In The Supreme Court of Bermuda

CIVIL JURISDICTION

2016 No: 218

BETWEEN:

DAVID LEE TUCKER

Plaintiff

And

HAMILTON PROPERTIES LIMITED

Defendant

RULING

Dates of Hearing:	Thursday 30 October 2025
Date of Judgment:	Monday 22 December 2025
Plaintiff:	In Person
Defendant:	Mr. Jordan Knight (Appleby (Bermuda) Limited)

Strike Out Application (RSC 18/9 (1)(d)) and Court's Inherent Jurisdiction- General Legal Principles on Abuse of Process caused by Want of Prosecution - Contumelious Delay and Inordinate and Inexcusable Delay causing prejudice to the fairness of a trial

RULING of Shade Subair Williams J

Introduction

1. The Defendant filed a summons dated 31 March 2025 by way of an application to strike out the Plaintiff's claim in its entirety on the grounds of abuse of process. The application is made pursuant to Order 18, rule 19(1)(d) of the Rules of the Supreme Court ("RSC"). The Plaintiff also relies on the Court's inherent jurisdiction to dismiss the action for want of prosecution on the grounds that the Plaintiff's litigation conduct and delay in the prosecution of the action constitutes an abuse of process.

2. The Defendant's 31 March summons is supported by the affidavit evidence of Mr. Jason Pethick, the Director of Finance & Business Support for the Defendant. That evidence was sworn on 27 February 2025. The Defendant also relies on the affidavit evidence of his Counsel, Mr. Jordan T Knight of law firm Appleby (Bermuda) Limited ("Appleby"). That affidavit was sworn on 30 October 2025 and was purposed to exhibit *inter partes* correspondence between Appleby and the Plaintiff's former Counsel, Mr. Saul Dismont of law firm Marshall Diel & Myers Limited ("MDM").

3. Having heard the submissions of Counsel for the Defendant and the Plaintiff, who appeared as a litigant in person, I reserved my Ruling which I now provide together with the reasons set out below.

The Plaintiff's Underlying Claim and the First Strike-Out Ruling:

4. The originating document in these proceedings was entitled[1] a 'Generally' Endorsed Writ of Summons (the "Writ") which was first filed on 31 May 2016. The Writ was amended on 23 August 2016 (the "Amended Writ") and the Plaintiff subsequently filed a Re-Amended 'Generally' Endorsed Writ of Summons (the "Re-Amended Writ") dated 26 January 2017.

5. On the basic facts pleaded, the Plaintiff was employed by the Defendant hotel where he worked as a bartender for a period shortly exceeding 10 years. By written notice, dated 17 December 2015, the Defendant was summarily dismissed from his employment. The Defendant's case is that the Plaintiff' was terminated from his employment on account of serious misconduct as stated in the written termination notice given to him. However, the Plaintiff contends that factors constituting unlawful discrimination were the true motivation for his termination.

[1] As pointed out by the Defendant's law firm, the Generally Endorsed Writ took the form of a Specially Indorsed Writ as it included a Statement of Claim

6. This is the second strike out application in these proceedings. The first strike out application was heard before me over 8 years ago on 26 and 31 October 2017 when I was the Registrar of the Supreme Court, sitting with the powers of a Judge in Chambers. The first strike-out ruling is reported in *D Tucker v Hamilton Properties Ltd.* [2017] SC (Bda) 110 Civ (11 December 2017).

7. As set out in my previous Ruling, the causes of action originally pleaded in the Writ were as follows:

   (i) Breach of employment contract;
   (ii) Unfair dismissal and wrongful dismissal;
   (iii) Unlawful discrimination by reason of age and disability;
   (iv) Unlawful discrimination by reason of place of origin;
   (v) Unlawful discrimination by reason of trade union affiliation; and
   (vi) Breach of freedom of association

8. Following the first strike-out ruling, which was upheld on appeal, various of the claims for breach of contract survived as did the claim for unlawful discrimination by reason of place of origin and trade union affililation. As for the claim for breach of the Plaintiff's right to freedom of association, I found that it was curable by amendment so to substitute the claim with a discrimination claim.

9. Notwithstanding the Court's grant of leave to amend, no subsequent amendments to the claim were ever made by the Plaintiff.

The Present Strike-Out Application

10. It is the Defendant's position that the Plaintiff's claim should be struck out as an abuse of process pursuant to the Court's inherent jurisdiction or pursuant to the Court's statutory powers under RSC Order 18/9 (1)(d) which provides:

18/19 Striking out pleading and indorsements
19 (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

(a) it discloses no reasonable cause of action or defence, as the case may be; or (b) it is scandalous, frivolous or vexatious; or
(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) ***it is otherwise an abuse of the process of the court****;*
and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

11. The Defendant's application is rooted in the delay caused by the Plaintiff. Counsel for the Defendant, Mr. Jordan Knight, submitted that for no less than the last six years, since 1 November 2018, the Plaintiff has failed to take any material step to prosecute his claim. He pointed out that if the Plaintiff issued fresh proceedings, the claim would be time-barred.

12. On Mr. Knight's submissions, the delay occasioned by the Plaintiff is contumelious and / or inordinate and inexcusable. On the arguments advanced by Mr. Knight, this has caused the Defendant real prejudice and has deprived the Defendant of its constitutional right to a fair trial within a reasonable timeframe.

Objections to the Strike-Out Application

13. The Plaintiff, having belatedly sworn affidavit evidence in opposition to the present application, made two primary points.

14. Firstly, between 2015 and 2025, the Plaintiff's evidence is that he suffered a grave illness which obstructed him from securing and or maintaining gainful income. While he has now recovered from his medical issues, he finds himself in real financial debt, having leaned on loan assistance for the purpose of his health treatments.

15. Secondly, the Plaintiff asked the Court to take notice of his financial inability to secure ongoing legal representation. At the outset of these proceedings, he was represented by Ms. Sara Tucker of Trott & Duncan Limited ("T&D"). On account of his inability to satisfy T&D's outstanding legal fees, T&D withdrew their services, and the Plaintiff sought alternative legal assistance from law firm Marshall Diel & Myers Limited ("MDM").

16. At the initial stage of his relationship with MDM, the Plaintiff was assisted by Mr. John Hindess who took steps to secure the Plaintiff's file from T&D who had retained the Plaintiff's file due to non-payment of their outstanding legal fees. Eventually, the file was released to facilitate the Plaintiff's efforts to recover the costs awarded against the Defendant by the Court of Appeal in respect of the first strike out application. That award, however, was insufficient to satisfy the whole of T&D's and MDM's fees. Notwithstanding, the Plaintiff received assistance from Mr. Saul Dismont in commencing separate civil proceedings seeking an order of the Court to approve a contingency fee arrangement. However, no such order was granted in those proceedings.

17. In summary, the Plaintiff's position is that he has been unable to effectively prosecute this claim due to serious health and financial struggle.

Relevant Legal Principles

18. Although no hardcopy reports of previous case law were produced for the Court, Mr. Knight cited four authorities in his written submissions, all of which were previous cases from this jurisdiction of Court. Each of those decisions were delivered by the learned former Hon. Chief Justice, Mr. Ian Kawaley. The cited cases are as follows:

    1) *Re Burrows* [2005] Bda LR 77
    2) *Hofer v The Bermuda Hospitals Board* [2015] Sc (Bda) 55 Civ
    3) *Mermaid Beach and Racquet Club Ltd v Donald Morris* [2004] Bda LR 49
    4) *Bailey v Wm E Meyer & Company Ltd [2017]* Bda LR 5

19. I have had careful regard to these decisions and refer to each of them further below. As the Plaintiff in this matter objected to the application without the benefit of legal representation, I expanded my review to the full scope of the Bermuda case law in addition to English case law and authority from the Grand Court jurisdiction in the Cayman Islands.

The Court's Inherent Power and Duty to Safeguard against Abuses of Process

20. The Court's inherent jurisdiction not only empowers it but also obliges it to safeguard against conduct which would otherwise malign the overall fairness and integrity of its proceedings. The Court acts as its own gatekeeper and is expected to expel from its arena any abuse which, if left undisturbed, would plunge its repute deep into the scrutiny of the reasonable-minded observer.

21. In *Hunter v Chief Constable* [1982] AC 529 at para [536 C] Lord Diplock put it this way:

    "*It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied…*"

Delay alone will not suffice to establish Abuse of Process

22. It is now widely accepted that delay alone, even inordinate and inexcusable delay, will not suffice to establish an abuse of process in civil proceedings. It is the combination of delay and another relevant factor, such as contumelious litigation conduct, or serious prejudice compromising the fairness of the pending trial proceedings, which would give rise to an abuse of process.

23. In *Birkett v James* [1977] 2 All E.R. 801, the House of Lords envisaged that delay aggravated by disobedience to a previous peremptory order (otherwise termed an "Unless Order") would adequately meet the threshold for dismissal. What is implicitly clear is that the reference to disobedience is intended to denote wilful disobedience meeting what has been long labeled contumelious delay. Lord Diplock's statement of the principle was as follows:

"*Although the rules of the Supreme Court contain express provision for ordering actions to be dismissed for failure by the plaintiff to comply timeously with some of the more important steps in the preparation of an action for trial, such as delivering the statement of claim, taking out a summons for direction and setting the action down for trial, dilatory tactics had been encouraged by the practice that had grown up for many years prior to 1967 of not applying to dismiss an action for want of prosecution, except upon disobedience to a previous peremptory order that the action should be dismissed unless the plaintiff took within a specified additional time the step on which he had defaulted.*"

24. The decision in *Icebird Ltd v Alicia P. Winegardner* [2009] UKPC 24 was an appeal from the Court of Appeal of Bahamas in which the underlying action was a claim for an injunction to restrain interference with an easement. The Privy Council was ultimately concerned with the question as to whether the plaintiff's delay constituted an abuse of process. Lord Diplock stated:

"*7. Their Lordships respectfully concur in the approach taken by the House in Grovit v Doctor. There had been over two years delay when nothing had been done to prosecute the action. This was because the plaintiff had "literally no interest in actively pursuing this litigation". The deputy judge had so found on the evidence. As Lord Woolf noted, delay in prosecuting an action and abuse of process are separate and distinct grounds on which an application to strike-out the action may be made but may sometimes overlap. Want of prosecution for an inordinate and inexcusable period may justify a striking-out order but "if there is an abuse of process, it is not strictly necessary to establish want of prosecution." (647H). Where, however, there is nothing to justify a strike-out order other*

than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorising the delay as an abuse of process without clarity as to what it is that has transformed the delay into an abuse and, where necessary, evidential support. In Grovit v Doctor the added factor was the judge's finding, made on the evidence, that the plaintiff had lost interest in the libel proceedings he had commenced and had no intention of prosecuting them to judgment. No comparable finding had been made by Lyons J in the present case and the evidential basis for any comparable finding is not apparent to their Lordships.

8. Birkett v James [1978] AC 297 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied –

"... either (1) that the default has been intentional and contumelious e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse of the court, or (2)(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) 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 to have caused serious prejudice to the defendants either as between themselves and the plaintiff or between them and a third party" (per Lord Diplock at 318).

The present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible? This was a ground relied on in the respondent's summons and, although not the basis of the respondent's success before Lyons J or before the Court of Appeal, their Lordships think it right to consider whether this might be so."

25. Allowing the appeal, the Privy Council found that Lyons J ought to have made an Unless Order issuing the necessary directions for the prosecution of the action instead of having dismissed the action at first instance. Ultimately, the delay in the prosecution of the action did not deprive the parties of the prospect of a fair trial of any of the issues.

26. In *Sandcroft v Reliable Industries Ltd* [2019] 1 CILR 77 Williams J was concerned with the issue of delay as the basis for an application to stay the proceedings as an abuse of process for a want of prosecution. Adopting the alternative approach to dismissal of the proceedings,

the Cayman Islands Grand Court judge instead issued active case management directions under the warning of an Unless Order. At paras [22]-[23] and [25] he held:

"*22The courts should strive to achieve greater control over delay. A court may make unless orders with the effect that an action may be struck out unless certain steps are taken by a specified time. This will place the onus on P to justify her continuing with the action, if she fails to diligently progress the action. This is consistent with the court's obligation under the overriding objective. Although we do not operate under rules similar to the Civil Procedure Rules used in England and Wales, I note the observation made by May, L.J. in Purdy v. Cambran (6), when he said ([2000] C.P. Rep. 67, at para. 46):*

"The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim."

23 What is extraordinary in this case is that one would expect P to be the one who is most anxious to get this matter disposed of either by settlement or a trial. I am satisfied, due to the approach being taken hitherto by P, that this is a case which I must actively case manage. A part of that management is to make directions which will make clear the requirement for P to diligently pursue the action and what the consequences will likely be if she fails to do so…

…

25 The orders that I have made in this judgment are designed to move this case forward in a manner consistent with the overriding objective. Inordinate and inexcusable delay alone may not amount to abuse of process. However, it may do so if it involves a wholesale disregard for the rules of court and court orders with full awareness of the consequences; see Habib Bank Ltd. v. Jaffer (5) ([2000] C.P.L.R. 438, at para. 10 (per Nourse, L.J.)). P would be well advised to ensure full compliance. P's attorney must provide their client with a copy of this transcript so that she can be left in no doubt about the likely consequence of her hereafter failing to properly pursue her claim, especially as the limitation period has passed."

Want of Prosecution: Delay and Other Factors which constitute an Abuse of Process

Want of Prosecution

27. In civil proceedings, the success of an application for want of prosecution is dependent on a proven case of abuse of process. As explained above, delay alone will not give rise to an abuse of process. However, if the delay is of a contumelious nature, the Court may have cause to strike out the claim on the grounds of abuse of process. In the absence of contumelious delay, the Court will be concerned as to whether the delay is in fact inexcusable and inordinate. If so, the applicant (usually a defendant) will also be required to establish that the delay has caused prejudice of such kind and to such extent that it deprives the defendant of the opportunity for a fair trial. (See *Mermaid Beach and Racquet Club Ltd v Donald Morris* [2004] Bda LR 49, per Kawaley J).

Contumelious Delay

28. Contumelious delay by a plaintiff may give rise to an abuse of process, especially when there has been protracted delay. The term contumelious, ancient as its origins are, denotes disdainful and contemptuous conduct. In a general sense, delay of a contumelious nature is willful and errant. Its threshold exceeds mere error; contumelious conduct in ordinary parlance engages a real level of mischief, insolence and spiteful intention.

29. In the context of civil litigation, contumelious delay applies to litigation in which there is deliberate and protracted delay caused by a litigant who has no sincere intention to bring the litigation to completion. It is also established by a litigant's refusal or blatant disregard of Court Orders. This is especially so for litigants who inexcusably disobey any one or more peremptory orders having been expressly warned by the Court of the likely consequences of failure to comply.

30. It is not necessary to prove inordinate and inexcusable delay in order to establish an abuse of process once the litigation conduct is shown to be contumelious. That said, previous Bermuda and English case law suggests that the Court may deem a series of separate delays which are both inordinate and inexcusable as contumelious, where the litigant does so knowingly. This will obviously depend on the full circumstances of the case. Be that as it may, a finding of contumelious delay in circumstances where no fair criticism can be made that the litigant has flagrantly or abusively ignored the rules of Court or directions specifically issued by the Court is relatively unusual.

31. In *Grovit* v. *Doctor* [1997] 2 All E.R. 417 Lord Woolf pointed out that contumelious delay on its own is capable of founding a dismissal for abuse of process, whether or not want of prosecution is also established. Lord Woolf said:

"*...This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v. James [1978] A. C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*"

32. These principles, settled by both the House of Lords in *Grovit* and the Privy Council in *Icebird,* are binding and have been followed in many subsequent cases decided in other Commonwealth and English common law jurisdictions.

33. The subject of contumelious delay is addressed in a 19 March 2025 Mondaq publication of a thought-provoking article entitled "*Don't Let Sleeping Dogs Lie: Intentional Delay and Contumelious Conduct in Civil Litigation*" written by Mr. Erik Penz and Ms. Laura Williamson of Bermuda law firm Kennedys Law LLP. The authors of the article (perhaps errantly) considered the case of *HSBC v Vigilante et al* [2024] SC (Bda) 74 to be the first reported civil case in Bermuda in which the Court struck out a claim on the grounds of contumelious conduct. In that case Mr. Christopher Trott filed a summons application to strike out the third-party notice which had been issued against him. The application was grounded on delay caused by the second defendant, Mr. Mark Pettingill. The basis for the application is described in the Ruling of Wheatley A/J as follows:

"…
a) The Second Defendant caused the third party proceedings to go to sleep for nine and one-half years and his failure to observe the Third Party's rights as a third party amounts to abuse of process, for which the Third Party has suffered prejudice and for which the court shall strike out the Third Party Notice;

b) The Second Defendant's delay was contumelious as it was an intentional decision "to let sleeping dogs lie" in the face of the progress of the main action, and therefore the court should exercise its discretion to dismiss the third-party proceedings for want of prosecution;

c) Even if the delay was not intentional, it was inordinate and inexcusable, and there is both serious prejudice and a substantial risk that a fair trial would be impossible such that the third-party proceedings should be dismissed for what the prosecution; and

d) The Second Defendant's inordinate and inexcusable delay was in complete disregard of the Rules of the Supreme Court 1985 (the RSC) and with full awareness of the consequences, such that it can properly be regarded as both an abuse of process of the court and contumelious conduct."

34. Mr. Penz, appearing on behalf of Mr. Trott, argued that the Second Defendant's delay of 9½ years in pursuing the Third Party Notice was contumelious because he intentionally decided "*to let sleeping dogs lie*". He relied on the set of previous Bermuda law cases handed down by Kawaley CJ which were also cited by Mr. Knight in the present case.

35. Mr. Pettingill was represented by Mr. Grant Spurling of law firm Chancery Legal. Mr. Spurling argued that the principles endorsed in the previous Bermuda case law cited applied only to contumelious delay caused by a plaintiff against a defendant, as opposed to delay between a defendant and a third party. That proposition was flatly rejected by the Court. On the final findings of the Court, Wheatley A/J held at paras [26]-[27] and [29]:

"*26. …The Second Defendant explicitly accepted that he "let sleeping dogs lie" when it came to the Third Party. Indeed, the Second Defendant failed to notify the Third Party that directions had been issued for trial and thereafter listed for a five-day trial in November 2022. This, along with the findings in the Ruling that HSBC had not caused delay in progressing these proceedings, it is evident that the Second Defendant's failure to take any action against the Third Party for a period of 9½ years was intentional.*

27. Moreover, the Second Defendant did not provide any satisfactory explanation for the extraordinary delay in taking the necessary steps against the Third Party other than to erroneously place blame for such at the feet of HSBC. This is plainly wrong.

…

29. In light of the findings, the Third Party Notice is hereby struck out for want of prosecution. This is based on the Second Defendant's contumelious delay by waiting 9½ years until attempting to proceed against the Third Party which amounts to an abuse of process."

36. Prior to the case of *HSBC v Vigilante et al.* the issue of contumelious delay was put before Kawaley CJ in *Hofer v The Bermuda Hospitals Board*[2] [2015] Sc (Bda) 55 Civ. In that case the period of delay had run for some 18 years after the prosecution of the claim was halted by reason of the plaintiff's lack of funds.

37. On the background facts, the plaintiff, Mr. Thomas Hofer, had been admitted as an in-patient to the mental health facility then known as St. Brendan's Hospital. Mr. Hofer suffered from a paranoid psychiatric illness. On 12 February 1994 he sustained a serious injury while he was under the care of the facility. The injury resulted in the fracture of Mr. Hofer's spine, rendering him an incapacitated quadriplegic. He was subsequently transferred to his native country in Germany on 24 April 1994.

38. On 14 January 1997 Ms. Anna Hofer, as his next friend, issued proceedings in Bermuda. The defendants entered an appearance on 16 February 1998 and served their Defence on 28 July 1999. On 22 April 2008 the defendants issued the first summons application to strike out the action for want of prosecution in respect of the period between January 1997 until 2008. Resisting the application, the Plaintiff's then counsel, Mr Michael Scott, swore an affidavit dated the 8 May 2008, pleading for Mr. Hofer to be given a chance to pursue his claim. The application was argued before Bell J (as he then was) who struck out the action, having declined to impose any unless orders.

39. The dismissal ordered by Bell J was successfully appealed and set aside by a majority of the Court. Evans JA delivered the majority judgment with which Zacca P was agreed (see *Hofer v The Bermuda Hospitals Board* BM 2010 CA 5). The appeal was argued by Mr. Larry Mussenden (as he then was), thereby replacing Mr. Scott who had moved on to occupy an elected public office. Notwithstanding the finding of the Court that the period of delay was indeed inordinate and inexcusable, the appeal was allowed on the basis that no serious or substantial prejudice to the Defendant had been established. The Court did not consider that fading memories of witnesses was an issue in this case as detailed records, reports and simultaneous witness statements had been prepared from which memory refreshing was available. At paras [41]-[42] of the judgment, Evans JA said:

"*41. This was not a motor accident or similar case, where the recollections of bystanders or even the parties themselves may fade or become unreliable with the passage of time, though that risk is reduced if the evidence is recorded at or shortly after the event. Even in such cases, there has been some judicial discussion, and difference of opinion, as to whether the process is as pronounced after an initial period of, say, three years (see the citations in Slade*

[2] The authors of "*Don't Let Sleeping Dogs Lie: Intentional Delay and Contumelious Conduct in Civil Litigation*" did not refer to Kawaley CJ's decision in Hofer v Bermuda Hospitals Board, a decision which pre-dated the *HSBC v Vigilante et al* case.

v. Adco Ltd. passim). But here, the issue of liability turns on a specific event, of a horrifying nature (Mrs. Dillas Wright's report refers to the "horrible sound" made when the plaintiff fell to the floor), and the evidence of Mr. Bentham and Mr. McQueen in particular was recorded soon after the event when it was fresh in their minds.

42. In my judgment, the defendants fail to establish in the present case 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."

40. In the dissenting judgment of the Court, Stuart-Smith JA found the delay attributable to Mr. Scott's conduct of the case to be "scandalous" and "astonishing" particularly because the defendant had been warned that an application to strike out for want of prosecution would be made if the matter did not progress. At para [3] of Stuart-Smith JA's dissenting judgment, he said:

"3. *Be it that as it may, it is now well established that mere delay, in the absence of contumelious conduct, and none as alleged here, is not sufficient to justify striking out. The delay must be such that there is a serious risk that a fair trial cannot be had or that the defendant has suffered serious prejudice as a result of the culpable delay*."

41. Stuart-Smith JA went on to find the Defendant would suffer prejudice from being forced to defend proceedings. In the concluding paragraph he stated:

"*22. For these reasons I have come to the clear conclusion that if the Court is to exercise its discretion afresh, we should hold that the defendants have suffered serious prejudice through the inordinate unconscionable delay of the claimant's legal advisors and there is a serious risk that it is no longer possible to have a fair trial and therefore I would dismiss the appeal*."

42. The matter was remitted to the Supreme Court. At paras [21]-[22 Kawaley CJ stated:

"*21. Again it is self-evident that this Order envisaged that, the case having narrowly survived a strike out application which was granted at first instance and only set aside by majority in the Court of Appeal, would be pursued with due diligence. To the best of my recollection there was no indication given to the Court when the matter came before it on the 12th August that there was any need for some special dispensation to be given to the Plaintiff with respect to this timetable because of funding difficulties.*

22. Be that as it may the record shows that the timetable fixed by the Court was simply ignored and no attempt was made to come back before the Court to seek the Court's

indulgence with a view to fixing a new timetable or indeed to seek any further assistance with bringing the case forward."

43. As observed in Kawaley CJ's decision, other out-of Court factors contributed to the delay which continued after the matter returned to this jurisdiction of Court. Preparatory efforts were made by Mr. Mussenden to obtain Mr. Hofer's medical reports and the defendant hospital records. Further, the progress of the case was impeded by the decision of the Legal Aid Committee to defer Mr. Hofer's application for full funding.

44. By Summons dated 5 March 2015, the defendant hospital filed a second summons application for the claim to be struck out in its entirety pursuant to the inherent jurisdiction of the Court to dismiss the action for want of prosecution and pursuant to RSC Order 18 Rule 19(d) (and or the Court's inherent jurisdiction) to strike out the proceedings as an abuse of the Court's processes.

45. Mr. Alan Doughy, Counsel for the defendant hospital, submitted that the Plaintiff's prosecution of the claim amounted to contumelious conduct, given the background of inordinate and inexcusable delay caused by the conduct of Mr. Hofer's claim and Mr. Hofer's narrow escape from the first strike out application.

46. At paras [35]-[36] and [39] Kawaley CJ quoted from two decisions of the English Court of Appeal addressing the legal principles relevant to contumelious conduct:

"*35. The next legal area that Mr Doughty's submissions addressed was the area relating to what amounts to contumelious conduct and in that respect he referred to, amongst other passages, the observations of Parker LJ in Culbert v Steven G Westwell & Co Ltd UNK [1993] 1 PIQR P54 where the following statement appears (at page 65):*

'An action may also be struck-out for contumelious conduct or abuse of the process of the Court or because a fair trial in the action is no longer possible. Conduct is in the ordinary way only regarded as contumelious where there has been a deliberate failure to comply with a specific order of the court. In my view however, a series of separate inordinate inexcusable delays in complete disregard of the rules of Court and with full awareness of the consequences can also be properly regarded as contumelious conduct or, if not that, to an abuse of the process of the Court.'

36. In addition, he referred to the observation of Nourse LJ in Choraria v Sethia [1998] CLC 625 where this was said (at page 630):

'The law as it applies to this case may therefore be stated thus. Although inordinate and inexcusable delay alone, however great, does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will, of the rules of Court with full awareness of the consequences is capable of amounting to such an abuse, so that, if it is fair to do so, the action will be struck out or dismissed on that ground. With regard to the facts of this case, I would add that a disregard of a non-peremptory Order must, if anything, be a fortiori to a disregard of the rules.'

…

39. Finally, I am assisted by the following observations of Nourse LJ in Choraria v Sethia [1998] CLC 625, in another case where the claim had survived an earlier strike-out application, Nourse LJ (at 632) said this:

'In my judgment the Plaintiff failure to comply with the order to set down for over a year after he had survived the first application to strike out was, at the least, a piece of breath-taking insouciance. Combining it with all the previous defaults, especially his failing to comply with two orders for interrogatories, I think that he acted in a wholesale disregard of his obligations under the rules and orders of the court, the first application to strike-out having made him fully aware of the consequences of his conduct.'

47. Shifting the Court's focus from Mr Doughty's reliance on technical and procedural breaches of various rules, Kawaley CJ considered the broad complaint to be about the plaintiff ignoring the non-peremptory Order setting out trial directions which had been made in 2010. Citing *Choraria*, Kawaley CJ found that such non-compliance was capable of meeting the contumelious threshold, failing which, it qualified as an abuse of process.

48. In the concluding passages of his ruling, Kawaley CJ held:

"*50. Here one is not dealing with a final order, but the governing rationale behind the jurisdiction to strike out for want of prosecution and the parallel jurisdiction to strike out for abuse of process is the principle that justice delayed is often justice denied. And looked at more narrowly, although a plaintiff has a right of access to the Court as Mr Doughty was very keen to point out, a defendant has a corresponding right to have the matter brought against him resolved within a reasonable time.*

51. In all the circumstances of the present case it seems to me that, to put it bluntly, enough is enough. It cannot be right that plaintiffs should be able to hold defendants over a barrel, so to speak, for the period time that this action has occupied: namely, the writ was issued on the 30th January 1997, which is now approximately 18 1/2 years ago. And today we are not, in my judgment, realistically close to trial.

52. In my judgment, looking at the matter broadly, the present proceedings have been brought in a way which constitutes an abuse of the process of the Court. I would not base my decision that this claim must be struck out on the alternative ground that there is substantial, or not insignificant, prejudice to the Defendant, because it seems to me that there is no need to analyse what is a somewhat difficult issue, particularly in light of the judgment of the Court of Appeal in this matter, albeit five years ago.

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. And in saying that it is important for me to also clarify that this is an objective analysis that does not involve any criticism of the Plaintiff's present or past attorneys. I accept 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."

49. At para [52] of Kawaley CJ's ruling in *Hofer v Bermuda Hospitals Board* he was expressly clear in stating that he did not strike out the claim on the alternative ground of prejudice to the defendant occasioned by inordinate and inexcusable delay. By implication, so it seems to me, Kawaley CJ found that the delay amounted to an abuse of process because it was contumelious.

Inordinate and Inexcusable Delay

50. In the absence of contumelious delay, the Court will move on to consider whether and to what extent the delay is otherwise inordinate and inexcusable.

Use of the Limitation Period as a Measuring Stick for Inordinate Delay

51. A most concise illustration of the relevance of the limitation period in actions where there is a plea for dismissal for want of prosecution or abuse of process may be found in the below statement made by Lord Denning M.R. in *Instrumatic Ltd. v. Supabrase Ltd.* [1969] 1 W.L.R. 519, at [522F]:

"*The period of limitation is six years. It has not run. If this action were dismissed, the plaintiffs could start another action tomorrow. So what good is it to dismiss the claim for want of prosecution*?"

52. As pointed out by Edmund-Davies LJ in a concurring judgment of the House of Lords in *Birkett v James*, Lord Denning, three days after having handed down the decision in *Austin Securities Ltd. v. Northgate & English Stores Ltd.* [1969] 1 W.L.R. 529, said at [533G]:

"*But I would not place too much emphasis on this point. If it were a proper case for dismissing for want of prosecution, I would not hesitate to strike it out, even though another action could be brought straight away*."

53. This gear shift is said to have kickstarted a new trend of judicial opinion which perhaps accounts for the varying views on the degree of relevance and importance a non-expiry of the limitation period has to applications for dismissal founded on delay amounting to abuse.

54. In the leading judgment of the Court, Lord Diplock in *Birkett v James* cited the judgment of Cairns L.J. in *Department of Health & Social Security v. Ereira* [1973] 3 All E.R. 421 at 423, as an example of a prevailing view that the Court has no power to strike out a freshly issued writ in a new action brought within the limitation period, notwithstanding that the writ in the previous action was dismissed for inordinate and excusable delay which prejudiced the defendant and the fairness of the formerly issued proceedings. Lord Diplock explained:

"*There appears, however, to be no similar consensus upon what weight is to be given to the fact that a fresh writ may be issued in deciding whether or not to dismiss the existing action. By some Lords Justices it has been suggested that great importance ought to be attached to it. Others consider that it is of little, if any, relevance—as did Cobbs J. and the Court of Appeal in the instant case.*

For my part, for reasons that I have already stated, I am of opinion that the fact that the limitation period has not yet expired must always be a matter of great weight in determining whether to exercise the discretion to dismiss an action for want of prosecution where no question of contumelious default on the part of the plaintiff is involved; and in cases where it is likely that if the action were dismissed the plaintiff would avail himself of his legal right to issue a fresh writ, the non-expiry of the limitation period is generally a conclusive reason for not dismissing the action that is already pending."

55. Salmon LJ, delivering a concurring judgment in the House of Lords' decision in *Birkett v James,* agreed that the Court is powerless to strike out a writ subsequently issued within the limitation period for the same cause of action. He further opined that the dismissal of the first action without any decision on the merits could not be caught by the doctrine of *res judicata*. He reasoned that nothing in the law would have stopped a plaintiff from delaying the issuance of the first writ until the very last day of the limitation period. From that

perspective, one can see that a defendant would have been in no better position than if the first action had never been brought. Salmon LJ said:

"*Indeed his position would have been worse because the first action at least gave him some information concerning the plaintiff's claim which he would not otherwise have obtained until after the issue of the second writ. In my view, the second action could not be dismissed as an abuse of the process of the court whatever inexcusable delay there may have been in the conduct of the first action*…."

56. In agreement, Edmund-Davies LJ said:

Your Lordships were told that Spring Grove Services Ltd. v. Deane is generally regarded as authority for the proposition that a second writ, asserting the same claim as that made in an earlier writ struck out for want of prosecution, can in its turn be struck out as being necessarily an abuse of the process of the court even though issued within the limitation period. If that, indeed, is what the case decides, I have to say that in my respectful judgment it was wrong..."

Delay must cause serious prejudice to the Defendant, rendering a fair trial impossible

57. The question of resulting prejudice arose in the judgment of Kawaley J in *Re Burrows* [2005] Bda LR 77. In that case the applicant (the "Applicant"), commenced proceedings before the Court by an Originating Summons seeking constitutional redress pursuant to section 15 of the Constitution. The action made complaint of a 4 ½ year delay in proceedings against him before the Human Rights Commission ("HRC").

58. On 16 June 1998 Stephany Burrows complained to the HRC that the Applicant had committed an act of sexual discrimination against her two weeks prior, on 2 June 1998. Ms. Burrows had been dismissed summarily for an alleged inappropriate relationship, a penalty which, according to her complaint, proved to be more severe than that given to male colleague who had engaged in similar conduct.

59. The HRC found merit in the complaint against the Applicant, notwithstanding its receipt of a 24 June 1998 letter from Major Goulding to the HRC setting out the Applicant's denial of the discrimination claim and its plea for the HRC to refrain from referring the complaint to the Minister in light of the compensation paid to Ms. Burrows in settlement of her civil claim. Notwithstanding, the HRC forwarded Ms. Burrow's complaint to the Minister in June 1999 after the Applicant refused to settle the complaint or accept the HRC's investigative findings. The Applicant's position had been set out in a letter dated 6 May 1999.

60. By 24 September 1999 the Minister had promptly appointed a Board of Inquiry (the "BOI"). However, the period of delay which ensued thereafter triggered the Applicant's constitutional complaint before the Court. The BOI made an unsuccessful attempt to schedule a preliminary hearing in February 2000 and for the subsequent near-four year period which followed, the matter was no further advanced, notwithstanding (i) a 6 July 2000 letter written by the Applicant to the Ministry stating the Applicant's presumption that the HRC Complaint was no longer being pursued and (ii) an August 2000 telephone confirmation by the HRC's Executive Officer that the complaint was 'still alive'. However, it was not until December 2003 that the BOI made a further effort to fix a date for a preliminary hearing, at which point the Applicant gave notice of its intention to raise the delay complaint.

61. In advancing the constitutional complaint before Kawaley J, the applicant relied on the 4 ½ year delay period which lapsed between its 6 May 1999 letter and December 2003. On the constitutional claim the Applicant asserted that he had suffered prejudice and excessive delay which amounted to a breach of his constitutional right to a fair trial within a reasonable timeframe under section 6 of the Constitution.

62. Pointing out an example as to why it was that a fair trial was no longer possible, the Applicant complained that Major Goulding, the senior executive who terminated Ms. Burrow's employment, was no longer of competent mind to give evidence. While the Applicant conceded that Ms. Burrows was not to blame for the delay occasioned by the BOI the Court was asked to factor into consideration that she had already been compensated in the settlement of her civil claim and that she had received free legal assistance for her HRC complaint. The Applicant also pointed out that there was a lack of any indication as to what additional relief she was seeking over and above the settlement monies she had received. By way of relief, the Applicant sought injunctive relief to permanently restrain the BOI from proceeding with the hearing.

63. Reserving the independence between the Minister and the BOI, Crown Counsel for the Minister was reluctant to address the substantive complaint. However, Crown Counsel did point out that the Applicant could have proceeded by way of judicial review seeking an order of mandamus to compel the BOI to proceed.

64. However, on this point Kawaley J determined that the BOI was not empowered to grant any relief for the delay which had ensued. That being the case, it would have only been open to the Applicant to obtain an order of mandamus compelling the BOI to proceed after the delay had already occurred because such relief could only be granted if a statutory tribunal was breaching its statutory powers by failing to deal with a complaint in an expeditious manner.

65. The BOI had its own legal representation before the Court. Counsel for the BOI, in response to the Applicant's complaint about the impact of Major Goulding's absence on the fairness of a trial, argued that Mr. Bascombe was present at the meeting which resulted in the complainant's summary dismissal. The submission made on behalf of the BOI was that Mr. Bascombe was virtually a partner of Major Goulding making him quite capable of explaining the rationale behind the dismissal. Counsel also argued that Ms. Burrow's case was arguable and that she had a right to recover damages for 'injury to feelings' under section 20A(2) of the Human Rights Act 1981.

66. Citing the English High Court decision in *Audergon v La Baguette Ltd.* [Unreported], Crown Counsel submitted that delay could only be complained of if it prejudiced the outcome of the case. However, Kawaley J found that Major Goulding's unavailability, caused by the delay, seriously prejudiced the Applicant's ability to defend itself before the BOI. Kawaley J recognized that a breach of the right to a hearing within a reasonable time could not automatically entitle a party to a permanent stay. Relying on the House of Lords decision in *A-G's Reference (No. 2 of 2001)* ELR [2004] 2 A C 72 at para [53] Kawaley J said:

"*53. The Privy Council in Dyer v Watson left open the question of whether, if a delay complaint was upheld before trial, the proceedings should be or need not be automatically be stayed. A distinguished majority (Lord Bingham, Lord Nicholls, Lord Steyn, Lord Hoffman, Lord Hobhouse and Lord Millet) of the House of Lords in A-G's Reference (No. 2 of 2001) ELR [2004] 2 A C 72 decided that unless the effect of the delay was to compromise the fairness of the pending trial, the applicant was not entitled to a permanent stay of the delayed trial. A clear minority (Lord Hope and Lord Rodger) felt that once an infringement of article 6(1) was established on grounds of unreasonable delay, no lawful trial could subsequently take place. This decision, on appeal from the High Court of Justiciary under the Scotland Act, was handed down on January 29, 2002*."

67. It was because the delay had caused real prejudice to the fairness of the hearing in *Re Burrows*, that Kawaley J accepted that a stay would be justified. So, against that background, the Court declared that the continuance of the BOI proceedings would breach the Applicant's constitutional right to a fair hearing within a reasonable time. Accordingly, an order of stay of the BOI proceedings was granted.

68. Kawaley J's reasoning in *Re Burrows* was consistent with the House of Lords' reasoning in *Birkett v James*. In the concluding portion of Salmon LJ's concurring judgment, he said:

"*I entirely agree with my noble and learned friend Lord Diplock that William C. Parker Ltd. v. F. J. Ham & Son Ltd. [1972] 1 W.L.R. 1583 was correctly decided. When a defendant is seriously prejudiced (as he often is) by a writ being issued long after the cause of action has*

accrued, before the action can be dismissed for want of prosecution, (a) the delay subsequent to the issue of the writ must fail to comply with the time table laid down in the rules: (b) it must be inordinate and inexcusable; (c) in deciding whether it is, the delay prior to the issue of the writ should be taken into consideration, and (d) the delay after the issue of the writ must increase the prejudice already suffered by the defendant in that he must be worse off than he would have been but for that delay" [my emphasis].

69. The English Court of Appeal in *Allen v. Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229; [1968] 1 All E.R. 543 settled the established principles of common law relating to the Court's jurisdiction to dismiss a civil action for want of prosecution. These principles were later approved by the House of Lords in *Birkett v James* where Lord Diplock famously stated:

"*The modern practice as to dismissing actions for want of prosecution dates from 1967. By that time the dilatory conduct of proceedings in the High Court by solicitors to plaintiffs whose causes of action would turn upon the reliability of witnesses' recollections of past events had become a scandal, particularly in the case of those who litigated with the help of legal aid. Postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice could not be done. True it is that at the trial the evils of delay would be likely to bear more heavily on the plaintiff on whom the onus would lie of proving that things had happened as he alleged, but the risk that justice would not be done to him extended also to the defendant and, even if successful at the trial, the defendant was likely to be out of pocket for his costs, which in legally aided cases he had little prospect of recovering*."

70. In *Re Burrows* Kawaley J stated that he found the Canadian authorities on delay to be a useful guide but also found that hostility to delay under Bermuda law ought to be greater than that of Canada because the Bermuda Constitution, unlike the Canadian Charter, expressly protects the right to a civil trial before courts and tribunals within a reasonable time. Having considered the decision of the Supreme Court of Canada in *British Columbia Human Rights Commission v Blencoe* [2000] 190 DLR (4th) 513, Kawaley J quoted the following passages of Justice Bastarache's judgment for the majority of the Court:

"*101. In my view, there are appropriate remedies available in the administrative law context to deal with state-caused delay in human rights proceedings. However, delay, without more, will not warrant a stay of proceedings as an abuse of process at common law. Staying proceedings for the mere passage of time would be tantamount to imposing a judicially created limitation period (see: R. v. L. (W.K.), 1991 CanLII 54 (S.C.C.), [1991] 1 S.C.R. 1091, at p. 1100; Akthar v. Canada (Minister of Employment and Immigration),, [1991] 3*

F.C. 32 (C.A.). In the administrative law context, there must be proof of significant prejudice which results from an unacceptable delay.

102. There is no doubt that the principles of natural justice and the duty of fairness are part of every administrative proceeding. Where delay impairs a party's ability to answer the complaint against him or her, because, for example, memories have faded, essential witnesses have died or are unavailable, or evidence has been lost, then administrative delay may be invoked to impugn the validity of the administrative proceedings and provide a remedy (D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at p. 9–67; W. Wade and C. Forsyth, Administrative Law (7th ed. 1994), at pp. 435–36). It is thus accepted that the principles of natural justice and the duty of fairness include the right to a fair hearing and that undue delay in the processing of an administrative proceeding that impairs the fairness of the hearing can be remedied (see, for example, J. M. Evans, H. N. Janisch and D. J. Mullan, Administrative Law: Cases, Text, and Materials(4th ed. 1995), at p. 256; Wade and Forsyth, supra, at pp. 435–36; Nisbett, supra, at p. 756; Canadian Airlines, supra; Ford Motor Co. of Canada v. Ontario (Human Rights Commission)(1995), 24 C.H.R.R. D/464 (Ont. Div. Ct.); Freedman v. College of Physicians & Surgeons (New Brunswick), (1996), 41 Admin. L.R. (2d) 196 (N.B.Q.B.)).

... 115 I would be prepared to recognize that unacceptable delay may amount to an abuse of process in certain circumstances even where the fairness of the hearing has not been compromised. Where inordinate delay has directly caused significant psychological harm to a person, or attached a stigma to a person's reputation, such that the human rights system would be brought into disrepute, such prejudice may be sufficient to constitute an abuse of process. The doctrine of abuse of process is not limited to acts giving rise to an unfair hearing; there may be cases of abuse of process for other than evidentiary reasons brought about by delay. It must however be emphasized that few lengthy delays will meet this threshold. I caution that in cases where there is no prejudice to hearing fairness, the delay must be clearly unacceptable and have directly caused a significant prejudice to amount to an abuse of process. It must be a delay that would, in the circumstances of the case, bring the human rights system into disrepute. The difficult question before us is in deciding what is an 'unacceptable delay' that amounts to an abuse of process."

71. In *Jim Bailey v Wm E Meyer & Co Ltd* the Defendant applied to strike out the Plaintiff's action for want of prosecution, arguing that the inordinate and inexcusable delay (8-10 years of inaction) constituted an abuse of process at paras 12-25.

72. However, the Plaintiff argued that the Defendant should also be held accountable for the delay of proceedings as the Defendant had colluded in the Plaintiff's inaction instead of taking steps to advance the action. The Plaintiff relied on the Overriding Objective under

RSC Order 1A and argued that the pre-CPR authorities on the Court's power to strike out an action for abuse of process onset by delay had thus been displaced. Clarifying the position, Kawaley J explained at para [14]:

"*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*."

Analysis and Findings

73. In this case I am concerned with parallel applications for (i) dismissal of the action for want of prosecution, invoking the Court's common law and inherent jurisdictional powers and (ii) the statutory striking out of the claim as an abuse of process pursuant to RSC Order 18, rule 19(1)(d). The former entails an analysis of the nature and effect of delay and the question as to whether the delay meets the threshold for an abuse of process. The concept of abuse of process under RSC Order 18, rule 19(1)(d), on the other hand, does not necessarily require litigation delay. An abuse of process may be established in the absence of delay. However, as delay is the platform on which the facts of this case stand, it warrants emphasis that delay alone does not suffice to establish an abuse of process. Whichever power the Court is exercising, the legal principle on delay is unchanged. Delay constituting an abuse of process requires the applicant to demonstrate (i) contumelious conduct or (ii) inordinate and excusable delay rendering the prospect of a fair trial impossible.

74. It thus follows that the first question for my determination in this case is whether the delay in this case is contumelious.

Has there been Contumelious Litigation Conduct or Contumelious Delay?

75. It is the Defendant who has brought this application before the Court; so, the burden of establishing contumelious delay against the Plaintiff is on the Defendant. In this case, in order to prove contumelious delay the Defendant must prove at least one of the following:

(i) That the delay caused by the Plaintiff was deliberate and absent of any sincere intention to prosecute the claim and bring the litigation to an end

or

(ii) That the Plaintiff blatantly disregarded the obligation imposed on him by the Court to file a Re-Re-Amended Statement of Claim notwithstanding his knowledge that the prosecution of the claim could not progress without doing so.

76. As noted earlier herein, the Plaintiff has failed to file a Re-Re-Amended Statement of Claim as envisaged by my 2017 Ruling, delivered some 8 years ago. It is not to be overlooked that no order of directions was made by the Court for the filing of a Re-Re-Amended Statement of Claim. Instead leave to amend was simply "granted" by my 2017 Ruling. It is also of note that no subsequent peremptory orders were sought or made against the Plaintiff. However, the passage of 8 years without the filing of an amended pleading can hardly be treated as an oversight. That is because leave to amend was granted in rescue from the first strike out application and also because the Plaintiff's failure to file a Re-Re-Amended Statement of Claim would have had to have been immediately flagged by the Court and or the Defendant once the Plaintiff embarked on any step intended to advance the prosecution of the claim. While it is fair to point out that the basis for the first strike out application was not delay, it is nevertheless the case that the Plaintiff was made well aware of the fact that he could not progress the prosecution of his claims without first filing a Re-Re-Amended Statement of Claim.

77. It is significant, in my judgment, that up until 26 August 2025 when the Plaintiff filed a Notice of Intention to Act in Person, Mr. Tucker was sequentially represented by Counsel of two of Bermuda's most reputable law firms, namely T&D and MDM. Of course, the issue of unpaid and accumulating legal fees would have been a matter of real criticality to Counsel, given the Plaintiff's financial limitations. However, there is no justification in my judgment, having regard to the level of legal assistance and representation provided, for the Plaintiff's failure to make good his pleaded case since December 2017.

78. Having failed to file a Re-Re-Amended Statement of Claim for more than 2.5 years, on 18 August 2023 the Plaintiff filed a summons for directions in aid of his recovery of the costs awarded to him at the close of the interlocutory appeal proceedings. The Plaintiff's summons for directions was drafted without reference to any material steps to be taken to advance the main action. The summons provided:

> "…
> 1. *For directions for the matter to proceed;*
> 2. *For an order that the Plaintiff's previous attorneys, Trott & Duncan, be permitted to represent the Plaintiff for the purposes of taxation in relation to the award of costs in Civil appeal No. 3 of 2018 made by the Court of Appeal on 12 March 2018;*

3. *Such further directions as the Court may think fit; and*
4. *Costs of this application shall be the Plaintiff's*."

79. On the eve of the return date for the summons, Mr. Dismont invited Mr. Knight to agree directions and to delist the summons. The correspondence between the parties on the issue of proposed directions proceeded as follows:

Wednesday 27 September 2023:
Mr. Dismont wrote to Mr. Knight asking; "…*Can we agree some directions to avoid us having to appear tomorrow. Is there anything you specifically require?...*"

Mr. Knight replied; "…*We are still confirming instructions, but it would be helpful to know what directions you were planning to seek in the meantime. We reserve our client's rights entirely*…"

Thursday 28 September 2023 9:14am:
Mr. Dismont wrote to Mr. Knight; "…*Sorry for the delay. Can we agree to delist today while we seek to agree directions. Unfortunately, I was in hospital most of yesterday with my mother. I think it is probably best to first deal with the order for T&D to represent the client in relation to the appeal costs. Once that is dealt with we can move ahead. In light of that perhaps:*

1. *Plaintiff shall file and service [sic] evidence within 14 days,*
2. *Defendant 14 days thereafter,*
3. *Plaintiff shall provide mutually available dates for trial,*
4. *Matter shall be set down for ½ day hearing*
5. *Plaintiff shall file skeleton no less than 10 days before the trial, Defendant shall file no less than 5 days before the trial*
6. *Costs in the cause.*

Let me know, thanks…"

Thursday 28 September 2023 9:29am:

Mr. Knight replied; "…*Propose you write to the Court to request the de-listing, we won't object to it. We are, however, objecting to the order sought re T&D and, and on directions, we are reserving our client's right to bring a strike out application for want of prosecution concerning your client's claim more generally.*

Depending on whether the Court grants your de-listing request, perhaps we can have a call later this morning to discuss next steps."

80. The 2023 correspondence between Mr. Dismont and Mr. Knight and the delisting of the Thursday 28 September 2023 chambers appearance highlights the Plaintiff's sole focus on recovering its interlocutory appeal costs at the expense of the prosecution of the underlying claim. Even after the Plaintiff was warned on 28 September 2023 of a pending second strike-out application against him, he still took no real steps to prosecute the claim. As a holding strategy, the Plaintiff's litigation activity has been limited to the filing of Notices of Intention to Proceed, Notices in respect of his representation in the litigation and steps proposed for his costs recovery from the first strikeout application. Remarkably, during the entire of the period commencing on 1 November 2018 through to 16 March 2025 (when the present application was filed by the Defendant) no real steps were made by the Plaintiff to advance the substantive claim.

81. Notwithstanding the Plaintiff's delinquent litigation activity, I have taken into consideration the fact of the separate civil action taken out on behalf of the Plaintiff seeking leave to enter a contingency fee arrangement with Counsel. That, in my assessment, plausibly illustrates the Plaintiff's desperately ambitious intention to financially ready himself to prosecute the underlying claim. Otherwise put, I would not find in these circumstances that it was or is the Plaintiff's intention to litigate this case without end. For that reason, I am unable to find that the delay caused by the Plaintiff was deliberate and or absent of any sincere intention to prosecute the claim and bring the litigation to completion.

82. The next question is whether the Plaintiff blatantly disregarded the obligation imposed on him by the Court to file a Re-Re-Amended Statement of Claim notwithstanding his knowledge that the prosecution of the claim could not progress without doing so. Further above, I found that there is no justification for the Plaintiff's failure to have filed a Re-Re-Amended Statement of Claim since December 2017, having had regard to the level of legal assistance and representation he was able to secure for the majority of the timespan of this 9-year litigation. In my judgment, the period of delay between 1 November 2018 and 16 March 2025 was knowingly caused by the Plaintiff. Whether this period may be properly characterized as one marathonic delay period or a series of separate delays is of no difference to this case because I have found that the Plaintiff caused the delay knowingly and because for the reasons outlined further below, the delay is both inordinate and inexcusable.

83. For these reasons I am bound to find that the delay constitutes contumelious delay, even if narrowly so, given the absence of any previous peremptory orders.

84. As this is arguably a border-line case of contumelious delay, I have also considered the question of inordinate and inexcusable delay coupled with prejudice against the fairness of a trial.

Has there been Inordinate and Inexcusable Delay?

85. As earlier stated, this is the Defendant's second strike out application. On the first application for the proceedings to be struck out, various claims were dismissed by my Ruling of 11 December 2017. Again, as earlier stated, in the first strike-out Ruling, the Plaintiff was given leave to amend the Re-Amended Statement of Claim and to date, no amendment of the Plaintiff's pleaded case has been filed.

86. On 28 January 2019 a Notice of Change of Attorney was filed on behalf of the Plaintiff, by which MDM replaced T&D. Notwithstanding, no material steps were taken by or on behalf of the Plaintiff to advance the proceedings between 1 November 2018 and 18 May 2023. That resulted in a delay period of more than 4.5 years.

87. On 18 May 2023 the Plaintiff filed a Notice of Intention to Proceed. On 18 August 2023 the Plaintiff filed the summons application for a directions order permitting T&D to represent the Plaintiff for the taxation of the bill of costs arising out of the appeal against my first strike-out Ruling. (I have recited to terms of the Order sought on that summons further above).

88. At this stage, the pleadings had not yet closed as the Plaintiff never amended his pleadings pursuant to my first strike out ruling which had at that point been handed down approximately 5.5 years prior on 11 December 2017. The Plaintiff's proposed directions artificially included a prayer for the matter to proceed. I say 'artificially', because the Plaintiff, by the filing of the summons, was solely interested in recovering his costs incurred as a consequence for the Defendant's challenge to his (the Defendant's) partial escape from the striking out and dismissal of his action. There was no mention, in either the correspondence or the proposed directions, of the outstanding amendments to the Re-Amended Statement of Claim or any other steps to be taken to close the pleadings, nor was there any mention of what might be included in the trial directions.

89. More than a month after the filing of the 18 August 2023 summons, the Plaintiff invited the Defendant to agree directions and to delist the summons. I have quoted from that party to party email correspondence further above.

90. The time which lapsed between 1 November 2018 and 16 March 2025 is 6 years and 4.5 months. The statutory limitation period for an action founded in tort and for an action founded on simple contract is 6 years, pursuant to the provisions of the Limitation Act 1981.

In my judgment, the expiry of the limitation period weighs heavily in the Defendant's favour as it is no longer open to the Plaintiff to reissue fresh proceedings in the event of the dismissal of his claim. Had (i) the statutory limitation period commenced from 12 March 2018 (when the first strike-out application proceedings concluded with the Ruling of the Court of Appeal) and had (ii) the Plaintiff filed the Writ on 31 March 2025 (when the present summons was filed marking the end of the inordinate and inexcusable delay period) a period of 7 years would have lapsed, exceeding the 6 year limitation period.

91. For all of these reasons, I find that the period of delay in this case is both inordinate and inexcusable.

Is a Fair Trial Still Possible?

92. On the unchallenged affidavit evidence of Mr. Jason Pethick, the Defendant's witnesses are no longer available to give evidence at trial. At para [13(d)] he deposed:

"*Since the matter was commenced, the following witnesses are no longer available due to having left the employ of the Defendant:*

(i) Allan Trew – Director of Community Relations (8 June 1979 to 7 February 2021)
(ii) George Terpilowski - Managing Director of Southampton Princess and oversight of General Manager of Hamilton Princess (18 July 2011 to 11 July 2016)
(iii) Mario Dietrich – Director of Food & Beverage (1 April 2015 to 18 October 2017)
(iv) Stanford Bradshaw – Union Representative (20 July 2015 to 29 September 2019)
(v) *Jeanette Matthew - Human Resource Manager (6 January 2014 to 1 February 2017)*"

93. Mr. Knight, in his written submissions, argued at paras [56] and [57]:

"*The relevance of these witnesses is evident from their titles and from the documents and evidence already before the Court, including (but not limited to):*

The Plaintiff's allegations that Defendant's report of the disciplinary meeting on 11 December 2015 was manipulated for discriminatory purposes (paragraph 14 of the Tucker Affidavit). None of the individuals present at that meeting (on behalf of the Defendant) are employees of the Defendant any longer and are unavailable.

The Plaintiff's allegations concerning his interactions with management. The managers at the time were those named above and they are all no longer employed by the Defendant and are unavailable."

94. The evidence which was filed in the first strike out application provides insight into the relevance and value of the witnesses listed by Mr. Pethick. I have reviewed this evidence together with the pleadings and my Ruling of 11 December 2017 on the first strike out application.

95. In Mr. Allen Trew's first affidavit sworn on 14 September 2017 he stated at paras [16]-[20]:

"*In December 2015, Misland Capital Asset Managers, the Defendant's affiliate, engaged an independent firm to carry out an integrity audit of the Defendant's hotel operations.*

The independent evaluator carried out an anonymous observation process on 9 December 2015. Thereafter he met with the Defendant's General Manager, Director of Food & Beverage and Director of Human Resources on 10 December 2015 to provide a verbal report of items of concern. His findings were also provided in a written report on 11 December 2015. A copy of the independent auditor's report as it relates to the Plaintiff is exhibited at Tab 4.

The auditor witnessed the Plaintiff using incorrect procedures in over pouring alcohol when making dinks, in breach of the Defendant's Hotel Policy and Standard Operating Procedures, resulting in inconsistent guest service.

As a result of the audit findings the Plaintiff was called to attend a meeting with the Directors of Food & Beverage and Human Resources on 11 December 2015. However, the Plaintiff did not present himself until Monday, 14 December 2015 at 10am, claiming not to have received the messages on 11 December 2015. The Plaintiff was accompanied by Stanford Bradshaw, the union shop steward.

At the meeting the Plaintiff was advised that he would be placed on paid suspension pending the outcome of an investigation. It was agreed that they would discuss the findings of the audit at the meeting and the Plaintiff's statement was taken. His refusal to sign was noted by Mr. Bradshaw who signed the statement. A copy of the statement is exhibited at Tab 5. A copy of the Warning or Discipline Notice setting out the Plaintiff's suspension is exhibited at Tab 6. Again, the Plaintiff's refusal to sign was noted, and Mr. Bradshaw signed his acknowledgment."

96. The Plaintiff's evidence was that on Monday 14 December 2015, he was approached by Mr. Stanford Bradshaw, the Shop Steward and Supervisor in his Department. The Plaintiff deposed that Mr. Bradshaw instructed him, the Plaintiff, to accompany him, Mr. Bradshaw, to attend a meeting which was being held by management. The Plaintiff's evidence in his 9

October 2017 affidavit filed in opposition to the first strike-out application, was that he was confronted with a secret shopper report on the one drink he was accused of having "slightly over poured". The Plaintiff stated he answered to the allegations "openly and honestly despite the very hostile environment" he was in. At paragraph 14 of the Plaintiff's affidavit, he stated:

"*It will be my evidence at trial that the notes produced by the Hotel which are put forward to confirm things that I said during this meeting have been manipulated. This is because there are clear difference[s] between the Hotel's note and the note of the Shop Steward Mr. Bradshaw which I now attach at pages 6-8 of "DT-1". It will be my evidence at trial that the framing of the Defendant's note was doctored to suit their agenda. This was an act in breach of my contract and I believe was fueled by discriminatory motives. I am advised that this is a matter for trial*."

97. In the Plaintiff's Further and Better Particulars made pursuant to the Defendant's 16 March 2017 request, he outlined the factual underpinnings for his claim that the Defendant discriminated against him by reason of his trade union affiliation with the Bermuda Industrial Union ("BIU"). The particulars of his pleaded case at paras [2i]-[2iii] are as follows:

"*The Plaintiff has held sustained ties with the Bermuda Industrial Union. Whilst employed at the Defendant Hotel the Plaintiff served as Shop Steward on behalf of the unionized workers at the Hotel between January 2014 and December 2015. The Plaintiff first noticed a change in attitude of management staff at the hotel but one in particular was Mario Dietrich, the Food and Beverage Manager.*

The particulars of the discrimination began to manifest itself following industrial action initiated against the Defendant due to the dismissal of several hotel workers outside of the scope of the Collective Bargaining Agreement ("CBA"). This action came about as a result of Bermuda bar porter staff being terminated from their positions and the Plaintiff, who was shop steward at the time, assisting in galvanizing the workers who downed tools for approximately 10 days in between 28 January and early February 2014.

The attitudes and temperament of the hotel management and captains, who are persons directly under management began to shift at this time, particularly against Bermudian staff. Mr. Mario Dietrich began expressing himself in a disrespectful manner towards the Plaintiff and failed to provide the Plaintiff with any assistance despite the Plaintiff's repeated request for help as a result of his back condition. Plaintiff also felt that Mr. Dietrich was very quick to minimalize him and dismiss his views on staff following the strike and this impolite manner worsened once talks regarding changes to the bar areas job description intensified following the industrial action."

98. In relation to the Plaintiff's pleaded allegations that the Defendant's management style was 'autocratic', he referred to the conduct of both Mr. Brian Halle and Ms. Jeanette Matthew.

99. Having considered the documents and materials filed in this matter, I have extracted what I consider would be the essential issues for trial. They are as follows:

The Primary Issues

(i) The stated and actual reason(s) for the Plaintiff's summary dismissal

(ii) The details of what was said and what transpired at the meeting of 14 December 2015

(iii) Whether the Plaintiff admitted to any acts of serious misconduct at the meeting of 14 December 2015

Issues Raised on the Defence Case

(iv) Whether the Defendant's Hotel Policy and Standard Operating Procedures and/or the Fairmont Hotels & Resorts' Standards of Conduct and approved Fairmont recipes and processes (the "Defendant's Procedures") governed the Plaintiff's employment conduct and the procedure for the Plaintiff's preparation and serving of alcoholic beverages during the course of his employment

(v) The terms of the Defendant's Procedures

(vi) Whether the Plaintiff had actual and/or constructive knowledge of the Defendant's Procedures

(vii) Whether the Plaintiff was contractually obliged to comply with the Defendant's Procedures

(viii) Whether the Plaintiff breached any contractual obligation to comply with the Defendant's Procedures

(ix) Whether the Plaintiff committed acts of serious misconduct by over pouring and under pouring drinks for customers and guests of the Defendant

(x) Whether the report of the independent auditor of the Defendant established or supported a finding of serious misconduct on the part of the Plaintiff

(xi) Whether the Defendant reasonably and fairly concluded that the Plaintiff had been consistently breaching the Defendant's Procedures for a sustained period of one year and nine months

Issues Raised on the Plaintiff's Case

(xii) Whether the Defendant committed any acts of discrimination against the Plaintiff by reason of his place of origin, by reason of disability, or by reason of his beliefs or political opinions in contravention of the provisions of the Human Rights Act 1981

(xiii) Whether the stated reason(s) for the Plaintiff's summary dismissal was used as a shield to conceal discriminatory acts or practices against the Plaintiff

(xiv) Whether the Defendant breached a contractual obligation to the Plaintiff to institute a minimum 3-day work week system

(xv) Whether the Defendant breached a contractual obligation to the Plaintiff to provide adequate training and support staff to the Plaintiff for the carrying out of his duties

(xvi) Whether the Defendant breached a contractual obligation to the Plaintiff to take reasonable care in ensuring the Plaintiff's health, safety and welfare at work by requiring the Plaintiff to carry on heavy lifting despite his back ailments

(xvii) Whether the Defendant breached a contractual obligation to the Plaintiff by changing the Plaintiff's written job description without having consulted with the Plaintiff and

(xviii) Whether the Defendant breached a contractual obligation to the Plaintiff by discriminating against the Plaintiff because of his trade union affiliation with the BIU in contravention of Article 9 of the Collective Bargaining Agreement of 2008-2011 between the Defendant (and other hotels) and the BIU.

100. Having regard to what I see as the issues for trial and the relevance and importance of the evidence which would come from the witnesses involved, I find that it is a certainty that the unavailability of Mr. Allan Trew, Mr. Mario Dietrich, Mr. Stanford Bradshaw and Ms. Jeanette Matthew would deprive both the Plaintiff and the Defendant of any opportunity for a fair trial. I go further. In my judgment, even if these witnesses were indeed available, I am mindful that the passage of time since 14 December 2015 is so significant that it is only inevitable that these persons' evidence at trial would be seriously afflicted by faded memories. This is unmitigated by the statements and reports authored on behalf of the Defendant as the factual accuracy of the report on the 14 December 2015 meeting is plainly in dispute.

101. For these reasons, I am bound to conclude that a fair trial is no longer possible.

Conclusion

102. In exercise of the Court's inherent jurisdictional powers and in exercise of the Court's statutory powers under RSC Order 18/9 (1)(d), the action is dismissed for want of prosecution and the Re-Amended Statement of Claim is struck out as an abuse of process.

103. As for costs, I accept, as a matter of general principle, that contumelious delay will likely strengthen the merits of a claim for indemnity costs. However, considering the particular circumstances of this case, it appears to me, *prima facie*, that the appropriate costs order to be made is on a standard basis. That being the case, I would not deprive the parties of the opportunity to be heard on the issue of costs.

104. Subject to either party wishing to be heard on the suitable costs order to be made and filing a Form 31 TC within 21 days, I award costs in the cause on a standard basis in favour of the Defendant, to be taxed by the Registrar if not agreed.

Dated this 22nd day of December 2025

SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT