



[2022] JMCC COMM 18

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. 2013 CD 00149

BETWEEN	CAMILLE PATRICIA THOMPSON	1ST CLAIMANT
	(Administratrix of the Estate of Karlene Whyte)	
AND	VALLEY SERVICES STATION LIMITED	2ND CLAIMANT
AND	GAVIN WHYTE	DEFENDANT

IN CHAMBERS

The Claimants are unrepresented. The 1st Claimant appears in person and as a representative of the 2nd Claimant

Ms. Catherine Minto instructed by Nunes, Scholefield, DeLeon & Co for and on behalf of the Defendant

Dates Heard: May 19 & July 19, 2022

Civil Practice & Procedure – Application to Dismiss Claimant’s Case for Want of Prosecution – Rule 26.3 of the Civil Procedure Rules – Rule 26.1 (2) (v) of the Civil Procedure Rules – Court’s Overriding Objective – Rule 1.3 of the Civil Procedure Rules

PALMER HAMILTON, J.

BACKGROUND

[1] On the 11th day of November, 2013 Karlene Whyte and Valley Services Station Limited filed a Claim Form accompanied by a Particulars of Claim against Gavin Whyte seeking several declarations. The Claimants sought to have the Court make declarations in relation to the shares and interest of the Defendant in the 2nd

Claimant and in relation to the property located at Wakefield in the parish of Trelawny.

- [2] On the 12th day of November, 2013 Karlene Whyte and Valley Services Station Limited sought by way of a Re-Issued Notice of Application for Court Orders an injunction restraining the Defendant, his servants or agents from in any way whatsoever operating or attempting to operate or interfering in the management of the 2nd Claimant and in the operations and management of the service station operating on premises owned by Karlene Whyte and Gavin Whyte until the trial of the matter hereof, or for such other period as determined by the Court. The hearing of the application for injunction came before this Honourable Court on the 31st day of January, 2014. The said application was refused and the injunction not granted.
- [3] On the 14th of October, 2020 in Claim Number **2018 HCV 03884**, Ms. Thompson was appointed as the Administratrix of the estate of her mother, Karlene Whyte who died on the 2nd day of March, 2019, for the purpose of pursuing a claim on behalf of the deceased estate. On the 15th day of March, 2022, this Honourable Court made an Order that Camille Patricia Thompson, as Administrator of the Estate of Karlene Whyte, be substituted as the 1st Claimant.

THE DEFENDANT'S APPLICATION

- [4] Following the refusal of the application for injunction, the Defendant, Gavin Whyte (hereinafter referred to as Mr. Whyte), filed a Notice of Application for Court Orders on the 14th day of January, 2022 seeking the following Orders:
- a. *That the claim filed herein be dismissed for Want of Prosecution; and*
 - b. *Costs to the Defendant.*
- [5] The Application was made pursuant to Part 26 of the Civil Procedure Rules 2002, as amended (hereinafter referred to as the CPR). The grounds on which the application are being made are that since the dismissal of Ms. Whyte's application

for injunction she took no further steps in the matter and that Ms. Whyte has abandoned this claim in favour of a new claim filed in **Claim No. 2018HCV03884**.

- [6] Ms. Thompson filed an Affidavit in Response to the Defendant's Application on the 29th day of March, 2022.

THE DEFENDANT'S SUBMISSIONS

- [7] Counsel for the Defendant, Ms. Minto submitted that since the dismissal of the injunction in 2014, no further steps have been taken by the Claimants in relation to this matter and she argued that the Claimants lost interest in this matter. The case at bar has been dormant for eight (8) years. She further submitted that the lack of interest in respect of this matter is underscored by the fact that the 1st Claimant initiated another action against her client seeking identical reliefs to the declarations claimed in the case at bar. She also noted that the 2nd Claimant has been dormant since 2014 and there is no interest in the reliefs claimed at 1 to 5 in the Claim Form.

- [8] Ms. Minto relied on the case of **Allen v Sir Alfred McAlpine & Sons** (1969) 1 ALL ER 543, which sets out a three part test for dealing with striking out cases on want of prosecution:

(a) that there is inordinate delay in the prosecution of the matter;

(b) that this delay is inexcusable; and

(c) that the Defendants are likely to be seriously prejudiced by the delay.

- [9] She argued that once the Defendant has established that the delay has been inordinate and is inexcusable, a rebuttable presumption of prejudice arises. The Court ought to dismiss the claim unless the Claimant establishes on a balance of probabilities, that the Defendant has not suffered prejudice or that other circumstances would make it unjust to terminate the action. The Defendant, therefore, only has to establish that there has been inordinate delay. Learned

Counsel contended that there can be no good reason for the delay as Ms. Thompson was able to initiate an entirely new claim seeking almost identical reliefs to that which is claimed herein.

- [10] Counsel argued that the eight (8) year delay by the Claimants has caused serious prejudice to her client who has to engage and pay Counsel to defend a second action and the costs awarded to her clients in the case at bar remains unpaid.
- [11] Learned Counsel also relied on the following cases: **Birkett v James** [1977] 2 All E.R. 801, **Port Services Limited v Mobay Undersea Tours Limited and Fireman's Fund Insurance Company** S.C.C.A. No. 18/2001, **Horace Mead v CIBC (Ja.) Limited and the Attorney General of Jamaica** C.L. 1995/M – 147, **Ballentyne, Beswick & Company (A Firm) v Jamaica Public Service Company** [2016] JMSC Civ 12.

THE CLAIMANTS' SUBMISSIONS

- [12] Ms. Thompson submitted that she is unable to answer on her mother's part as to why she did not advance the claim since 2013. She contended in her Affidavit in Response that she is not in a position to respond to the claim that was initiated by her late mother. She argued that she was not put in a position to fully represent her late mother's estate until September of 2021 and she was only granted a full Grant of Administration recently.
- [13] Ms. Thompson, in her Affidavit, also contended that since the initiation of this Claim the Defendant has accrued debts using the assets of the 2nd Claimant and which has been accruing interest. The Defendant has yet to provide any monetary compensation to either Claimant for said debts. She argued that the Defendant registered another company using the assets of the 2nd Claimant and he continues to operate and manage same.

[14] She argued that not all the reliefs claimed in the claim herein are included in Claim No. **2018 HCV 03884** and she is asking that she be able to amend and merge the 2 claims pursuant to Rule 21.8 (1-3) of the CPR.

ISSUE

[15] The issues which arise with this application are:

- (a) Whether there is inordinate and inexcusable delay in the prosecution of the matter;
- (b) Whether such delay will give rise to a substantial risk of an unfair trial or of serious prejudice; and
- (c) Whether the Claimants' claim should be struck out for want of prosecution.

LAW AND ANALYSIS

[16] Rule 26.3 (1) of the Civil Procedure Rules 2002, as amended (hereinafter referred to as 'the CPR') gives the Court the power to 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.*

[17] Rule 2.4 of the CPR defines the phrase 'statement of case' as a '*Claim Form, Particulars of Claim, Defence, Counterclaim, Ancillary Claim Form or Defence and*

a Reply; and any further information given in relation to any statement of case under Part 34 either voluntarily or by order of the court.'

[18] Sime in his text, *A Practical Approach to Civil Procedure*, 22nd Edition, noted that *the jurisdiction to strike out is to be used sparingly, because striking out deprives a party of its right to a fair trial, and of its ability to strengthen its case through the process of disclosure and other court procedures. The result is that striking out is limited to plain and obvious cases where there is no point in having a trial.*

[19] In the case of **Charmaine Bowen v Island Victoria Bank Limited, Union Bank Limited et al** [2014] JMCA App 14 Phillips JA specified the following factors to be taken into consideration by the Court in determining whether or not to exercise its discretion to strike out a party's statement of case:

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

[20] In the case of **Ronham & Associates Ltd v Christopher Gayle and Mark Wright** [2010] JMCA App 17 Morrison JA had before him an application to strike out appeal for want of prosecution. Morrison JA referred to the case of **Annodeus Entertainment Ltd and Others v Gibson and Others** (2000) *The Times*, 3 March, which outlined the considerations relevant to have regard to in applications to strike out for want of prosecution:

- (i) the length of the delay;*
- (ii) any excuses for the delay;*
- (iii) the extent to which the claimant had complied with the rules and any orders of the court;*
- (iv) the prejudice to the defendant;*

- (v) *the effect on the trial;*
- (vi) *the effect on other litigants;*
- (vii) *the extent, if any, to which the defendant has contributed to the delay;*
- (viii) *the conduct of the claimant and the defendant with regard to the litigation; and*
- (ix) *any other relevant factors.*

[21] I found the case of **West Indies Sugar v Stanley Minnell** (supra) relied on by Learned Counsel Ms. Minto to be helpful. Forte JA noted the principles which should govern the exercise of the court's power to dismiss an action for want of prosecution as outlined by Lord Diplock in **Birkett v James** [1977] 2 All E.R. 801. He noted on pages 2 and 3 of the said judgment that:

“The power should be exercised only where the court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action or is such as is likely to cause or to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between each other or between them and a third party.” [emphasis added]

A. *Whether there is inordinate and inexcusable delay in the prosecution of the matter*

[22] Since the dismissal of the injunction in 2014, the Claimants took no further steps to advance this matter. It is clear from the chronology of events that since 2014 there was no activity on the claim until Mr. Whyte filed the Notice of Application to have the claim dismissed in 2022. The question to be answered is whether this period from 2014 up to the date when the Notice of Application was filed amounts to an inordinate delay.

[23] Four (4) years after the Claim was filed and the injunction refused, the Claimant, Ms. Thompson, initiated new proceedings against the Defendant seeking identical

reliefs in relation to the property located at Wakefield in the parish of Trelawny and another property located at Maxfield in the parish of Trelawny. The Claim was filed by way of a Power of Attorney that was given to Ms. Thompson by her mother.

- [24] In the case of **Sharon Mott (Administrator Kishauna Ann-Marie Clarke, deceased, intestate) v University of Technology Jamaica and ors** [2021] JMSC Civ 78 the Court refused to dismiss the claim for want of prosecution as even though the 4 ½ years of inactivity on the Claim amounted to an excessive delay on the part of the Claimant, the Defendant had not shown that it would suffer prejudice.
- [25] On the other hand, in the case of **Ronham** (supra), the appellant's appeal was dismissed for want of prosecution as 11 years had passed since the appeal was filed and no steps were taken to advance the appeal since the date of filing. The Court in **McNeil v Public Supermarket Ltd** [2019] JMSC CIV. 26 struck out the Claimant's statement of case where the claim remained inactive for a period of 9 years and 4 months.
- [26] In the case of **West Indies Sugar v Stanley Minnell** (supra) the Court held that there had been inordinate and inexcusable delay by the Claimant who commenced his suit four (4) years after the cause of action arose and a further four (4) years elapsed before leave was sought to file his Claim out of time.
- [27] The Claimants have not given any explanation as to why there has been such an extensive delay in relation to the claim herein. There is no evidence before the Court of any enquiries by or on behalf of the Claimants as to what is the next step to be taken in relation to this matter. Ms. Thompson was appointed, by way of the an Order made in the 2018 Claim, as Administratrix in 2020 to conduct court proceedings on behalf of the estate of her late mother and was only granted a Grant of Administration in July of 2021. Even after obtaining the Grant of Administration no steps were taken by Ms. Thompson and no explanation proffered.

[28] Therefore, I find that there is inordinate inexcusable delay on the part of the Claimants as no steps have been taken by them to advance the matter since 2014, especially considering the fact that they were able to initiate new proceedings during this eight (8) year inactive period.

B. Whether such delay will give rise to a substantial risk of an unfair trial or serious prejudice

[29] Having found that the delay is inordinate and inexcusable, I must now determine whether such delay will give rise to a substantial risk of an unfair trial or serious prejudice. Wolfe JA in the case of **Vasti Wood v H.G. Liquors Limited and Crawford Parkins etc.**, [1995], 48 WIR 240 stated that:

“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”.”

[30] Thomas J in the case of *McNeil v Public Supermarket Limited* (supra) mentioned the cases of **Icebird Ltd v Winegardner** [2009] UKPC 24) and **Adelson v Anderson** [2011] EWHC 2497, which 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.”

[31] In **West Indies Sugar v Stanley Minnell** (supra) it was held that the length of delay in and of itself was evidence that there would be a substantial risk that a fair trial would not be possible.

[32] Lord Woolf stated in **Grovit and Others v Doctor and Others** [1997] 2 All ER 417, 424, that, "To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process".

[33] In the case of **Biss v Lambeth Southwark and Lewisham Health Authority** [1978] 2 All ER 125, 131 Lord Denning MR stated 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**"*
[emphasis added]

[34] It is clear from the cases that a party's statement of case will not automatically be struck out if it has been determined that there is inordinate and inexcusable delay. However, if there is evidence that the trial can proceed with no prejudice being suffered by the parties then the trial should be allowed to proceed. Therefore, despite the fact that I have found that there is inordinate and inexcusable delay, I must still look at the other considerations to be taken into account before exercising my discretion. What is also clear from the cases is that where delay makes a fair trial impossible then the Court is to exercise its jurisdiction to have the party's statement of case struck out for want of prosecution.

[35] Learned Counsel Ms. Minto argued that this eight (8) year delay has caused serious prejudice to her client who has to engage and pay for counsel to defend a second action seeking almost identical reliefs. The claim filed by the Claimants in 2018 is in relation to 2 properties, one of which is the subject of this claim. However, as Ms. Thompson submitted, not all the relief sought in the case at bar are being sought in the 2018 claim.

[36] Mr. Whyte in his Defence filed on the 9th day of October, 2014 contended that he has no interest in the 2nd Claimant and will consent to and execute the required documents to effect the removal of his name from the Company register. This therefore means that the reliefs claimed at 1-5 of the Claim Form filed on the 11th day of November, 2013 could have been dealt with 8 years ago. If those reliefs are dealt with then what would be left on the claim would only be in relation to the property located at Wakefield in the parish of Trelawny. These are the Orders that Counsel Ms. Minto submitted are identical to the ones claimed in the 2018 claim filed by the Claimants. I must note here that the Claimant still has an active claim before this Honourable Court in relation to the same property.

[37] Sykes J, as he then was, in the case of **Gordon Stewart v. Goblin Hill Hotels Limited and Ors.** 2016 JMCC Comm 38 stated that the longer the time between the event and the application for striking out the easier it is for the Court to draw the inference that a fair trial is no longer possible.

[38] If the Claimants' are allowed to proceed with the Claim, I find that the Defendant will be prejudiced, especially as it relates to costs incurred in the Commercial Courts. To facilitate this matter being protracted would bring the Justice System into disrepute. Justice would not be rendered in allowing costs to be unfairly accumulated to the detriment of the parties. It is therefore my judgment that the Claimants failure to do anything to move the matter along for eight (8) years shows that there is a substantial risk that justice could not be done in this case.

C. Whether the Claimants' claim should be struck out for want of prosecution

[39] In the case of **Charmaine Bowen v Island Victoria Bank Limited and Ors.** [2017] JMCA Civ 23 Books JA stated 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)."

[40] I remind myself that the Court's discretion to strike out a party's statement of case is a measure of last resort and the discretion should only be exercised in plain and obvious cases. Having regard to the overriding objective of the CPR, that is that the Court is to deal with cases justly by ensuring that it is dealt with expeditiously and fairly, I find that a refusal of the Defendant's application will result in injustice to the Defendant. I find that the delay of eight (8) years is inordinate and inexcusable.

[41] In my judgment therefore, I exercise the discretion to strike out the Claimants' statement of case for want of prosecution.

ORDERS AND DISPOSITION

[42] Having regard to the foregoing, my orders are as follows:

- (1) The Defendant's Notice of Application for Court Orders filed on the 14th day of January, 2022 is granted.
- (2) The Claimants' statement of case against the Defendant in the Claim No. 2013CD00149 stands as struck out.
- (3) Costs awarded to the Defendant to be taxed if not agreed.
- (4) Defendant's/Applicant's Attorneys-at-Law to prepare, file and serve Orders made herein.