[2009] CS (Bda) 24 Civ (1 May 2009)

IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
Civ. 1998: No. 245

BETWEEN:

BARRY J. KESSELL

First Plaintiff

-and-

CEDARBERRY (BERMUDA) LIMITED

Second Plaintiff

-v-

JOHN BARRITT & SONS LIMITED

First Defendant

-and-

ALEX WINSTON RUSSELL

Second Defendant

REASONS FOR RULING
(APPLICATION TO STRIKE-OUT FOR WANT OF PROSECUTION)

Date of Hearing: April 17, 2009
Date of Reasons: May 1, 2009

Mr. Allan Doughty, Trott & Duncan, for the Plaintiffs
Mr. Craig Rothwell, Cox Hallett Wilkinson, for the Defendants

Introductory

1. The Defendants applied by Summons dated November 18, 2008 to strike out the present application for want of prosecution for the second time in this history of this long-running personal injuries action. The Plaintiffs claim damages for personal injuries sustained in a road traffic accident which occurred on January 17, 1997, over 12 years ago. Unlike recent similar applications made in respect of actions which have "gone to sleep" for several years, the present application was based on the proposition that the cumulative effect of a history of numerous comparatively modest delays was not only inordinate and inexcusable but had also caused serious prejudice to the Defendants.

2. The Defendants application was clearly, in general terms, a strong one. However, having regard to the countervailing fair trial rights of the parties, it seemed to me that the cumulative delay was not quite so inexcusable in a traditional sense and the prejudice to the Defendants not quite so serious, as to warrant striking-out for want of prosecution. Accordingly I declined to strike–out the proceedings altogether, set a firm pre-trial timetable and awarded the costs of the application to the Defendants in any event.

3. In light of the industry of both counsel in placing carefully prepared arguments before the Court in relation to an application which raised novel points, I indicated that I would give reasons for my decision.

Chronology of action

4. The following Chronology was prepared by the Defendants' counsel and helpfully summarises the history of the action for the purposes of the present application:

CHRONOLOGY

	Event
1997	
January 17th 1997	*Road Traffic Accident*
June 18th 1997	*Letter before action sent to the Defendants' insurer by attorney, Christine M. Hoskins*

August 13th 1997	*The Defendants' insurers instructed attorneys wrote to Ms. Hoskins seeking medical reports and a schedule of loss*

1998

June 22nd 1998	*The Plaintiffs' second attorneys, Diel & Myers, wrote to advise that legal proceedings would be filed*
July 24th 1998	*Writ of Summons with attached Statement of Claim filed*
September 10th 1998	*Amended Statement of Claim filed*
September 14th 1998	*Statement of Defence filed*
October 6th 1998	*Defendants requested discoverable documents from the Plaintiffs relating to his business records from 1995 to 1998*
November 3rd 1998	*Summons for Directions filed with affidavit of the First Plaintiff seeking, inter alia, a split trial*

1999

January 27th 1999	*Letter from Diel & Myers requesting that the Summons for Directions be adjourned sine die in return for the agreement that there be an interim payment of $35,000.00 to the First Plaintiff (Interim payment paid February 15th 1999)*
February 15th 1999	
May 18th 1999	*Medical reports of Dr. Chelvam, Dr. Martin and Dr. Ringer provided to the Defendants' attorneys*
September 2nd 1999	*Notice of Change of Attorneys filed by Telemaque & Associates, the third attorneys for the Plaintiffs*
October 7th 1999	*Medical reports of Dr. Shaw and Dr. Martin provided to the Defendants' attorneys*

2000

January 6th 2000	*Plaintiffs' list of documents filed*
January 17th 2000	*Defendants' attorneys requested that loss of income claim be updated when directions for trial are to be sought as a year has*

	passed since the loss of income claim was pleaded
January 21st 2000	*Various loss of income and/or loss of profits documentation was provided to the Defendants' attorneys*
February 1st 2000	*Defendant's attorneys raise questions regarding documentation*
February 16th 2000	*Defendants' attorneys requested financial statements of the Second Plaintiff for 1995, 1996 and the second half of 1998*
June 9th 2000	*Various accounts provided to the Defendants attorneys*
August 30th 2000	*First Plaintiff improperly submits affidavit in court filein relation to his losses*
October 4th 2000	*Letter sent by the Defendants' attorneys advising that it was not possible to value the Plaintiffs' claims*

2001

October 30th 2001	*Letter sent by the Plaintiffs' attorneys, inter alia, requesting a second interim payment*
December 5th 2001	*Notice of Change of Attorney filed by Francis & Forrest, the fourth attorneys for the Plaintiffs*
December 12th 2001	*Letter sent by the Defendants' attorneys summarizing the inadequacies of the claim presentation and the discovery by the Plaintiffs*

2002

March 20th 2002	*Documentation, including the reports of Dr. Chelvam and Dr. Shaw, provided by the Plaintiffs in reply to the above*
April 18th 2002	*Letter sent by the Defendants' attorneys advising that the medical information provided by the First Plaintiff raised a serious issue of causation*

2003 - 2004

March 23rd 2004	*Notice of Change of Attorney filed by Smith & Co, the fifth attorneys for the Plaintiffs.*

July 14th 2004	*Further Summons for Directions filed, again seeking, inter alia, a split trial*
August 5th 2004	*Summons for Directions withdrawn*
December 16th 2004	*Letter sent by the Defendants attorneys advising that the Plaintiffs' Amended Statement of Claim of September 1998 and their list of documents were both seriously out of date and needed amendment*
2005	
February 18th 2005	*As above*
September 27th 2005	*As above*
October 4th 2005	*Reply by Smith & Co. advising the Plaintiffs had retained new but unnamed attorneys who had obtained legal aid for them*
October 6th 2005	*Letter to Smith & Co. informing the Plaintiffs that since this was their fifth change of attorney the Defendants' intention was to proceed notwithstanding the change*
November 24th 2005	*Summons filed by the Defendants' attorneys to have these proceedings struck out for the Plaintiffs failure to make discovery, failure to apply for directions and want of prosecution*
2006	
April 12th 2006	*Defendants agreed to adjourn their application if Plaintiffs (now represented by Christopher Francis Forrest, their sixth attorneys) filed and served Supplementary List of Documents*
May 11th 2006	*Plaintiffs filed their Supplementary List of Documents*
June 6th, 2006	*Defendants' attorneys provide medical report of Dr. Froncioni*
July 4th 2006	*Plaintiffs supplied the Defendants with a draft Amended Statement of Claim*
August 2nd 2006	*Plaintiffs provide documents from the Supplementary List*

2007

May 4th 2007	*Notice of Change of Attorney filed by Lynda Milligan-White & Associates, the seventh attorneys on record for the Plaintiffs.*
May 8th 2007	*Plaintiffs provide medical report of Dr. Christian dated 22nd January 2007*
May 15th 2007	*Plaintiffs propose directions for trial*
July 17th 2007	*Plaintiffs provide earlier undisclosed reports of Dr. Froncioni*
July 18th 2007	*Defendants point out need for further directions for exchange of witness statements on liability and quantum*
July 26th 2007	*Letter sent to Plaintiffs stating that their Statement of Claim needs to be formally amended*
August 28th 2007	*Plaintiffs state that need supplemental opinion from Dr. Christian before being able to amend Statement of Claim and suggest directions to provide Re-Amended Statement by 28th September 2007 and witness statements by 16th November 2007*
September 11th 2007	*Plaintiffs state that Re-Amended Statement of Claim will be provided by the end of September 2007*
October 18th 2007	*Plaintiffs state that they are awaiting supplemental report of Dr. Christian before providing Re-Amended Statement of Claim*

2008

May 21st 2008	*Defendants request copy of supplemental report of Dr. Christian*
June 13th 2008	*Plaintiffs provide letter from Dr. Christian and invite suggestions for directions*
August 11th 2008	*Defendants repeat the directions already canvassed in past correspondence including need for Re-Amended Statement of Claim*
September 25th 2008	*Defendants request that Re-Amended Statement of Claim be provided*

September 26th 2008	*Letter from the Plaintiffs' attorneys stating, "many of the files developed in this case over the years have gone astray" and promise to provide the Re-Amended Statement of Claim within 21 days*
November 10th 2008	*Defendants file Notice of Intention to Proceed"*

Legal findings: the jurisdiction to strike-out for want of prosecution

5. Mr. Rothwell submitted that the Bermudian law principles on striking-out for want of prosecution had been considered most recently in the following local cases: *Thomas Hofer (by his next friend Anna Hofer)-v- The Bermuda Hospitals Board* [2008] SC (Bda) 40 Civ; *Mermaid Beach and Racquet Club Ltd.-v-Donald Morris* [2004] Bda LR 49, *Re Burrows* [2005] Bda LR 77 and *Roberts and Hayward –v- Minister of Home Affairs and Public Safety* [2007] Bda LR 31. He submitted that the applicable principles are all derived from the following passage in Halsbury's Laws 4th edition, Volume 37 paragraph 448:

> *"The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied : (1) that the default has been intentional and contumelious; or (2) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and 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 have caused serious prejudice to the defendants either as themselves and the plaintiff or between each other or between them and a third party*
>
> *The power to dismiss an action for want of prosecution, other than in a case of contumelious conduct by the plaintiff, should not usually be exercised within the currency of any relevant limitation period…on an application to dismiss for want of prosecution the court will take into account all the circumstances of the case, including the nature of the delay and the extent to which it has prejudiced the defendant, as well as the conduct of the parties and their lawyers…."*

6. I accept this broad submission, which Mr. Doughty, the Plaintiffs' counsel, did not dissent from. However, this traditional common law approach to striking-out for want of prosecution operates under the umbrella of section 6(8) of the

Bermuda Constitution (the local equivalent of article 6 of the European Convention on Human Rights). The following constitutional provision (considered in *Re Burrows* where a stay of proceedings was granted in favour of the respondent to a human rights complaint under section 15 of the Constitution on delay grounds) operates in favour of civil plaintiffs and defendants alike:

> "*Any court or other adjudicating authority prescribed by law for the determination of the existence or extent of any civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.*"

7. The process of civil litigation requires the Court to engage in a judicial juggling act, constantly seeking to keep the respective parties' constitutional fair trial rights balls in the air. And if the plaintiff does not advance his case with due diligence, his fair trial rights may fall to the ground, and his opponent will triumph on strike-out grounds. The Plaintiffs have a right of access to the Court and to a fair trial, but the Defendants have a corresponding right to a fair trial within a reasonable time. It is the task of balancing these potentially conflicting yet overlapping constitutional fair trial rights which underpins this Court's duty to manage cases justly under Order 1A of this Court's Rules ("*the Overriding Objective*").

8. In *Re Burrows*, where the conflict between the respondent's right to have her claim heard and the applicant's right not be subjected to an unfair trial were in sharp focus, I considered the implications of the following *dictum* of Lord Bingham in *A-G's Reference (No.2 of 2001)* [2004] 2 AC 72: "*…the Convention cannot, in the civil field, be so interpreted and applied as to protect the Convention Right of one party while violating the Convention right of another.*" I construed this to mean as follows:

> "124. *In simple terms, the only hearing to which any litigant is entitled to is fair one, and fairness is indivisible. A hearing must be fair to both parties and no litigant is entitled to a hearing that is unfair to their opponent and unfairly tilted in their favour. So if the Applicant can no longer, by reason of the delay and a key witness' unavailability, have a fair hearing, no question of the Ms. Burrows being deprived of her fair hearing rights under section 6(8) arises. Her only potential constitutional complaint would seem to arise in respect of the delay, which has in effect extinguished her right to a hearing. But the delay itself is her grievance, not the interpretation of section 6(8) in such a manner as to hold that the Applicant's right to a hearing within a reasonable has been infringed.*

> *125. Lord Bingham's injunction against interpreting and applying article 6 of ECHR in a manner which deprives the party not seeking relief of their own Convention rights would be breached in the following circumstances. If despite a breach of the Applicant's right to a hearing within a reasonable time a fair hearing was still possible, the complainant's right to a fair hearing would still subsist intact. To grant a stay or dismiss her complaint in these circumstances would infringe her own fair hearing rights, and would therefore be an impermissible way in which to apply section 6(8) of the Constitution.*"

9. Accordingly, in my judgment the common law discretionary power to strike-out for want of prosecution must be exercised in a manner which is consistent with the overarching constitutional fair trial rights of the parties. Where a fair hearing for a defendant/strike-out applicant is no longer possible, this extinguishes the plaintiff/strike-out respondent's own connected fair trial rights and the claim *must be* struck-out. Where there has been some interference with a defendant's fair hearing rights due to the plaintiff's delay but a fair trial is still possible, the plaintiff's fair hearing rights are not automatically extinguished. In these circumstances the Court *may* grant or refuse a strike-out application, applying the traditional common law principles, including (as Mr. Rothwell submitted) the wider interests of the civil justice system as a whole. However, the Court must still analyse the applicable facts under the guiding light of the parties' respective fundamental fair trial rights.

10. The Defendants' counsel relied on three important principles which did not appear to have been considered by this Court before. Firstly, he relied on Lord Woolf's holding that "[a] *plaintiff, even in the case of personal injuries, has to be responsible for the conduct of his solicitor*": *Lownes-v-Babcock Power Limited* [1998] EWCA Civ 211[1]. Secondly, counsel relied on the application of the following *dictum* to the present case:

> "*The most important point of serious prejudice, in my judgment, is undoubtedly the fact that by reason of the change in the plaintiff's employment status the claims* [sic] *the defendant will now have to meet is very much more substantial than it would have been if the claim had been brought on for trial at the date when it should have been brought on. In all those circumstances I am satisfied that the defendant has shown that he has sustained serious prejudice by reason of this very substantial delay.*"[2]

11. I accept the application of both of these broad principles as reflecting part of Bermudian law, subject to an important *caveat* in both cases. These general

[1] Cited by Chadwick LJ in *Watson-v-Woodhouse* [1999]EWCA Civ 1053, transcript page 15.
[2] *Ibid*, at page 9. Counsel also cited in support of this point *Doyle-v-Robinson* [1994] P.I.Q.R. 59.

principles must be applied by this Court in the light of both (a) the fundamental nature of the parties' fair trial rights under section 6 (8) of the Constitution, and (b) the flexible nature of this Court's modern case management powers under the Overriding Objective.

Factual findings

12. The Defendants' Summons was supported by the Affidavit of the Defendants' counsel, Mr. Rothwell, sworn on December 17, 2008. The Court is bound to assume that the Defendants' application is based on inferences they invite the Court to draw from the un-contentious matters of record. No direct evidence was filed in support of an assertion that any particular witness the Defendants wished to call will, by virtue of such witness' age or capacity, either (a) be unable to testify at trial, or (b) have particular difficulty in recalling the accident in question. Nor was evidence (as opposed to argument) filed in support of the contention that the delay would result in an enlargement of the Plaintiffs' damages claim.

13. The Defendants' Chronology set out such a strong case of inordinate and inexcusable delay in cumulative terms that the Plaintiffs were only credibly able to contest the prejudice arguments on the Plaintiffs' behalf.

14. The record shows (a) the Plaintiffs' first lawyers (of record) issued proceedings on July 24, 1998, 18 months after the accident; (b) pleadings were filed by both parties in September 1998 with the Defendants requesting disclosure of the Plaintiffs' business records on October 6, 1998; (c) an interim payment was made by the Defendants on February 15, 1999; (d) three medical reports were served by the Plaintiffs on May 18, 1999 (and two further reports in October); (e) the Plaintiffs' second attorneys filed a Notice of Change of Attorneys on September 2, 1999); (f) on January 6, 2000, the Plaintiffs' List of Documents was served. Discovery took place through the rest of the year with the Defendants contending the information provided on quantum was deficient; (g) on December 5, 2001, the Plaintiffs' third attorneys filed a Notice of Change of Attorneys; (h) in March 2002, the Plaintiffs provided some further documentation by way of discovery. Four weeks later the Defendants wrote identifying a serious issue about causation based on the medical evidence; (i) nearly two years later on March 23, 2004, the Plaintiffs' fourth attorneys came on the record. A Summons for Directions was filed and withdrawn; (j) after chasing the Plaintiffs in correspondence through 2005 only to be told in October another change of attorneys was about to take place, the Defendants on November 24, 2005 filed their first application to strike-out for want of prosecution; (k) on April 12, 2006 the Defendants agreed to adjourn their strike-out application if the Plaintiffs' fifth attorneys of record agreed to file an Amended and Supplementary List of Documents; (l) after serving this List and a draft amended pleading and further discovery in 2006, on May 4, 2007 the Plaintiffs' sixth attorneys came on the record and four days later a further medical report was served on the Defendants; (m) in mid- September 2007 a Re-amended Statement of Claim was promised. After clarifying in

October 2007 that delivery of this pleading was dependent on further medical evidence, the Plaintiffs promised on September 26, 2008 to serve it within 21 days; (o) on November 10, 2008, some three weeks after this deadline had passed, the Defendants filed a Notice of Intention to Proceed which was served on November 17, 2008; and (p) on December 10, 2008, the Plaintiffs served a draft Consent Order attaching a proposed Re-Amended Statement of Claim. The Defendants' response was to file the present application.

15. By the time the Plaintiffs responded to the present application, the Plaintiffs' seventh attorneys of record were acting on their behalf. The First Kessell Affidavit did not dispute the Chronology and essentially made the case that the prejudice to the Defendants did not make a fair trial impossible. It was admitted that seven lawyers acted for the Plaintiffs overall, but the following explanations were offered for the four changes of attorneys of record: (a) the first lawyer was not moving the case forward quickly enough as a result of which the First Plaintiff's mortgage was foreclosed on; (b) the second lawyer wound-up his practice; (c) the third lawyer was terminated at the direction of Legal Aid on billing grounds; (d) the fourth lawyer was terminated at the direction of Legal Aid on lack of seniority grounds; and (e) the only litigation lawyer at the sixth firm left necessitating this change. Mr. Doughty indicated that he was merely acting under a limited legal aid certificate for the purpose of opposing the strike-out application. If successful, it was hoped a full certificate would be granted.

16. I found that the delay was delay inordinate and inexcusable but that a material contributing cause for the delay was, on a balance of probabilities, institutional weakness within the civil justice system which adversely affects personal injury plaintiffs' right of access to the Court. It seemed probable that the Plaintiffs' first attorneys of record were privately retained, that the First Plaintiff was unable to adequately fund the litigation. Having lost his house, the First Plaintiff became eligible for Legal Aid but was twice forced to change lawyers at the direction of Legal Aid, ironically for contrasting reasons: (a) perceived excessive billing (possibly due to a senior lawyer somewhat reluctantly working at the comparatively low Legal Aid rates), and (b) because the next attorneys assigned too junior a lawyer to the case (presumably because no senior civil lawyer was willing to work at Legal Aid rates). The sixth lawyer left the retained firm to establish his own practice and, one may reasonably infer[3], did not agree to continue to act because of a reluctance to start off a new civil litigation practice with Legal Aid work.

17. This unhappy series of unfortunate legal representation events in my judgment reflects the fact that (a) Bermuda needs to institute a system of conditional fees for personal injury claims and other matters similar to that instituted in the United Kingdom over ten years ago (the Bermuda Bar Council may well currently have this important matter under consideration), and (b) in the interim, Legal Aid rates

[3] It is a matter of record that the lawyer in question has continued to act for one or more of his former firm's clients in non-legally aided matters.

are too low to encourage experienced civil litigators to take on large and/or complex publicly-funded personal injury claims. While the sins of the lawyers are ordinarily attributable to the client, this rule cannot apply to the significant delay which must be attributable in the present case to this extraordinary sequence of events.

18. Where the delay is attributable to a material extent to these institutional weaknesses in Bermuda's civil justice system, in my judgment it would be unjust to fail to take these matters into account when putting the respective fair hearing rights of the Defendants and Plaintiffs into the scales in the context of an application to strike-out for want of prosecution. This is not a "bog standard" running down case at all. It involves complex issues of causation and damage, including the alleged failure of the First Plaintiff to wear a seat belt and the significance of a pre-existent injury; while the changes of representation were not necessarily the predominant cause for the global delay, it seemed obvious that they were a material factor on any sensible view of the facts.

19. Since the inordinate delay did not involve any deliberate failure to comply with orders of this Court, the application could only be struck-out if the Defendants were able to further show either: (a) a substantial risk that a fair trial will not be possible, or (b) serious prejudice. In paragraph (8) of the Rothwell Affidavit, it is asserted that: "*With the Plaintiffs seemingly being unable to produce necessary and/or coherent evidence to justify their claim for loss of income, the Defendants' ability to challenge those amounts claimed is severely prejudiced as is their ability to have a fair trial*". In my judgement, as the Plaintiffs contended, the inability of the Plaintiffs to prove their losses can hardly prejudice a fair trial for the Defendants. There is no real evidence upon which this Court could properly find that there was a substantial risk that a fair trial for the Defendants was no longer possible.

20. It was, however, obvious that the passage of time has been prejudicial to the Defendants in a general sense. Their witnesses (expert and non-expert) may have diminished independent recollections of the 12 year old events. The loss of earnings claim it is proposed to assert by way of the Re-Amended Statement of Claim may be difficult to verify and/or challenge. But the diminished recollection point (not supported by any direct evidence of diminished capacity on the part of specific witnesses) and the loss of earnings point both have prejudicial implications for the Plaintiffs as well in circumstances where they bear the burden of proof. An additional financial prejudice argument was advanced by counsel at the hearing without evidential support; namely, the fact that the past earnings element of the claim would be inflated by the date of the delayed trial.

21. Taking all of these matters into account the Defendants did establish serious prejudice, but quite clearly at the lowest end of the scale.

Findings: exercise of Court's discretion

22. Perhaps the strongest legal argument advanced by the Defendants in support of exercising the Court's discretion in favour of striking out was the submission that "*the court must look at not only issues of prejudice in this case but also to the administration of justice generally in deciding where the balance of prejudice lies*" (Submissions, paragraph 79). Looked at overall, the way in which the Plaintiffs' case has been conducted could be regarded as an abuse of the process of the Court. However, the Plaintiff has clearly wished to advance his claim and has been forced into serially changing lawyers through no obvious fault of his own. The parties have clearly not been on an equal footing.

23. Because of the institutional weaknesses with Bermuda's civil justice system which adversely impact on impecunious personal injury claimant's right of access to the Court under section 6(8) of the Constitution, the wider interests of justice appeared to me to favour permitting the Plaintiffs to pursue their claim, on the clear understanding that any further delays in progressing this action to trial would not be tolerated by this Court. Of course, had a fair trial not been possible or the prejudice to the Defendants flowing from the inordinate delay been more serious than was shown, this Court would have had no choice but to strike-out this application.

24. It seemed to me that the appropriate way for the Court to give effect to both sides' fair hearing rights while compensating the Defendants for the manner in which the Plaintiffs have conducted this litigation was to award them the costs of the present application, to be paid out of the Consolidated Fund on behalf of the Plaintiff. In addition, of the Court's own motion, I ordered directions anticipating a trial to be fixed not before November 1, 2009[4], on the express basis that unless the Plaintiffs complied with the directions their claim should be struck-out.

25. It is noteworthy that while the Defendants appear to have consistently chased the Plaintiffs throughout in correspondence, they never took the more active initiative of seeking to move the litigation forward by seeking peremptory orders from this Court. In the post-January 1, 2006 era of the Overriding Objective, the use of peremptory orders may be the best weapon for defendants genuinely wishing to either (a) progress a dilatory action and/or (b) strike-out for want of prosecution, without having to rely on establishing that either serious prejudice or the impossibility of a fair trial.

Conclusion

[4] In granting leave to the Plaintiffs to file their Re-Amended Statement of Claim, I did not consider the Defendants' possible objections to this application. As the case for refusing leave corresponds with the test for striking-out an unsustainable pleading, the Defendants may always apply to strike-out any averments which they wish to contend ought to be struck-out.

26. For these reasons I refused the Defendants' strike-out application on April 17, 2009, but awarded them the costs of the application in any event.

Dated this 1st day of May, 2009

KAWALEY J