



IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2000: No. 245

BETWEEN:

ORLAFORD LIMITED

Plaintiff

-v-

(1) DEAUVILLE COMMUNICATIONS WORLDWIDE LIMITED
(2) DEAUVILLE COMMUNICATIONS WORLDWIDE LIMITED
(3) HEMISPHERE MANAGEMENT LIMITED
(4) CAPITAL GENERATION LTD.
(5) SIU B. WUT
(6) KINGFISHER INC

Defendants

**RULING ON APPLICATION TO STRIKE-OUT FOR WANT OF
PROSECUTION**
(In Chambers)

Dates of Hearing: November 12, 2010, February 1, 2011
Date of Ruling: February 8, 2011

Mr. Nathaniel Turner, Attride-Stirling & Woloniecki,
for the Plaintiff
Mr. Saul Froomkin Q.C., Mello Jones & Martin,
for the Respondent

Introductory: history of action

1. The instant application was made by the 3rd Defendant by Summons dated August 31, 2010 and seeks to strike out the Writ and Re-Pleaded Statement of Claim for want of prosecution.
2. The Plaintiff, an Irish company, commenced proceedings against the 1st Defendant (also an Irish company) by Specially Endorsed Writ on July 31, 2000. On November 13, 2002, its first attorneys filed a Notice of Intention to Proceed. On January 30, 2003, the Plaintiff's second attorneys filed a Notice of Change of Attorneys; on April 1, 2003, they applied for leave to amend the Specially Endorsed Writ. On April 17, 2003, the Chief Justice granted leave to amend and the 2nd Defendant (a Caymanian company), the 3rd Defendant (a Bermudian company), the 4th Defendant (a Caymanian company), the 5th Defendant (an individual resident in Hong Kong) and the 6th Defendant (a Liberian company) were added as parties to the present action. By Summons issued on May 30, 2003, the Plaintiff applied for leave to serve the foreign Defendants abroad, and obtained leave on June 12, 2003 from Simmons AJ (as she then was). By Summons dated August 29, 2003, the 3rd Defendant applied to strike-out the Amended Writ and Statement of Claim on the grounds that they disclosed no reasonable cause of action. On September 11, 2003, I adjourned the first strike-out application by consent *sine die*.
3. On October 28, 2003, a Notice of Change of Attorneys was filed by the Plaintiff's third attorneys. By Summons dated December 5, 2003, the Plaintiff applied to re-amend the Amended Writ and Statement of Claim in minor respects. This application was listed for hearing together with the 3rd Defendant's first strike-out application on December 2, 2003. In the Plaintiff's Submissions, it was explained that the claim against the 3rd Defendant was for the tort of conspiracy to injure, the central allegations being that it had conspired with the other Defendants to procure BBC International Limited ("BBC") to breach its License Agreement with the Plaintiff thus depriving the Plaintiff of royalties. On December 2, 2003, directions were given for the hearing of the re-amendment application and the strike-out application was again adjourned *sine die*. However, on December 12, 2003 the Plaintiff's attorneys wrote the Court to indicate that the 3rd Defendant had consented to their re-amendment application. This was formally granted on December 22, 2003 by Simmons J.
4. On January 7, 2004, the 3rd Defendant issued a fresh strike-out Summons under Order 18 Rule 19 (a)-(d) inclusive. Directions for this application were ordered by Chief Justice Ward on January 29, 2004. This application was listed for hearing on April 14, 2004 together with a March 25, 2004 application by the Plaintiff to further amend the Re-Amended Statement of Claim. This application was duly heard by Chief Justice Ground. On April 16, 2004, the Chief Justice declined to strike-out the Statement of Claim on the grounds advanced by the 3rd Defendant but directed the Plaintiff to file an entirely new Statement of Claim. The Re-Pleaded Statement of Claim was filed on May 13, 2004 dealing with events occurring between in and about 1995 and in and about 2002. On

June 7, 2004, the 3rd Defendant filed its third strike-out Summons and the following day filed its Defence. The 3rd Defendant's second active strike-out application was dismissed by Simmons J on December 22, 2004.

5. On July 19, 2005, the Plaintiff filed its List of Documents and two days later a Summons for General Discovery. The first return date was delisted. On December 6, 2005, the Plaintiff issued a Summons seeking to compel the 3rd Defendant to file its list of Documents verified by affidavit. This application was granted by Simmons J on December 15, 2005. On January 11, 2006, the 3rd Defendant filed its Verifying Affidavit and List. On April 6, 2006, the Plaintiff's third attorneys filed an application to be removed from the record on the grounds that, *inter alia*, the question of who could give instructions on behalf of the Plaintiff was in dispute before the Ontario Court. On April 27, 2006, the Chief Justice granted the removal from the record application.
6. Having taken three years (and three sets of attorneys) to constitute the parties to the action, the Plaintiff spent a further year settling a coherent pleading. Some six months were wasted by the 3rd Defendant's unsuccessful strike-out application, and each party took six months to serve their Lists of Documents. The Plaintiff was then compelled to retain its fourth attorneys.
7. On May 25, 2006, the Plaintiff's fourth and current set of attorneys came onto the record. On June 8, 2007, just over a year later, the Plaintiff's attorneys filed a Notice of Intention to Proceed, followed by various Search Praecipes over the course of the next four weeks. The action's blissful somnolence continued for a further three years until on August 2, 2010, a further Notice of Intention to Proceed was filed. On August 31, 2010, the present application was issued.
8. On November 12, 2010 when the present application was initially heard, it appeared to me that apart from issues of delay, the existence of an arguable case could still not clearly be discerned from the Re-Pleaded Statement of Claim. To enable me to adjudicate the present application with a clearer sense of the merits of the Plaintiff's claim, I ordered the Plaintiff to supply Further and Better Particulars which were duly filed.

The pleadings

9. The Plaintiff's case is as follows. On September 13, 1991, BBC- by an agreement with Nicholas A. Rodgers ("the License Agreement") obtained the exclusive right to use the Rodgers Patent. The Plaintiff is the ultimate assignee of Rodgers' rights under the License Agreement. The Plaintiff alleges that the Defendants conspired with each other and BBC to injure it by causing loss of income generated by the Rodgers Patent, their predominant intention being to injure the Plaintiff. Alternatively, they conspired to injure the Plaintiff by unlawful means, namely by inducing BBC to breach the License Agreement by entering into the June 16, 1995 Deauville Service Agreement ("the Service Agreement"). According to the Particulars under paragraph 12: *"It was known and intended by the Defendants... that BBC would not reveal to the Plaintiff that it had breached the License Agreement and would not account and pay to the Plaintiff royalties*

on the sale of such footwear pursuant to the Deauville Service Agreement.” The only allegations specifically advanced against the 3rd Defendant are that it managed the affairs of the 1st and 2nd Defendants and its senior employee Christopher Wetherhill executed the Service Agreement on the 1st Defendant’s behalf.

10. A Wisconsin action brought against BBC was settled on January 9, 1997 (“the Settlement Agreement”), as appears from the Chief Justice’s Ruling dated April 16, 2004 herein. The Plaintiff contends that agreement did not release BBC or its agents in relation to the subject matter of the present action, which only came to its notice in 2002. This argument was considered plausible by the Chief Justice as the Wisconsin action was not based on a breach of the License Agreement.
11. The 3rd Defendant’s Defence firstly denies any wrongful acts which caused the Plaintiff damage. Secondly, it complains of inordinate delay. Thirdly, it is alleged that the Plaintiff’s claim is time-barred because it was aware of the 3rd Defendant’s involvement in the subject-matter of the present action as long ago as 1996-1997 when it brought two Wisconsin actions against BBC, the second of which (in 1997 and post-Settlement Agreement) concerned breaches of the License Agreement. Because it failed to sue the 3rd Defendant at that time, it is fourthly alleged that the Plaintiff is estopped from bringing its present claim.
12. The Plaintiff’s Reply alleges that the role of the Defendants in the conspiracy was not ascertained until 2002 when the existence of the 2nd Defendant was discovered, a discovery which was impeded in part by the 3rd Defendant’s counsel refusing to meet to discuss these matters in 2000 and its employees opposing the restoration of the 1st Defendant to the register in Dublin later that same year. As the Wisconsin proceedings dealt with different matters, no delay or estoppel arises in relation to the present claim.
13. It should be noted that at the strike-out application heard by the Chief Justice in April 2004, an Affidavit filed by Margaret Every in opposition to the restoration application before the Irish High Court was produced. In paragraph 4 she deposed as follows: *“I have no reason to believe that Deauville was ever involved, whether directly or indirectly, in the sale of shoes that light up or in any conspiracy of any type with BBC. Up until the 9th August 2000, Orlaford was unknown to me.”* Also in evidence was a deposition from James Cheung and Donald Lee (relied upon by the Plaintiff in the Irish restoration proceedings in an affidavit sworn on January 18, 2001 and obtained in the Wisconsin proceedings) which revealed that BBC had entered into an agreement with a company named “Deauville” for the sale of shoe products, which agreement would not likely refer to any specific shoe product such as that covered by the License Agreement. It seems probable that these depositions were given prior to October 11, 1996 when judgment was entered in favour of the Plaintiff against BBC in the first Wisconsin action. BBC won a non-infringement summary judgment application in the second action on March 24, 1998 in relation to whether or not a new product infringed the Rodgers Patent, but it seems unlikely that the depositions were taken in relation to this later action.

14. It must also be observed that the Service Agreement was entered into between BBC and the 1st Defendant, so the discovery of the formation of the 2nd Defendant is not obviously central to the acquisition of knowledge of the existence of the present claim against the 3rd Defendant. Further, on the face of the Service Agreement, the 1st Defendant “recognizes” that BBC “has license agreements for Products which may be subject to this Agreement, and that all of licensor’s rights and interest in and to any Products, and that all use of Trademarks inures to the benefit of such licensor and [BBC]...” This express acknowledgment of the rights of licensors such as the Plaintiff is inconsistent with the conspiracy relied upon and any notion that the 1st and/or the 3rd Defendant (as its manager) were contractually obliged to either (a) have regard to the obligations owed by BBC to such licensors, or (b) let alone ensure that BBC complied with its obligations under such license agreements.
15. The Further and Better Particulars of the Plaintiff’s claim must be viewed in light of the aforesaid-albeit incomplete-evidential background. It is further alleged that (a) the 3rd Defendant was the directing mind of the Deauville Defendants, who had no employees of their own; (b) the 3rd Defendant “had full knowledge of the contents of the License Agreement since it caused and/or enabled Deauville to enter into the Deauville Service agreement”; (c) “the fact [of] the entry by Deauville and BBC into the [Service] Agreement... contemplated the non payment by BBC of royalties to Orlaford”; (d) the 3rd Defendant’s actions caused injury to the Plaintiff and should be deemed to have intended the consequence of its actions. Mr. Froomkin characterised these Particulars as “nonsense”. In relation to the aforesaid averments, I find that (a) is merely introductory, (b) and (c) are each inherently illogical; as a result (d) is nonsensical.
16. It is now quite clear that the Plaintiff’s claim cannot possibly succeed on its presently pleaded case.

The evidence

17. The 3rd Defendant filed two affidavits in support of its application. Firstly, the Affidavit of Sharon Morgan-Suess sworn on August 27, 2010 deposes that the 3rd Defendant was purchased by Citigroup Inc. on August 6, 2007 and that none of its current employees have any knowledge relevant to the present claim. The conduct complained of involves one Margaret Every one and Christopher Wetherhill, neither of whom have been associated with the companies purchased by Citigroup Inc, namely the BISYS Group and its subsidiaries¹. The 3rd Defendant has no means of compelling relevant witnesses to cooperate in the defence of the present claim. Secondly, the Affidavit of Stephen Notman sworn on August 26, 2010 sets out the chronology of the present action, noting that the last substantive step taken in the action by the Plaintiff was on December 15, 2005.
18. The Plaintiff responded with the Affidavit of Terena Shaw, the sole shareholder of Cabarete Holdings BV, a Dutch company which was solely authorised on April 28, 2006

¹ The 3rd Defendant’s name and ownership have seemingly changed twice since the period covered by the present action. In 1987 it was called BISYS Hedge Fund Services Limited; it is now Citi Hedge Fund Services, Ltd.

by Justice Cumming of the Ontario Court to “*direct on Orlaford’s behalf the conduct of the Bermuda and Florida litigation.*” The explanation advanced for the delay is principally the following. The parties behind the 3rd Defendant (who are Defendants in the Florida action, which has now been settled) filed numerous strike-out applications in the Bermuda proceedings designed to cause delay and embroiled Shaw in handling other actions which impeded her ability “*to aggressively pursue the Bermuda action*” (paragraph 13). But for the present application, the next step the Plaintiff would take would be to issue a Summons for Directions. It is further contended that if the action is dismissed, the other Defendants who are liable to be proceeded against by way of default would receive an undeserved windfall-this point was sensibly not pursued in argument as no issue of striking-out the entire action properly arises.

19. In summary, the Plaintiff’s explanation for the delay complained of appears to be that it unilaterally decided to focus on overseas litigation first before turning its attention to the present litigation. The 3rd Defendant contributed to this delay because its affiliates contested the overseas litigation and it pursued various strike-out applications in the present action designed primarily to avoid trial.

Applicable legal principles

20. A claim may only be struck-out for want of prosecution where the applicant is able to show not only inordinate and inexcusable delay but further “*that a fair trial of the issues is no longer possible, or that they have suffered serious prejudice by reason of the Plaintiff’s delay*”: per Evans JA in *Hofer-v-Bermuda Hospitals Board* [2010] CA (Bda) 4 Civ at paragraph 42. In deciding what constitutes serious prejudice, particular regard must be had to the circumstances of the specific case.

Findings

Has there been inexcusable and inordinate delay?

21. I find that the Plaintiff has been guilty of inordinate and inexcusable delay in conducting the present action. In my judgment the Plaintiff was fortunate to survive two strike-out applications in circumstances where the Defendant not only has a very arguable limitation defence, but where the central theory underlying the Plaintiff’s pleaded case as recently particularized is barely intelligible and logically incomprehensible. The Service Agreement which underpins the present claim was entered into on June 15 1995, and mostly came to the Plaintiff’s notice later that same year-there is a paper thin argument that it could not reasonably have known of the claim until 2002.
22. Having narrowly survived two strike-out applications, the Plaintiff let the action go to sleep from January 2006 (when the Overriding Objective came into effect under Order 1A of the Rules) until August 2010, 4 ½ years later and 15 years after the relevant transactions occurred. The reason for the delay is not said to be a lack of funds or difficulty in instructing lawyers, but a deliberate decision to give priority to foreign litigation without applying to stay the proceedings before this Court.

23. For the purposes of the present application, the Plaintiff relies on an April 28, 2006 Ontario Court Order as authorising Cabarete to direct the Plaintiff's conduct of the present litigation. This Order was on its face made pursuant to hearings on March 20, 24 and April 27 and 28, 2006. The Plaintiff by its actions or inaction caused its former attorneys to apply on April 12, 2006 to be removed from the record on the grounds that it was incapable of instructing them, an application which was heard and granted by this Court on April 27, 2006. Meanwhile, in Ontario, the instructions problem was being resolved. This suggests the Plaintiff had no interest in prosecuting the action with attorneys who were well versed with the issues and were quite happy to instruct new attorneys who would take time to get up to speed and were, in the event, not instructed to progress the action for an incredible further four years. There is no suggestion that the Plaintiff was impecunious or that this is a case of an eager client frustrated by inattentive lawyers.
24. In my judgment the Plaintiff's conduct of this action constitutes inexcusable delay and an abuse of the process of this Court in the context of commercial litigation where there is no suggestion that there is not a level playing field between the Plaintiff and the 3rd Defendant.

Has the 3rd Defendant suffered serious prejudice?

25. This is clearly not a case where a fair trial is no longer possible because crucial witnesses are unavailable. It is self-evidently a case where the fairness of the trial generally will be undermined due to the dimming of memories. The 3rd Defendant will be prejudiced by this factor and its inability, due to the passage of time, to ensure the cooperation of key witnesses in a case where the knowledge of those individuals is central to its potential liability.
26. At first blush, the prejudice the 3rd Defendant will suffer does not appear to be sufficiently serious to justify striking-out for want of prosecution under traditional principles applicable to this area of the law. This conclusion seems inevitable because there is nothing presently before the Court to suggest that the Plaintiff will be in a position to adduce positive evidence in support of the crucial averments of knowledge upon which its case is based. Its case appears to be based on inferences drawn from documents rather than on oral testimony of conversations or meetings in which it is alleged the 3rd Defendant's then employees acquired the requisite knowledge of BBC's intention to breach its obligations under the License Agreement with which the Defendants were not obviously involved. In my judgment, these inferences alone cannot sustain the cause of action of conspiracy to defraud as against a company which merely managed the entity and its affiliates which contracted with BBC to supply goods on terms that expressly reserved the rights of patent licensors such as the Plaintiff. Is the 3rd Defendant's true remedy not to wait for trial in the expectation that it will defeat this weak claim? Yet pursuing an unmeritorious claim in a dilatory manner is itself prejudicial to a trading company which must record a contingent liability on its books and a misuse of the processes of the Court. Further, having regard to this Court's jurisdiction

to strike out proceedings, a defendant ought not to be compelled to wait until trial to dispose of a hopeless claim.

27. Mr. Turner submitted that it was not open to me to re-open the question of whether or not the Re-Pleaded Statement of Claim ought to be struck-out as against the 3rd Defendant; the issue is *res judicata*. Is the Court powerless to discipline a party who pursues a claim which is subsequently identified as hopeless after an earlier strike-out application has been dismissed? Is the exercise of the discretionary power to strike-out not subject to review in light of subsequent developments in the action? In the present case what makes it plain and obvious that the Plaintiff's claim against the 3rd Defendant is hopeless is the Further and Better Particulars (served long after discovery) of the Plaintiffs case on intention to injure. Either this Court must be able to revisit its earlier strike-out ruling of December 2004, in light of the recently filed Particulars, or this Court must be able to take into account the fact that it is now clear that the claim is hopeless as a factor (together with the other prejudice complained of) constituting serious prejudice justifying striking-out for want of prosecution.

Decision

28. On either of these two grounds, I would exercise my discretion in favour of striking-out the Plaintiff's claim. However, as the want of prosecution ground alone was argued, I find that the 3rd Defendant would be seriously prejudiced by having to defend at trial what is now clearly an unsustainable claim (in relation to events which occurred over 15 years ago) and which has been outstanding against the 3rd Defendant for seven years. I have regard in this respect to the Overriding Objective and the importance of, *inter alia*, "*deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others*": Order 1A rule 4(2)(c). I also have regard to the Court's inherent jurisdiction and its statutory jurisdiction under Order 18 rule 19(1)(d) of the Rules to stay or dismiss an action on abuse of process grounds.
29. In the context of commercial litigation where the parties are on an equal footing, this Court must be more willing to strike-out claims which are prosecuted in an abusively dilatory way than may be the case in other legal contexts where plaintiffs' rights of access to the Court are actually or potentially impaired by limited resources and other vulnerabilities in relation to claims against more empowered defendants. Failure to firmly enforce the spirit of this Court's Rules will only encourage litigants to conduct cases in a manner which undermines judicial efficiency and causes undue prejudice to other parties involved.
30. I refused leave for the Plaintiff to adduce further evidence in the form of a draft unsworn Second Terena Shaw Affidavit, which was filed shortly before the resumed hearing. This evidence would have potentially proved that the 3rd Defendant's counsel had recently copied email correspondence relating to the present case to a US lawyer who has previously acted for BBC. It was asserted that the inferences to be drawn from this fact were that (a) the 3rd Defendant and BBC were in some way connected, and (b) that this connection further demonstrated that the two had conspired to injure the Plaintiff in 1995.

This desperate argument only confirmed how little solidity there was to the Plaintiff's case, 5 years after the parties exchanged Lists of Documents, 10 years after the present action was commenced against the 1st Defendant, 14 years after the Plaintiff first learned in general terms of the existence of the License Agreement and 15 years after the events complained of against the 3rd Defendant. This argument is infected with the central fallacy of the Plaintiff's case from the outset; the mere fact that the 3rd Defendant managed a company which entered into an agreement with BBC does not prove that it knew that BBC intended to breach its separate obligations to the Plaintiff under the License Agreement. The tort of conspiracy to injure requires proof of more than guilt by association.

Conclusion

31. The Plaintiff's claim as against the 3rd Defendant shall be struck-out for want of prosecution. Unless either party applies by letter to the Registrar to be heard as to costs within 14 days, the costs of the present application and the action as a whole shall be the 3rd Defendant's in any event, to be taxed if not agreed.

Dated this 8th day of February, 2011 _____
KAWALEY J