IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

2003: No. 70

JIMMY BAILEY

Plaintiff

-v-

WM. E. MEYER & COMPANY LIMITED

Defendant

RULING ON STRIKE-OUT APPLICATION

(in Chambers)

Strike-out application-want of prosecution-abuse of process-inaction over 8-10 year period-ability of Defendant to complain of Plaintiff's inaction when taking no steps itself to advance the action-overriding objective

Date of hearing: January 12, 2017
Date of Ruling: January 23, 2017

Mr. Martin Johnson, Martin Johnson Barristers & Attorneys, for the Plaintiff
Mr. Craig Rothwell, Cox Hallett Wilkinson Limited, for the Defendant

The Application

1. By a Summons dated November 8, 2016, the Plaintiff applies to strike-out the present action for want of prosecution, *inter alia*, under the inherent jurisdiction of the Court. The only ground seriously pursued was the complaint that the inordinate and inexcusable delay exemplified by a failure to take any steps to prosecution the action between January 2008 and January 2016 constituted an abuse of process.

2. The Plaintiff's claim relates to contracts entered into in October 1999 and August 2001. It was commenced by a Generally Writ of Summons issued February 17, 2003 and broadly replicated a Defence and Counterclaim filed by the Plaintiff in the present action in Supreme Court Civil Jurisdiction 2002: No. 135, which was commenced by the Defendant herein against the Plaintiff herein by Writ issued on April 5, 2002 ("the 2002 Action") to recover $20,000 allegedly due under the 2001 Agreement. The Agreements sued on by the Plaintiff in the present action and by way of his Counterclaim in the 2002 Action sought damages assessed as amounting to at least $2.5 million for, *inter alia*, the loss of profits for failure to transfer the business to which the Agreements related.

3. A default judgment obtained by the Defendant herein early in the 2002 Action was set aside by consent on February 6, 2006. Thereafter the Defendant did not pursue the 2002 Action and the Plaintiff herein did not pursue his Counterclaim in that action either. Although that earlier proceeding is not before the Court, the Defendant accepts that it has abandoned the right to pursue that claim on the basis that, as a logical consequence of the relief sought against the Plaintiff on the present application in these proceedings, the Plaintiff will be unable to pursue his Counterclaim in the earlier proceedings either.

Chronology

4. The following chronology of key events (derived from the fuller Chronology Mr Rothwell prepared) paints a broad picture of the progress of the present action:

    - February 14, 2003: Writ issued and Statement of Claim filed replicating Defence and Counterclaim in the 2002 Action;
    - February 25, 2003: Statement of Claim amended;
    - March 13, 2003: Defendant enters an appearance;
    - April 7, 2003: Defence filed;
    - April 9, 2003: Defendant files strike-out application on grounds that action is duplicative;
    - August 29, 2005: Plaintiff files Notice of Intention to Proceed;
    - February 6, 2006: Consent Order in 2002 Action setting aside Default Judgment;
    - April 10, 2006: Plaintiff's attorneys propose consolidation of two actions and withdrawal of Defendant's strike-out application;
    - May 11, 2006: Plaintiff requires Defendant to file Defence to Counterclaim in 2002 Action;

- May 17, 2006: Defendant files Defence to Counterclaim in 2002 Action;
- May 18, 2006: Defendant files Notice of Intention to Proceed;
- December 19, 2007: Plaintiff files List of Documents;
- January 2, 2008: Plaintiff files Notice of Intention to Proceed;
- January 18, 2016: Plaintiff files Notice of Intention to Proceed;
- January 19, 2016: Plaintiff serves Notice of intention to Proceed;
- September 14, 2016: Plaintiff serves documents and requests discovery;
- October 9, 2016: Plaintiff files Summons for Directions;

Analysis of delay

5. The last step taken in Court was the filing of a Notice of Intention to Proceed and a List of Documents by the Plaintiff's former attorneys, Wakefield Quin, on January 2, 2008. There is no reliable evidence that the List of Documents was ever served. On April 7, 2003 the Defence was filed. There was no Reply so pleadings closed on April 21, 2003. The Plaintiff's counsel relied heavily on the point that the Defendant took no steps to pursue its first strike-out application, issued on April 9, 2003 and based on abuse of process grounds, although evidence was filed and the Registrar requested dates to set the matter down in May 2003.

6. However, the Plaintiff not only allowed the action to completely go to sleep for 8 years (January 2008-January 2016). It appears that the last documented attempt to move the global dispute (reflected in two actions in which the Plaintiff herein asserted a hugely bigger claim and counterclaim) forward in a manner which was communicated to the Defendant was the Plaintiff's attorneys' April 10, 2006 correspondence. Having made the proposal to consolidate the two actions, the Plaintiff took no meaningful steps in Court at all to progress his Counterclaim in the 2002 Action thereafter. Between April 10, 2006 and January 19, 2016 (9.75 years), there was seemingly no communication from the Plaintiff to the Defendant signifying his intention of prosecuting the present action. It was more than 10 years after the April 10, 2006 correspondence that the Plaintiff's new attorney unambiguously signified an intention of seriously proceeding by serving documents and requiring discovery on September 14, 2016.

7. The Defendant's evidence indicates that having regard to the comparatively modest size of its claim, a decision was taken not to pursue the 2002 Action and an assumption made that the present proceedings had only really been filed, in effect, as a tactical ploy to deter the Defendant from pursuing is claim for monies due under the Agreements. This is inherently believable as it is obvious that the Defendant's $20,000 claim in the 2002 Action could not (if vigorously contested) easily be

adjudicated in this Court in a commercially proportionate manner. After March 24, 2005, the claim in the 2002 Action fell within the jurisdiction of the Magistrates' Court.

8. Prejudice to a fair trial was complained of in a somewhat muted way. It is self-evident that memories will have faded. The Defendant cannot complain if it has rashly destroyed documents without first taking steps to confirm that the Plaintiff had abandoned his present claim. However, the most striking prejudice to my mind was being required to defend a claim which had gone to sleep for so long a time that it was reasonable in all the circumstances for the Defendant to assume that it had been abandoned. The abuse of process which was complained of was a wholesale disregard for the Rules and an inferred absence of any intention to pursue the action over an 8 year (or more) period.

9. The Plaintiff's evidence offers no or no convincing explanation for the failure to take any steps to progress the present action (in terms of Court filings) for a period of 8 years and (in terms of correspondence with the Defendant) a period of more than 10 years. He deposes that in 2008 his List of Documents was served (implicitly by his attorneys), but does not explain whether he has personal knowledge of this or, if not, the sources of his information and belief. He exhibits no documentary support for that assertion in circumstances where it appears that no copy of the relevant List was found on the file of the Defendant's then attorneys. The Plaintiff suggests, without elaboration, that he pressed his former attorneys to proceed, began a search in 2011 for a new lawyer and retained his current lawyer in 2014. There is no dispute that no communication took place between the Plaintiff's attorneys and the Defendant's attorneys between at least 2008 and 2016.

10. It is impossible to view the Plaintiff's $2.5 million claim as having any solidity to it, having regard to the unusual way in which it has been prosecuted. It was first raised by way of Counterclaim in response to the Defendant's attempts to recover $20,000 in from the Plaintiff herein the 2002 Action. It was next raised, for reasons which are still not entirely clear, in the present action and prosecuted with a lack of conviction which is in my experience unprecedented in relation to meritorious claims. The apparently incoherent approach adopted by the Plaintiff is far more easily understood as an 'attack is the best means of defence' response to the opposing claim. Viewed in this way, it was a response which ultimately achieved its goal when the Defendant tacitly abandoned its initial claim altogether. This begs the question, of course, why the Plaintiff has belatedly decided to revive his claim. That question does not arise for formal determination. It suffices to observe that experience teaches that litigants (save for the super-rich) with multi-million dollar claims which are demonstrably meritorious almost invariably prosecute such claims in a far more enthusiastic manner than has occurred with the Plaintiff in the present case.

11. The only cogent response to the present application to strike-out for want of prosecution was a technical one, namely that the Defendant was in breach of its own duties under the overriding objective to progress the matter.

Striking-out for want of prosecution on abuse of process grounds: legal principles

12. The sole arguable objection of principle advanced in opposition to the strike-out application was the proposition that the Defendant had, in effect, colluded in the Plaintiff's inaction and ought to have taken steps to advance the action rather than allowing sufficient time to pass until the present application could be made. This was buttressed by the supporting argument that the cases relied upon by the Defendant no longer applied because Order 1A of our Rules introduced a new, CPR regime which swept away the old law on striking out for want of prosecution altogether.

13. Before considering this main argument, I should regard that I summarily reject the submission that decisions governing whether an accused's constitutional right to be tried within a reasonable time[1] state the relevant test for civil want of prosecution strike-out applications.

14. However Mr Johnson did produce authorities which at first blush supported his main submission in broad terms. In *Biguzzi-v-Rank Leisure plc* [1999] 4 All ER 934 (CA), Lord Woolf explained that the CPR introduced an entirely new procedural code. It is true that he stated that pre-CPR authorities would not generally be relevant. But that was in the context of contending that the new regime imposed greater case management powers on the court to prevent delay than under the old Rules. Trial judges, post-CPR, were expected to use these case management powers judicially, only striking out as a last resort. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940):

> *"Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that:*
>
> > *'(2) The court may strike out a statement of case if it appears to the court-(a) that a statement of case discloses no reasonable grounds for bringing or defending the claim;(b) that the statement of case is an abuse of the court's process....' [and, most importantly](c) that there has been a failure to comply with a rule, practice direction or court order.'*
>
> *Under Part 3.4(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*

[1] *Dyer-v-Watson* [2004] AC 379; [2002] 4 LRC 577; [2002] UKPC D1; *Peter Giles and The Attorney-General-v-Andrew Hall* [2004] Bda LR 26.

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. "

15. *Biguzzi* was also a case in which the conduct of the strike-out application was analysed. The deputy district judge struck-out the claim, but the High Court judge (Kennedy J) reversed this decision. The Court of Appeal upheld Kennedy J's decision. Lord Woolf summarised the factual matrix (at 937f-h) as follows:

"*His Honour Judge Kennedy took a different view. He had clearly examined the events which had occurred in this case, from the point of view of the extent of the default on both sides. He came to the conclusion that both parties had been "ambling" forward towards trial and that there was a lack of a proper degree of expedition on the part of both parties. He indicated that, in relation to many of the matters, there was default on both sides. In doing so, it does not seem to me that he had lost sight of the fact that it is always for a claimant to prosecute his claim. The judge was, however, particularly concerned that part of the problem was due to the fact that the claimant was seeking to rely on psychiatric medical evidence. He took the view that the defendant was not being realistic in seeking to obtain discovery of medical notes relating to the claimant's psychiatric evidence (which the judge thought were probably now no longer obtainable).*

The judge went on to indicate that he thought that the case could still be tried fairly. The case was one in which it was important that, so much delay having occurred, it should now be heard promptly. He thought that the best course for him to take was not to strike out the plaintiff's claim but to achieve the objective of having the case heard at the first convenient date. "

16. This was more than a case of a defendant passively assenting to delay; active contribution to delay was involved. However, the Plaintiff's relying on the CPR regime was a double-edged sword. That regime is designed to encourage the courts to be less tolerant, not more tolerant, of delay. One the essential ingredients of the overriding objective, expressed as an element of dealing with cases justly, is the requirement imposed on both the Court and the parties in relation to each case of "*ensuring that it is dealt with expeditiously…*" (Order1A rule 1(d)).

17. Mr Johnson also relied upon the following observations I made in *Re Burrows* [2005]Bda LR 77 (at paragraphs 13-14):

"*67. And thirdly, in Russell-v- Stephenson [2000] Bda LR 63, an application to dismiss for want of prosecution was also dismissed despite two periods of delay of three and two years respectively. L.A. Ward, C.J. observed as follows:*

'A defendant is under no obligation to press a plaintiff to bring a matter to conclusion. Indeed, he may lull him into a false sense of security by refusing to challenge his misconceptions and thereby gain

the benefit of any period of limitation, even though the ethics of such an approach may be questionable. Owen-v-Robinson, Bermuda Civil Appeal No. 14 of 1999. However, active participation in generating the misconception is another matter…The defendant cannot properly now complain about the delay…I have considered the question whether the delay would inhibit the defendant in the presentation of its case…it cannot be argued convincingly that the unavailability of witnesses will seriously prejudice the defendant in the presentation of his case and render impossible a fair trial of the issues."

68. So the minimum threshold at common law an applicant for the dismissal of an action for want of prosecution must meet is the proof of (a) inexcusable delay, (b) expiry of the limitation period for the plaintiff's claim and (c) either (i) a substantial risk that a fair trial will be impossible or (ii) serious prejudice."

18. Even this authority condemns active rather than passive contribution to the delay by the strike-out applicant. However, more broadly, it is important to appreciate the difference between pre-CPR authorities being irrelevant when a new CPR rule is being applied and their continuing relevance when a pre-CPR rule is under consideration. Order1A of our own Rules represents a 'soft' entry into CPR rather than a 'hard' one. Most of our Rules remain pre-CPR and must merely now be applied guided by the overriding objective. It is also important to note that this Court presently lacks the resources to actively manage inactive cases in the way that is contemplated by the English CPR. The progress of litigation by and large still remains in the litigants' hands.

19. Mr Rothwell supported this analysis most effectively by reference to a comparatively recent English case which demonstrated that the old principles to striking out for want of prosecution still applied, even in England, post-CPR. In *Wearn-v- HNH International Holdings Ltd* [2014]EWHC 3542 (Ch), the court was "*considering the fate of an action begun nearly 14 years ago, in which the pleadings are not yet complete, disclosure has not taken place, and evidence has yet to be exchanged*"[2]. Barling J[3] approved the following statement of principles by Hamblen J in *The Owners and/or Bailees of the Cargo of the Ship Panamaz Star-v- The Owners of the Ship Auk* [2013] EWHC 4076 (Admlty):

"38.To commence or to continue proceedings which you have no intention to bring to a conclusion may constitute an abuse of process; see Grovit v Doctor [1997] 1 WLR 640: Habib Bank Ltd v Jaffer (The Times on 5 April 2000).

39. As Lord Woolf stated in Arbuthnot Latham Bank Ltd v Trafalgar Holdings [1988] I W.L.R. 1426 at p. 1437:

'Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is

[2] Paragraph 16.
[3] At paragraph 69.

> *convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes.'*
>
> *40. Inordinate and inexcusable delay alone does not amount to abuse of process. However, it may do so if it involves a wholesale disregard for the rules of court with full awareness of the consequences; see Habib Bank Ltd v Jaffer at [10] per Nourse LJ.*"

20. More recently, in *Hofer-v-Bermuda Hospitals Board* [2015] Bda LR 75, 18 years after the claim had been commenced and despite the fact that the delay complained of was clearly explained by reference to the plaintiff's lack of funds, I concluded:

> "*53. But it does seem to me to be, at the end of the day, plain and obvious that this action has been prosecuted overall in a way that amounts to an abuse of the process of the Court… I except entirely that the Plaintiff as a German national has faced genuine difficulties in funding his claim. But those difficulties, it seems to me, bearing in mind the very fluid concept of abuse of process, cannot justify the Court in privileging the Plaintiff's right of access to the Court over the Defendant's corresponding fair hearing rights. And, indeed, over the importance of the Court's processes being used in a way which meets the efficiency imperatives of the Overriding Objective.*"

20. Mr Rothwell also relied on the fact that Order 25 rule 1 provides that a Summons for Directions must be taken out within one month of the date when pleadings are deemed to have closed. Pleadings closed pursuant to Order 18 rule 20(1)(b) on or about April 21, 2003. Mr Johnson of course complained that Defendant itself was at fault, having issued a strike-out Summons on April 9, 2003 and been invited by the Registrar on May 1, 2003 to supply hearing dates, for not pursuing its own Summons.

Findings on abuse of process

21. The present action was from the outset very arguably an abuse of process in that it replicated the Plaintiff's Defence and Counterclaim in the 2002 Action. The allegation of abuse of process was supported by evidence filed in support of the Defendant's April 2003 strike-out Summons. The Plaintiff sought to justify the present proceedings by reference to the fact that his claim based on a different contract and that having filed his Defence and Counterclaim in the 2002 Action he had discovered that a Default Judgment had been entered against him in that action. There was some merit to the latter argument although it would have been more straightforward to simply to set aside the Default Judgment in the first proceeding. The former argument lacks credence as the Plaintiff's first legal step was to pursue the claim in the 2002 Action. The Defendant took no steps to pursue its strike-out application for almost three years prior to the entry into force of the overriding objective on January 1, 2006.

22. By consent the Default Judgment against the Plaintiff herein was set aside in the 2002 Action on February 6, 2006. Later that year, with the Plaintiff's proposal of consolidation (and dismissal of the Defendant's strike-out application) apparently unresolved, the Defendant filed its Defence to Counterclaim in the 2002 Action. The Plaintiff was in financial terms the main claimant in both the present action and the 2002 Action and had the option of pursuing either his Counterclaim in the 2002 Action or his claim in the present action but not, on any sensible view, both. He ought to have elected which claim to pursue in 2006. He asserted a massive claim for $2.5 million as against the Defendant's comparatively trifling $20,000 claim (less than 1% of the Plaintiff's claim). The primary duty lay on the Plaintiff to pursue that claim (either in the 2002 Action or the present action). The Plaintiff took no meaningful steps manifesting a serious intention of prosecuting the present action (i.e. which were communicated to the Defendant) after his attorneys wrote to the Defendant's attorneys on April 10, 2006 for more than 10 years. The next step (ignoring the purely procedural service of a Notice of intention to proceed on January 19, 2016) was when discovery was requested on September 14, 2016. The Summons for Directions was filed 13 years after the time fixed by the Rules. The Defendant did not contribute to this delay in any identifiable manner.

23. The Defendant was entitled to assume that the Plaintiff's main objective was to ward off the Defendant's own straightforward $20,000 claim and to assume that the Plaintiff had no intention of pursuing the present action, hearing nothing from the Plaintiff for 8 years at least and, in my judgment quite probably (the difference being immaterial to the result), a period in excess of 10 years. The Defendant was also entitled to abandon its own claim in the 2002 Action on the grounds that, as a result of the Plaintiff's Counterclaim in that action and his corresponding claim in this action, it would be difficult to achieve a cost-effective recovery. In the unique circumstances of this case, the Defendant did not breach its obligations under Order1A of the Rules by '*letting sleeping dogs lie*'.

24. In all the circumstances of the present case, the Plaintiff's conduct of the present action constitutes an abuse of process on such a scale that in the exercise of my discretion I find that the proceedings should be struck-out for want of prosecution. The cumulative effect of the following factors form the basis for this finding:

(1) the claim was asserted in response to the Defendant's claim in the 2002 Action for a modest sum, appears shadowy and from the outset has been prosecuted in an unconvincing manner which strongly suggests (without analysis of the actual merits) that it is devoid of merit;

(2) the same claim was asserted in two separate proceedings and so the present proceedings from the outset were potentially an abuse of the processes of this Court ;

(3) the Plaintiff's failure to communicate any or any serious intention to pursue the present proceedings to the Defendant for over 10 years made it reasonable for the Defendant to assume the proceedings had been abandoned;

(4) there is no satisfactory explanation for the delay which entailed a serious breach of the Plaintiff's obligation (under Order1A) to assist the Court to ensure that his claim was dealt with expeditiously;

(5) the Plaintiff filed his Summons for Directions over 13 years after the time prescribed by the Rules (Order 25 rule 1 as read with Order 18 rule 10(1)(b)) without in the interim seeking any dispensation from the Court;

(6) permitting proceedings which have been left asleep for so long to be revived would bring the processes of the Court into disrepute by allowing litigants to 'warehouse' claims until they choose to pursue them rather than prosecuting them diligently.

Conclusion

25. The Plaintiff's action is struck-out. Unless either party applies within 21 days by letter to the Registrar to be heard as to costs, the Plaintiff shall pay the costs of the present application to be taxed if not agreed.

Dated this *2*3rd day of January, 2017 _____

IAN RC KAWALEY CJ