In The Supreme Court of Bermuda

CIVIL JURISDICTION
2008: No. 137

BETWEEN:-

WILLIAM CRAIG

Plaintiff

-v-

GAVIN WILSON

Defendant

EX TEMPORE RULING

Date of hearing: 17th December 2012

Mr Richard Horseman, Wakefield Quin, for the Plaintiff
Mr Ben Adamson, Conyers Dill & Pearman, for the Defendant

1. By an application dated 5th November 2012, the Defendant seeks an order that this action be stayed or dismissed under RSC Order 25 rule 1(4), or alternatively under the inherent jurisdiction of the Court, for want of prosecution. The basis for the application under RSC Order 25 rule 1(4) is that the Plaintiff failed to take out a summons for directions within one month after the pleadings were deemed to be closed.

2. The Defendant submits that:

   (1) There has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; and

   (2) Such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issue in the action or is such as is likely to cause or have caused serious prejudice to the Defendant.

3. Those are the material parts of the test stated by the House of Lords in Birkett v James [1978] AC 297, which the Supreme Court has applied in Bermuda in Russell v Stephenson [2000] Bda LR 63.

4. The Plaintiff claims $1,359,796.80 as a debt due and owing, or alternatively damages for breach of contract, plus interest.

5. The claim is based on an oral contract allegedly made in 1992. The payments for which that contract provided were calculated by reference to a previous oral contract made in 1973. However the Defendant's liability to make a payment under the 1992 contract is not alleged to have arisen until November 2005.

6. The history of the action is relevant. On 13th June 2008 the Plaintiff issued a generally endorsed writ and statement of claim. The statement of claim pleaded both the 1973 contract and the 1992 contract. It also pleaded written agreements made in 1986 and 2004 which are no longer relied on.

7. The Defendant served a defence dated 25th July 2008. As it was filed with the Court by cover of a letter delivered by hand dated 25th July 2008 I conclude that it was probably served on the Plaintiff on or about that date. The Defendant admitted the 1973 contract, although he averred that it was illegal, and made no admissions as to the 1992 contract. The effect of that pleading was to put the Plaintiff to proof as to the existence and terms of the 1992 contract.

8. The Plaintiff did not serve a reply. Pursuant to RSC Order 18 rule 20, pleadings were deemed to be closed at the expiration of 14 days after service of the defence.

9. The Plaintiff did nothing further in the action until 11th February 2011, when his new attorneys filed and served notices of change of attorney and intention to proceed. That was an interval of some 2 ½ years.

10. The Plaintiff explains that the reason for the delay was that he left Bermuda and moved to China; changed attorneys; and had funding issues and related difficulties with the transfer of files. I don't think that moving to China or changing attorneys justifies a delay of that length. However I am sympathetic to the point about funding issues and difficulties transferring files.

11. I find that the delay was not in itself inordinate or inexcusable. But I shall take it into account when considering any subsequent delay.

12. By a letter dated 4th May 2011 the Plaintiff's attorneys wrote to the Defendant's attorneys. They enclosed a draft amended statement of claim and sought the Defendant's consent to the proposed amendments.

13. By a letter dated 11th May 2011 the Defendant's attorneys responded. They stated that they were taking instructions and would reply shortly.

14. There was no further correspondence until 8th May 2012, when the Plaintiff's attorneys sent a chasing letter to the Defendant's attorneys. They enclosed a fresh notice of intention to proceed, which was also dated 8th May 2012.

15. In the intervening 12 months the limitation period for bringing a claim under the 1992 contract had expired on 26th November 2011. This did not in itself present any difficulty for the Plaintiff as his claim under the 1992 contract was pleaded in the original statement of claim.

16. By a letter dated 9th May 2012 the Defendant's attorneys acknowledged the chasing letter and apologised for their oversight in failing to respond to the earlier letter.

17. By a letter dated 8th June 2012 the Defendant's attorneys advised the Plaintiff's attorneys that they did oppose the amendment. They noted that the amendment advanced a claim that was time barred. The Defendant's attorneys also sought security for costs as the Plaintiff was not resident within the jurisdiction.

18. By alleging that the claim was time barred the Defendant raised the issue of delay. I find that subsequent developments in the action notwithstanding, the Defendant has continued to maintain this challenge.

19. On 25th June 2012 the Plaintiff issued a summons to amend the statement of claim.

20. On 23rd August 2012 the Defendant issued a summons seeking security for costs. This application was resolved by consent.

21. On 31st August 2012 the Court made a consent order giving the Plaintiff permission to amend the statement of claim as per an attached draft. The draft was different to the draft with which the Defendant had originally been served, which was why leave to amend had not been agreed earlier.

22. The amended statement of claim deleted reference to the 1986 and 2004 written agreements. It pleaded an additional clause to the 1992 contract which dealt with the consideration provided by the Plaintiff. Otherwise, the way in which the 1992 contract was pleaded remained unchanged.

23. By a letter dated 20th September 2012 the Defendant's attorneys wrote to the Plaintiff's attorneys seeking an extension of time for service of a defence. The Defendant agreed.

24. The Plaintiff submits that by consenting to the amendment of the statement of claim, the Defendant has necessarily consented to an amended timetable for service of a summons for directions, the requirement to serve a summons

being triggered by the close of pleadings, and thereby waived his claim under order 25 rule 1(4).

25. I agree. However this leaves the question of the court's inherent jurisdiction to stay the action. In this regard, I note that the interval between the first notice of intention to proceed and the issue of the summons for leave to amend the statement of claim was around 16 months.

26. The Plaintiff submits that there were two reasons for the delay. The first reason was that there were concerns as to whether the Defendant could afford to satisfy a money judgment. The Plaintiff states at paragraph 4 of an affidavit dated 12th December 2012:

"*During this time, that is late 2011 and early 2012, I was considering the difficulties of enforcing any judgment. While I do not want to divulge privileged information, this was a concern which had been expressed to me by my new attorneys. While I believed I had a strong case, I was concerned whether I would ever be able to enforce a judgment. I believed that the Defendant had few if any assets. A friend of mine, AB, had also been owed money by the Defendant. He had told me that the Defendant claimed to have no funds available to pay this debt and that he was having no success in enforcing his money judgment. It was only recently, in early 2012, that I found out from AB that he had finally been paid a percentage of what was owed to him. I then decided that I should proceed with my case.*"

27. I have sympathy for the Plaintiff's position, but on the facts of this case that does not justify a 16 month hiatus, particularly given the prior history of delay. The Plaintiff consulted his new attorneys in February 2011, yet he states that it was not until "*late 2011 and early 2012*" that he was concerned with the difficulties of enforcing judgment. He does not quantify this period further but I take it to mean a month or so at the end of 2011 and another month or so at the start of 2012. In the context of this particular case that would be reasonable. But that does not justify the delay from February 2011 until late 2011 or the delay after early 2012.

28. Speaking more generally, concern that a defendant is impecunious may justify some measure of delay. How much delay will depend on the facts of the particular case. Relevant considerations might include the financial circumstances of the plaintiff, the cost of proceeding with the claim, the amount claimed, and the prejudice that delay might cause to the defendant. Hence prejudice to the defendant, if foreseeable, may be relevant not only to the consequence of inordinate and inexcusable delay but to whether such delay is inordinate and inexcusable. However a time will come when the defendant must elect whether or not to proceed with the action. In this particular case the time that the Defendant took to make his election was inordinate and inexcusable.[1]

29. The second reason given for the delay was the Defendant's failure to respond to the Plaintiff's letter of 4th May 2011. I find this reason unconvincing. The Defendant is not responsible for the progress of the Plaintiff's claim. The Plaintiff's attorneys could have written chasing letters. If these elicited no response they could have filed a summons to amend the statement of claim much sooner.

30. I therefore find that of the second, 16 month, period of delay, around 12 months was inordinate and inexcusable.

31. The Defendant claims that this delay has given rise to a substantial risk that he will not have a fair trial.

32. First, he states that he cannot reasonably be expected to remember details of oral agreements made 20 and 40 years ago.

33. Secondly, he notes that under the terms of the 1992 contract as pleaded in the statement of claim, he was entitled to deduct expenses from any monies due to the Plaintiff. However, he claims that he no longer has the documents on which he would need to rely in order to calculate his expenses and prove that they were incurred.

[1] I have revised paragraphs 27 and 28 from the judgment that I gave orally and added some further observations.

34. As to the first point, the Defendant gave oral evidence in divorce proceedings between the Plaintiff and the Plaintiff's wife in Toronto in October 2001. The Plaintiff has exhibited a transcript of the Defendant's evidence in which he describes the 1992 contract. I find that this is good evidence that the Defendant accepted that there was a 1992 contract and as to what he understood its terms to be.

35. As to the 1973 contract, as noted above the Defendant admitted this in his defence, although he challenged its legality.

36. As to the second point, there is no evidence that the Defendant has lost any documents during the delay complained of, still less during that part which I have found to be inordinate and inexcusable. There is therefore no evidence that it is the Plaintiff's inordinate and inexcusable delay which has caused any prejudice that the Defendant might suffer.

37. The Defendant has known of the action from the date of service of the writ. It would have been prudent for him to take steps at that time to obtain and preserve any documents on which he might want to rely. If he has failed to do so, then on his own head be it.

38. But I am not satisfied that there is a substantial risk that the Defendant will be unable to have a fair trial or suffer serious prejudice. He has given no details of the "lost" documents nor what steps, if any, he has taken to obtain copies. The Plaintiff submits that the Plaintiff will be able to provide on discovery evidence of at least some of the expenses claimed by the Defendant. It is premature to conclude that other expenses, such as legal bills, will be unobtainable. Where documentation is unavailable, the Court can where appropriate make generous allowance when estimating the amounts concerned.

39. Moreover, the expense claims do not go to the heart of the case: they go to reduce quantum but not to the question of liability.

40. In short, I am not satisfied that the Defendant's difficulties in establishing his expenses will prove insuperable.

41. I conclude:

(1) There has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers; but that

(2) Such delay will give not rise to a substantial risk that it is not possible to have a fair trial of the issue in the action and is not such as is likely to cause or have caused serious prejudice to the Defendant.

42. The application is therefore dismissed.

43. [By consent, the Court ordered costs in the cause.]

Dated this 17th day of December 2012 _____

Hellman J