show that it will be prevented from properly advancing its case if the Claimant's case is not struck out . Furthermore, any expenses which the Defendant incurred can properly be remedied by an award of costs as was suggested in ***Costellow.***

[40] On the other hand, there will also be some prejudice to the Claimant. Since the limitation period has passed, the Claimant will be permanently barred from bringing a new claim and from having it's claim adjudicated. If successful, it would have lost a benefit. When compared with the prejudice that the Defendant will face if the case proceeds to trial, it is clear that the greater financial hardship would be on the Claimant.

[41] In ***Attorney General of Jamaica and Roshane Dixon v Attorney General of Jamaica and Sheldon Dockery*** *[2013] JMCA Civ 23*, Harris JA stated in paragraph 18 that:

> *It cannot be too frequently emphasized that judicial authorities have shown that delay is inimical to the good administration of justice, in that it fosters and procreates injustice.* ***It follows therefore, that in applying the overriding objective, the court must be mindful that the order which it makes is one which is least likely to engender injustice to any of the parties. (emphasis added)***

[42] In this case the Claimant has shown a blatant disregard for the processes of the Court in refusing to comply with the mandatory mediation order which was made and in allowing approximately eight (8) years to elapse without any steps being taken to advance the claim. While it is an established principle that the Court should be very reluctant in seeming to give a helping hand to those who disobey

the orders of the Court, it appears that the Claimant does have an arguable case and that the prejudice which the Defendant might encounter if the matter is allowed to proceed to trial is such that an appropriate order of the Court could be deemed remedial. I have also considered the fact that if the Claimant's case is struck out, it will be prohibited from filing another claim since the limitation period has expired.

CONCLUSION

[43] On the basis that the Claimant has an arguable case and that the greater hardship would be occasioned to the Claimant if the claim is struck out, the justice of the case requires that the matter be properly ventilated in the Court despite the Claimant's egregious delay. The Claimant must bear the cost associated with this application which was occasioned by its inertness. Accordingly, the orders are as follows:

Orders

(a) Application for Court Orders filed 23rd January 2015 is refused.

(b) Mediation to take place by the 31st of March, 2017.

(c) Unless the Claimant attends mediation then its statement of case shall stand as struck out without the need for further order.

(d) Unless the Claimant complies with subsequent orders made in this claim then its statement of case shall stand as struck out without the need for further order.

(e) Should the Claimant be granted an award for damages or for a specified sum in the claim, no interest shall be awarded on the said sum from the 6th December 2007, date of the refusal to participate in mediation to 23rd January 2015, the date of this application.

(f) Costs of this application to the Defendant to be taxed if not agreed.

(g) The Defendant's Attorney to prepare, file and serve orders herein.