[2021] JMSC Civ.94

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2014 HCV 03473

BETWEEN	**CLINTON SMITH**	**CLAIMANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**DEFENDANT**

The Claimant Clinton Smith present in person and his attorneys-at-law Kinghorn and Kinghorn being absent.

Mrs. Tan'ania Small Davis and Chad Wynter instructed by Livingston Alexander Levy Attorneys-at-law for the Defendant/Applicant.

Heard: May 13, 2021 and May 25, 2021

Civil Procedure - Application to strike out claim for want of prosecution CPR 26.3(1)(b)

CORAM: MOTT TULLOCH-REID J (AG)

BACKGROUND

[1] The Defendant has applied to the Court to strike out the claim as an abuse of the Court's process and the claim be dismissed. Alternatively, the claim is to be dismissed for want of prosecution or alternatively that summary judgment on the claim be entered in favour of the defendant and that the claimant pays the defendant costs in the claim and costs in the application. The application is supported by an affidavit of David Flemming the Defendant's legal officer. Proof that both the Notice of Application and the Affidavit in Support were served on the

Claimant's attorneys-at-law was provided to the Court. There is no affidavit in response from the Claimant.

[2] The grounds on which the application are being made are that since the filing of the claim in 2014 the Claimant has taken no steps to prosecute the claim. The matter was referred to mediation in 2015 after the defence was filed and no steps have been taken since then to have the matter brought to mediation or to prosecute the claim on the part of the Claimant. In the meantime, the Defendant continues to incur costs from having the claim before the court.

[3] On the day of the hearing there was no sign of the Claimant's attorneys and so the Court called the offices of Kinghorn and Kinghorn, the Claimant's attorneys-at-law, to find out if they would be participating in the hearing. The office reported that they were trying to contact Mr Kinghorn. Suffice it to say Mr Kinghorn did not join the meeting. Mr Smith came in late and alone and his own attempts to locate his attorney were unsuccessful.

[4] Mrs Small Davis' arguments are subsumed in her written submissions filed on May 11, 2021. The gist of the argument is just an expansion of the grounds substantiated with case law. I am grateful to Mrs Small Davis and Mr Wynter for the submissions and cases which they provided as they assisted me greatly in coming to my decision. My only issue with the submissions was that Mrs Small Davis argued that the Claimant made no attempt to mediate the matter. I reminded her of CPR 1.3 which states that it is the duty of all the parties to assist the Court in furthering the overriding objective and so the Defendant could have also taken steps to mediate the matter. Mrs Small Davis responded to my comment by bringing to my attention to the case of **David McNeil v Public Supermarket Limited [2019] JMSC Civ 26** wherein my sister Thomas J at paragraph 28 of her judgment said "*it was the responsibility of the claimant to ensure that the mediation process did not remain in a state of limbo*". I believe that generally under the Civil Procedure Code the Plaintiff had that responsibility but under the Civil Procedure Rules, it is the Court which has that responsibility to push the matters through and

the Court must do this with the help of all the parties. The Defendant, therefore, could have taken steps to have the matter mediated. Notwithstanding, I do agree with Mrs Small Davis that only the Claimant can prosecute the case and in this case, the claim has been in limbo from 2015 for a cause of action that happened in 2013.

[5] Mrs Small-Davis relied on several cases in her written submissions. I will not refer to all of them as the principle of law is basically the same in all the cases the Defendant relied on. I will however make particular reference to the cases that assisted me most in coming to my decision. In the case of **Ronham & Associates Ltd v Christopher Gayle and Mark Wright [2010] JMCA App 17** Morrison JA (as he then was) referred at paragraph 25 to the decision of **Annodeus Entertainment Ltd and ors v Gibson and ors (2000) The Times 3 March** wherein the considerations which would be relevant in an application to strike out for want of prosecution were noted as being:

i. 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.

[6] The Claimant has taken no steps since 2015 and almost 6 years have passed since the matter was referred to mediation. The Claimant has not given any explanation as to why there has been such an extensive delay. Mr Smith in his submissions have only indicated that he left the matter in his attorneys' hands and

had expected them to be acting on his behalf. He explained that he had given instructions to his attorneys to prosecute the claim. He had followed up on several occasions with them as to the status of the case and was told that it was on going and that they were waiting for a date from the Court. Mr Smith also submitted that he does not want his case to be struck out because it was not his fault that no action was taken on the matter since 2015. The fault lay with his attorneys as it is they who did not represent his interests with alacrity. He did not hear from his attorneys until recently when they told him to attend the hearing of this application but they did not tell him what the application was about. These were submissions, not evidence.

[7] No trial date has as yet been set so the delay has not impacted a scheduled trial date. Since the cause of action arose in 2013, if the claim is struck out, the expiration of the limitation period would prevent the Claimant from bringing a new claim against the Defendant. This would be prejudicial to him. I must however also consider the prejudice which this delay has and will cause to the Defendant and determine who will suffer the greater prejudice if the order sought is granted.

[8] At paragraph 27 of the **Ronham** judgment, Morrison JA had this to say

> *"On the question of prejudice to the plaintiff, this court has on more than one occasion accepted that, in personal injury matters in particular, 'even the best of memories falter after a lapse of six years and so it may be impossible to obtain a fair trial' (per Downer JA in* ***Patrick Valentine v Nicole Lumsden and anor (1993) 30 JLR 525, 527****); see also* ***West Indies Sugar v Stanley Minnell (1993) 30 JLR 542, 546****, where some seven years had elapsed from the date of the accident by the time the matter reached this court, in which Forte JA, as he then was, considered that 'the length of the delay since the filing of the writ is in itself evidence that there is a substantial risk that a fair trial is not possible.'"*

In the **Ronham case** 11 years had passed since the appeal was filed and no steps had been taken to advance the appeal. Morrison JA formed the view that at that point in time it was not likely that the plaintiff or the defendant would have obtained a fair trial and that it was the appellant's primary responsibility to see to the advance of the appeal. The learned judge of appeal considered counsel for the appellant's argument in relation to **Biguzzi v Rank [1999] 1 WLR 1926** wherein Lord Woolf had stated that striking out was a draconian step and where alternative steps could be taken they should be as striking out was a sanction of last resort. Morrison JA however reminded counsel that notwithstanding that statement by Lord Woolf in **Biguzzi,** the same law lord in **Grovit and ors v Doctor and ors [1997] 2 All ER 417, 424** also said

> "*To commence and to continue litigation which you have no intention to bring to a conclusion can amount to an abuse of process."*

I also remind myself of Sir Christopher Slade in the case of *Nasser v United Bank of Kuwait* [2001] EWCA Civ 1454 said he was sure that Lord Woolf in the **Biguzzi v Rank Leisure plc**

> *"was not intending to suggest that the factors regarded by the court in Birkett v James as crucial, namely the length of relevant delay, the culpability for it, the resulting prejudice to the defendant and the prospects of a fair trial, are no longer relevant considerations when the court has to deal with an application for dismissal for want of prosecution*".

Ronham was found not to have evinced a real intention to bring the appeal to its conclusion and that amounted to an abuse of the process of the court. The Respondent's application to strike out Ronham's appeal were granted.

[9] A similar conclusion was arrived at in the case of **Keith Hudson and ors v Vernon Smith and anor SCCA 35 of 2005** the leading decision of K Harrison JA delivered on December 20, 2006. In that case the appellants appealed the decision of McIntosh J (as she then was) to strike out a claim for want of prosecution where a period of 20 years had elapsed between the filing of the claim to when it was dismissed for want of prosecution. At paragraph 35 of the judgment the Court held that the delay in prosecuting the claim amounted to an abuse of process and that the trial judge was justified under CPR 26.3 to strike out the claim even where the defendant could not point to any prejudice arising from the delay. K Harrison JA at paragraph 36 of his judgment quoted from the authors of Blackstone's Civil Practice 2004 edition page 513 which said

> "*the problems under the old law with dealing justly with cases where there had been delay was one of the main motivating factors in introducing the CPR, and it has been hoped that the old principles, and the considerable case law that developed around them, could be consigned to history. These concepts, however, may still have some life on the basis that even in CPR cases they survive as part of the court's inherent jurisdiction."*

The trial judge's order to strike out the case for want of prosecution was affirmed.

[10] In **Wright v Nutrition Products Limited (2003) Supreme Court, Jamaica, No 371 of 1997** Straw J (Ag) as she then was granted the defendant's application to dismiss the claim for want of prosecution on the basis that *"it would be a great burden on the witnesses to remember circumstances which occurred long before the writ was issued. The delay had exposed the defendant to the possibility of an unfair trial".*

[11] I now wish to consider two cases where the application to strike out case for want of prosecution was not granted. These are the cases of **Ballantyne, Beswick & Co (A Firm) v Jamaica Public Service Company [2016] JMSC Civ 13** and

Sharon Mott (Administrator Kishauna Ann-Marie Clarke, deceased, intestate) v University of Technology Jamaica and ors [2021] JMSC Civ 78. In the **Ballantyne case** there was a delay of eight years between referral to mediation and the application to strike out for want of prosecution. The Defendant had taken steps to have the matter mediated but the Claimant was reluctant to participate but took no steps to obtain an order to dispense with mediation. The Court focused on the fact that the Claimant had a claim that had merit and that the prejudice the Claimant would suffer outweighed that which the Defendant would suffer as the limitation period had expired and the Claimant would not have the opportunity to bring its claim again. Brown-Beckford J relied on the case of **Costellow v Somerset County Council [1993] 1 WLR 256, 264** where it was noted that

> "*Save in 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."*

The position in **Costellow** was accepted in **Hugh Bennett and anor v Michael Williams [2013] JMSC Civ 194** wherein it was 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."*

[12] In the **Sharon Mott** case, J Pusey J also refused the application to dismiss for want of prosecution in a situation where the Claimant had failed to take any steps in prosecuting the claim some 4 ½ years after the mediation had been thwarted because of the mediator's illness. Counsel for the Claimant/Respondent argued that the delay was an oversight on their part. Counsel for the First Defendant/Applicant argued that if the claim was allowed to continue, the Defendant would be prejudiced. The learned judge in coming to her decision agreed that there was excessive delay but that the Defendant had not shown how it was prejudiced by the delay or that a fair trial could not be had because of the delay (see paragraph 28 of the judgment). At paragraph 34, J Pusey J went on to say

> *"In the matter at Bar there is no evidence that supports a contention that the delay is so egregious that it would eradicate any semblance of fairness. There is nothing that suggests that memories will erode, evidence will be lost or destroyed or any prejudice will be occasioned by this admitted delay. Neither is there any evidence that the claimant has demonstrated no intention to proceed with the matter, as was the case in the Grovit matter itself. Each case must stand on its own facts*".

Unfair trial/Prejudice

[13] The question is whether there is any substantial risk of an unfair trial or prejudice to the defendant as a result of this inordinate delay. The cause of action arose in 2013, the claim was filed in 2014, pleadings were closed in 2015. The matter has not yet gone to mediation and trial dates have not yet been set. Mrs Small Davis argues that since trial dates are now being set for 2026, if the Claimant gets a trial date today, the trial would be held approximately 12 years after the claim was initiated. Is this fair to the Defendant? The Defendant has raised the issue of the prejudice it will face in the affidavit of in-house counsel, Mr David Flemming and in the written submissions filed on its behalf. Mrs Davis Small's oral submissions raise the issue of memories of witnesses, the availability of witnesses and the

defendant's general ability to defend the claim so late in the game. The evidence that supports the application does not raise any of those issues. The evidence of Mr David Flemming, in paragraphs 8 and 9 of his affidavit filed on April 15, 2020 as it relates to prejudice to the Defendant is limited to the following:

> *"It is also verily believed that given time which has elapsed since the commencement of this suit there is a real risk that the Defendant will not be granted a fair trial when this matter finally comes on for trial. This risk of an unfair trial is significant considering that, based on the current stage of the proceedings, this matter is not likely to proceed to trial before 2024, some ten (10) years after the filing of this claim and approximately eleven (11) years after the date of the alleged incident. The Defendant has not contributed to this delay.*
>
> *That the Defendant have [sic] been prejudiced by the Claimant's failure to diligently prosecute his claim as the Defendant has had the threat of these proceedings hanging over its head for the past five (5) years. Additionally, the Defendant has had to keep the file on this matter open and has had to allocate resources to and will have to continue to do so until the claim has been determined which could have been otherwise allocated."*

I am aware of the decision of Lord Denning MR in the case of **Biss v Lambeth Southwark and Lewisham Health Authority [1978] 2 All ER 125, 131** wherein he said:

> "*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."*

[14] Counsel Mrs Davis Small brought my attention to several cases in which the claim was dismissed for want of prosecution after the writ was filed but no statement of

claim was filed (**Wood v H G Liquors Ltd and anor 48 WIR 240** wherein 5 years had passed from the filing of the writ to the application to dismiss for want of prosecution and **West Indies Sugar v Stanley Minnell 30 JLR 542** wherein from the filing of the writ of summons to the time of filing of the application to strike out for want of prosecution a total of eight years had passed**)**. In **Norris McLean v Det Sgt Williams and others CL M215/1993 heard on April 9, 2002 by Jones J (Ag)** the claimant filed a claim in July 1993, an appearance and defence were filed by the Defendants in August 1993 and September 1993 respectively. A summons to enlarge time was made by the plaintiff in January 1997 but from that day until 2002, a total of 9 years, nothing was done by the plaintiff. The Defendants applied to dismiss the suit for want of prosecution as one of the defendants had resigned from the police force, another could not be located and the other, although available, because of the passage of time, could not remember the circumstances in which the incident happened. The Court held that although the Supreme Court Registry was to be blamed for some of the delay, the plaintiff and his attorneys also contributed to a significant portion of the delay. The delay was inordinate and the defendants would be prejudiced by the long delay as witnesses would be unavailable and the matter would not be tried fairly in those circumstances.

Merit of the claim

[15] The Claimant's claim against the Defendant is that he was driving his motor vehicle along a roadway when due to the negligent manner in which the Defendant carried out its operations and/or trade a light post fell causing and/or permitting an electricity ground wire to fall into the path of his motor vehicle, the motor vehicle collided with the ground wire and became entangled in it and as a result the Claimant suffered property damage, sustained personal injury and suffered loss and damage. The Defendant's response, as noted in its Defence, is that the pole fell when a third party, in the course of carrying out drain cleaning exercises removed or caused to be removed the soil around the guy pole thereby compromising its structural integrity and causing it to fall. I do not see where ancillary proceedings have been instituted by the Defendant against the third party. I do however believe that the Claimant has a claim with a real prospect of

succeeding and that the Defendant has provided a full defence to the claim which also has merit. The issue before the Court is triable and should under normal circumstances be left to a trial judge for consideration.

Analysis

[16] In the **Mott case** the First Defendant did not show how it had been prejudiced or would be prejudiced if the claimant was allowed to pursue the claim. In the **Ballantyne** case the prejudice the defendant would suffer resulted from "*the claim continuously hanging over its head indefinitely as it must annual report the claim as a contingent liability to its shareholders and insurers. It also highlighted the expenses which have been incurred in having to retain Counsel to represent its interests*" (see paragraph 38 of the judgment). Brown-Beckford J held that:

> "*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 be properly remedied by an award of costs…".*

[17] I have considered the reasoning of my sister Brown-Beckford J in the **Ballanytne case** and the fact that she considered the inability of the Claimant to file a new claim if the claim was struck out because the limitation period would have expired. Brown-Beckford J also took into account the fact that the Claimant had an arguable case and held that despite the Claimant's egregious delay the justice of the case required that the matter be properly ventilated in the Court. In the case before me similar issues arise with respect to the limitation period and the Claimant's arguable case. Justice is not just for the Claimant. It must also be for the Defendant and so a Claimant who initiates a claim against a Defendant has the responsibility of prosecuting the case in a timely manner. Notwithstanding the above, and given the fact that the Claimant has indicated that his attorneys-at-law are the reason for delay and in the face of the several decisions out of this Court

which indicate that a litigant is not to be punished for the negligence of his attorneys-at-law, I feel I am constrained to adopt the reasoning of my sister Brown-Beckford J and will use my case management powers to put the matter back on track so that any prejudice the Defendant may suffer as a result of the delay will be limited. It is my hope that if the matter goes to trial and the Claimant emerges the successful litigant, when interest is being determined, the trial judge takes into account the delay between 2015 and today's date which came about because of the Claimant's inaction.

[18] My orders are as follows:

a. The Defendant's application to strike out the claim filed on April 15, 2020 is refused.

b. The parties are to attend mediation on or before June 25, 2021. If the Claimant fails to participate in the mediation process on or before June 25, 2021 his statement of case will stand as struck out without the need for any further orders from the Court.

c. The Dispute Resolution Foundation is to treat the mediation of this claim as a priority.

d. Should mediation be unsuccessful, the parties are to attend Case Management Conference on September 29, 2021 at 12 noon for ½ hour.

e. Pre-trial Review is to take place on September 22, 2022 at 11:00am for ½ hour.

f. Trial is to be by Judge alone in Open Court for two (2) days on January 17 and 18, 2023.

g. The Claimant is to pay the Defendant's costs in the application in the amount of $250,000 on or before June 25, 2021 failing which his statement of case will be struck out.

h. The Defendant's attorneys-at-law are to file and serve the Formal Order.