In The Supreme Court of Bermuda

CIVIL JURISDICTION
2013: No. 211

BETWEEN:

HSBC BANK OF BERMUDA LIMITED

Plaintiff

and

(1) GIANNI CLAUDIO VIGILANTE
(2) MARK PETTINGILL
(3) REHANNA PALUMBO
(4) ALESSANDRE PAULMBO

Defendants

RULING

Date of Hearing: **7 November 2022**
Date of Ruling: **9 November 2022**

Appearances: **Jennifer Haworth, Dan Griffin, MJM Limited for Plaintiff**
Grant Spurling, Chancery Legal Ltd., for Second Defendant

RULING of Mussenden J

Introduction

1. The Plaintiff ("**HSBC**") caused a Specially Indorsed Writ of Summons and Statement of Claim to be issued on 3 July 2013.

2. By a Summons dated 23 June 2022 the Second Defendant ("**Mr. Pettingill**") seeks an order that the matter be struck out against him for want of prosecution pursuant to Order 34, rule 2 of the Rules of the Supreme Court 1985 (the "**RSC**") and for abuse of process pursuant to Order 18, rule 19 based on the grounds of delay. He has filed affidavit evidence ("**Pettingill 1**"). HSBC resists the application and has filed affidavit evidence ("**Griffin 1**" and "**Griffin 2**").

Background

3. HSBC pleaded that by a written guarantee made between HSBC and the Defendants dated 4 February 2010 (the "**Guarantee**") HSBC agreed to make and continue to make credit advances, loans or other banking facilities (the "**Facility**") to Bar One Limited (the "**Borrower**"). The Defendants unconditionally guaranteed on demand to pay to HSBC all monies advanced to or paid to or on account of Bar One Limited not exceeding $650,000.

4. The facility to the Borrower was not maintained and the Borrower was placed into voluntary liquidation on 30 March 2012. The Borrower (in Liquidation) was unable to pay its indebtedness to HSBC. As a result, the terms of the Guarantee fell due and on 15 July 2011 a written demand was made by HSBC to the Defendants who have not discharged the guaranteed sum of $650,000 following the demand or at all.

5. On 7 January 2014 judgment in default was granted against the First Defendant Mr. Vigilante in the sum of $650,000 together with costs.

6. On 20 September 2022 HSBC settled its claim against the Third and Fourth Defendants.

7. Since the judgment in default, there have been various steps taken to bring the matter on for trial against Mr. Pettingill for repayment of the entirety of the total amount outstanding less the amount already obtained from the other Defendants. As of 16 September 2022 the total amount outstanding exceeds the $650,000 limit pursuant to the Guarantee and amounts to $827,747.42, comprised of $595,843.32 principal and $231,904.10 interest. The various steps included orders for directions, amendments, the filing of notices of change of attorney, notices of intention to proceed and setting hearing dates.

8. The trial of this matter as against Mr. Pettingill is set for next week, 14 – 17 November 2022. Mr. Pettingill has filed his evidence in the case, namely his witness statement. HSBC has filed its evidence in the case, namely the witness statement of Alison Phillips.

Rules of the Supreme Court 1985

9. RSC Order 18, rule 19 states as follows:

"18/19 Striking out pleading and indorsements

"(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."

10. RSC Order 34, rule 2 states as follows:

"34/2 Time for setting down action

(1) Every order made in an action which provides for trial before a judge shall, whether the trial is to be with or without a jury, fix a period within which the plaintiff is to set down the action for trial.

"(2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may

apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just."

The Law on Strike Out Applications

11. In *Mermaid Beach and Racquet Club Ltd v Morris* [2004] Bda L.R. 49 Kawaley J (as he then was) stated:

> *"I accept that the law governing this Court's jurisdiction to strike-out proceedings for want of prosecution in the exercise of its inherent jurisdiction is broadly governed by the principles set out in English authorities on which the parties respectively relied. The crucial questions which fall to be determined thus are the following:*
>
> *(1) has there been contumelious delay on the Plaintiff's part? If the answer to this question is in the affirmative, it is open to me as a matter of discretion to accede to the first limb of the Defendant's application;*
>
> *(2) if the answer to (1) is in the negative, is the Plaintiff able to file a fresh writ if the present action is struck out? And if, as was tacitly conceded to be the case, the answer to issue (2) is in the affirmative, it is necessary to consider*
>
> *(3) are there exceptional circumstances pursuant to which any subsequent similar action brought by the Plaintiff could be struck out? Only if such exceptional circumstances exist is it necessary to go on to consider*
>
> *(4) whether inordinate and/or inexcusable delay has occurred, and whether*
>
> *(5) such delay is so prejudicial as to justifying striking-out on the grounds of delay."*

12. In *Bentley Friendly Society v Minister of Finance* [2022] SC (Bda) 9 Civ, I made reference to the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ (5 February 2019) where Subair Williams J set out the law on strike out applications.

13. Subair Williams J set out the general approach and the Court's case management powers.

"General Approach and the Court's Case Management Powers

50. In David Lee Tucker v Hamilton Properties Limited [2017] SC (Bda) 110 Civ *I outlined the general approach and relevant legal principles applicable to strike out applications. As a starting point, at paragraph 11, I stated:*

> *'The principles of law applicable to the strike-out of a claim were no source of contention between the parties. This area of the law has been well recited in previous decisions of this Court. In general synopsis, strike out applications ought not to be misused as an alternative mode of trial. It is not a witness credibility or fact finding venture and for good reason. The evidence before the Court at this stage is not oral and has not yet been tested through cross examination. A strike out application, in reality, is a component of good case management. Where the pleadings are so bad on its face and so obviously bound for failure, the Court should strike it out.'*

52. At paragraphs 14-16 in David Lee Tucker v Hamilton Properties Limited *I considered the Court's case management powers in the context of a strike out application:*

> *'14. The Court's determination of a strike-out application is a component of active case management. Essentially, the Court is required to identify the issues to be tried at an early stage of the proceedings and to summarily dispose of the others. This is aimed to spare unnecessary expense and to ensure that matters are dealt with expeditiously and fairly.'*

> *16. In* Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5 *at paras 14-15 the learned Hon. Chief Justice, Ian Kawaley, examined the impact of the new CPR regime and the Overriding Objective on strike out applications:*
>
> > *'...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. It is also important to remember that this reasoning was articulated in a statutory context in which an entirely new procedural code was in force. And the particular strike-out discretionary power which was under consideration in that case was an entirely new one, a power exercisable on grounds of mere non-compliance with the Rules. As Lord Woolf observed (at 939-940): "Under the CPR the keeping of time limits laid down by the CPR, or by the court itself, is in fact more important than it was. Perhaps the clearest reflection of that is to be found in the overriding objectives contained in Part 1 of the CPR. It is also to be found in the power that the court now has to strike out a statement of case under Part 3.4. That provides that: '(2) The court may strike out a statement of case if it appears to the court- (a) that a statement of case discloses no reasonable grounds for bringing or defending the claim; (b) that the statement of case is an abuse of the court's process...' [and, most importantly] (c) that there has been a failure to comply with a rule, practice direction or court order.'

Under Part 3.4(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the CPR over previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.'

53. At paragraph 13 in David Lee Tucker v Hamilton Properties Limited *I cited Auld LJ's remarks in* Electra Private Equity Partners (a limited partnership) v KPMG Peat Marwick [1999] EWCA Civ 1247 *p.613 which were previously relied on by the Bermuda Court of Appeal in* Broadsino Finance Co Ltd v Brilliance China Automative Holdings Ltd [2005] Bda LR 12."

14. Subair Williams J set out the case law on abuse of process:

"57. The term 'abuse of process' has long been explored and addressed by the Court. Having relied on the persuasive passages stated and approved by learned judges of this Court and those sitting in the English House of Lords, I cited the following at paragraphs 23- 25 in David Lee Tucker v Hamilton Properties Limited*:*

'Misuse of procedure

23. In Michael Jones v Stewart Technology Services Ltd [2017] SC (Bda)*, Hellman J considered the meaning of 'abuse of process' by reference to Lord Diplock's passage in* Hunter v Chief Constable [1982] AC 529 *at 536 C: "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... '"*

15. In *Hofer v The Bermuda Hospitals Board* [2015] Sc (Bda) 55 Civ Kawaley J (as he then was) referred to the observations of Parker J in *Culbert v Steven v Steven G Westwell & Co Ltd* [1993] 1 P.Q.I.R. 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."

16. In *Hofer* Kawaley J also referred to the observation of Nourse LJ in *Choraria-v- Sethia* [1998] C.L.C. 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."

Mr. Pettingill's application to strike out for want of prosecution

17. Mr. Spurling contends that the matter should be struck out as it has been beset by a chronology of delays since HSBC obtained default judgment against the First Defendant on 7 January 2014. He referred to Mr. Pettingill's First Affidavit where he asserted that HSBC had repeated unconsummated notices of intention to proceed after a year's delay and the failure to progress the matter in accordance with the Court's orders. Mr. Spurling made reference to the case of *Bailey v Wm E Meyer & Company Limited* [2017] Bda LR 5 which was incorporated into the case of *Fidelity National Title Insurance Company v Trott & Duncan Limited* [2019] SC (Bda) 10 Civ where Subair Williams J set out the Court's approach and case management powers.

18. Mr. Spurling argued that in *Bailey*, Kawaley CJ set out the Court's power to strike out an action in its entirety for want of prosecution, where the Plaintiff's conduct of the action constitutes an abuse of process. He submitted that the circumstances for striking out in *Bailey* mirrored the circumstances in the present case as: (i) it has been prosecuted in an unconvincing manner marked by sporadic activity; (ii) the Plaintiff has failed to communicate any or any serious intention to pursue the action to Mr. Pettingill for some eight years, making it reasonable for Mr. Pettingill to assume the proceedings had been abandoned; (iii) HSBC has failed to assist the Court (in defiance of Court orders) in its duty to ensure the action was dealt with expeditiously in furtherance of the Overriding Objective per Order 1A, rule 1 of the RSC; and (iv) reviving long-sleeping proceedings, in effect having warehoused claims until they chose to pursue them, rather than diligently prosecuting the matter, such that permitting such proceedings would bring the Court into disrepute.

Mr. Pettingill's application to strike out for abuse of process

19. Mr. Spurling submitted that in this case it was self-evident that witness memories and Mr. Pettingill's recollection of events surrounding the breach occasioning the principal action (the "**Breach**") will have faded overtime. Also, members of staff who could have spoken to Mr. Pettingill's actions in bringing the Breach to the attention of HSBC, its actions and statements in response and the Mr. Pettingill's attorney's file with respect to the a related action between the parties, including meetings are no longer readily accessible.

20. Mr. Spurling cited *Bailey* where Kawaley CJ indicated that

> "*... the most striking prejudice to my mind was being required to defend a claim which had gone to sleep for so long a time that it was reasonable in all the circumstances for the Defendants to assume that it had been abandoned. The abuse of process which was complained of was a wholesale disregard for the Rules and an inferred absence of any intention to pursue the action over an 8 year (or more) period.*"

Mr. Spurling argued that there were striking similarities between the present matter and *Bailey* suggesting that the Court ought to strike out HSBC's action pursuant to Order 18, rule 19 on the dual bases of the prejudice to a fair trial and clear abuse of process by HSBC which has delayed the case and abusing the process of the Court in maintaining proceedings when there was no intention of carrying the case to trial.

HSBC's Submissions

21. Mrs. Haworth submitted that HSBC does not seek to argue that it could issue a fresh writ. Further, Pettingill 1 does allege contumelious delay by HSBC. Thus she contends that questions (1), (2) and (3) in *Mermaid Beach and Racquet Club Ltd* fall away, leaving to be considered questions (4) on whether inordinate and/or inexcusable delay has occurred and question (5) whether such delay is so prejudicial as to justify striking out on the grounds of delay.

Whether inordinate and/or inexcusable delay has occurred

22. Mrs. Haworth submitted that in a case where there are multiple defendants, each who mount different defences or no defence at all, it is an unavoidable consequence that matters may take time to conclude. She referred to Mr. Pettingill's Amended Statement of Defence dated 21 June 2016 (the "**Defence**"), Mr. Vigilante was the driving force behind the business venture and HSBC was therefore concerned to seek payment from him, which was unsuccessful. She then referred to Griffin 2 and the index of the hearing bundle contending that the matter had progressed steadily towards a conclusion with limited intervening periods when the parties were seeking to resolve the matter by agreement. Further, between March 2020 and late 2021, the matter did not proceed to trial because of the Court's position as a result of the Covid-19 pandemic. In August 2020 HSBC wrote to Mr. Pettingill pursuing settlement but he did not respond. Mrs. Haworth argued that once her firm took conduct of the matter it has pressed forward as quickly as reasonably possible. She again referred to Griffin 2 for the chronology of events which demonstrate the efforts employed by HSBC to bring the matter to a conclusion. Thus there is no evidence of inordinate or inexcusable delay but it shows HSBC making every effort to progress the matter. Mrs. Haworth highlighted delays by the Defendants requesting a four day trial which took time to be allocated and Mr. Pettingill had filed incorrect forms in respect of the listing of the strike out application.

Whether such delay is so prejudicial as to justify striking-out on the grounds of delay

23. Mrs. Haworth argued that Pettingill 1 merely asserts that delays he attributes to HSBC have *"meaningfully and harmfully impacted his ability to secure a fair trial"*, however he has not set out how. She noted that no witness evidence other than his own has been served in the main action. Further, she argued that there are no witnesses for HSBC or Mr. Pettingill whose recall could be prejudiced by the time elapsed given the issues in the case. Mrs. Haworth referred to Griffin 2 and Alison Philip's witness statement which show that the case is a straightforward claim for enforcement of a Guarantee which given the nature of

the Defence, can be dealt with on the documents alone, namely the Guarantee, the demand from HSBC and the account showing the Facility was drawn down and remains unsatisfied.

24. Mrs. Haworth submitted that although Mr. Pettingill's Defence relies on his assertions as to the terms of his contractual arrangements with HSBC, they are clearly contradicted by the terms of the Facility documents, namely the Guarantee, the Facility and drawdowns of funds, the demand letter to Mr. Pettingill which he admits he received and his failure to pay the demand, which he admits. Mrs. Haworth also referred to Mr. Pettingill's Defence and relevant clauses of the Guarantee which demonstrate that matters raised in the Defence are not subject to the recall of any witness but a matter of the terms of the Guarantee. Mrs. Haworth submitted that Mr. Pettingill had recently made various new allegations in his witness statement dated 20 September 2022 which were not pleaded in his Defence and which should be disregarded by the Court.

25. Mrs. Haworth cited the case of *Barry Kessell and Cedarberry (Bermuda) Ltd v John Barritt & Sons Ltd and Alex Russell* [2009] Bda LR 27 where Kawaley J referred to the need when exercising the Court's discretion to strike out for want of prosecution to balance the rights of the parties pursuant to 6(8) of the Bermuda Constitution and the Overriding Objective, those rights are the plaintiff's right to a fair trial and access to justice versus the defendant's rights to a fair trial within a reasonable time. In that case, there was a possibility of diminished recall of witnesses and the claim still had some way to reach a trial. That was enough to establish serious prejudice to the defendants, but it was found to be at the lower end of the scale. Mrs. Haworth argued that *Kessell* was in contrast with HSBC's claim for payment of a sum of money set out in the Guarantee for which there is clear evidence in the form of account statements and the unsatisfied demand and which is due to be heard in a matter of days. Thus, she submitted that Mr. Pettingill cannot establish serious prejudice. Further, in *Kessell*, the Court still declined to exercise its discretion to strike out the claim because the competing factors under section 6(8) of the Bermuda Constitution and the Overriding Objective weighed in favour of the Plaintiff's right to access to justice.

Analysis of the Defendant's Applications

Whether there has been contumelious delay

26. In my view, Mr. Pettingill's application for strike-out should be refused for several reasons. First, Mrs. Haworth has submitted that Mr. Pettingill has not argued contumelious delay and therefore in respect of *Mermaid Beach and Racquet Club Ltd*, I should go on to consider the questions of whether inordinate and/or inexcusable delay has occurred and whether such delay is so prejudicial as to justify striking out on grounds of delay.

27. However, Mr. Spurling has submitted that the delays by HSBC amount to contumelious delay in particular, HSBC not complying with the orders of the Court and the filing of several Notices of Intention to Proceed. In respect of contumelious conduct, in *Hofer*, Kawaley J stated that the defendant's complaint was that his order of setting out trial directions in 2010 was ignored. He further stated that if one accepted the approach of *Choraria*, then that non-compliance can be regarded as contumelious or, alternatively, as an abuse of process. In the present case, the Orders for Directions of 28 May 2015 and 19 May 2016 contain similar obligations of HSBC, the Defendants and the Second Defendant. Also, the Orders for Directions dated 13 July 2017 and 2 June 2022 also contain similar obligations of the parties. Thus, I rely on *Choraria* to find that I am not satisfied that there has been, solely on HSBC, a complete, total or wholesale disregard of the Rules of the Court. Further, in *Hofer*, the 2010 order setting out trial directions had still not been complied with by the time of the strike-out application in that case. However, in this case, each successive order for directions was progressing the case onwards to trial such that the matter is now set for trial. Therefore, in my view, I am not satisfied that there has been contumelious conduct on behalf of HSBC.

Whether there has been any inordinate and/or inexcusable delay

28. Second, in my view there has not been any inordinate and/or inexcusable delay in this matter since default judgment was obtained. I have considered the chronology in this matter since the default judgment dated 7 January 2014 by reviewing the dates of the documents

filed in this matter. There has been activity in the matter in 2015, 2016 and 2017 including orders for direction dated 28 May 2015, 19 May 2016 and 13 July 2017. I have reviewed correspondence from HSBC's previous counsel dated 24 August 2017 wherein mention was made of the exchange of witness statements on or before 28 August 2017 and further disclosure. Also, I have noted "without prejudice" correspondence between the parties dated 6 July 2018, 20 July 2018 and 7 March 2022. In my view, prior to MJM coming on the record, there was constant activity in respect of this matter towards either a trial or a settlement. Thus, for that period of time, in my view, there was no inordinate or inexcusable delay.

29. I have also reviewed the activity since MJM came on the record on 13 February 2020. I accept that there was a period of time in 2020 to 2021 when the Covid-19 pandemic had an impact on the Court's ability to hear matters although I note that matters did start to progress by Zoom audiovisual technology. I do not consider this period during the Covid-19 pandemic to be an inordinate or inexcusable delay in the circumstances of the pandemic and the position of the Courts in conducting matters. Since the Notice of Intention to Proceed dated 10 February 2022 was filed, there has been considerable movement in the action such that it is set for trial within the next few days. Thus, there was no inordinate or inexcusable delay since MJM came on the record.

30. Third, Mr. Pettingill has contributed to some delay himself by failing to appear at a directions hearing, failing to reply to correspondence from MJM, pursuing a conflict of interest angle against MJM and changing attorneys on several times. Despite those events, a trial date has still been set in this matter. In my view, HSBC was making every effort to move the matter to trial despite the circumstances presented by Mr. Pettingill. Thus, I find that in determining the questions posed by Kawaley J in *Mermaid Beach and Racquet Club Ltd* that there was no inordinate or inexcusable delay in this matter.

Whether such delay is so prejudicial as to justify striking-out on the grounds of delay

31. Fourth, I have already found above that there was no inordinate or inexcusable delay in this matter such that I need not consider question (5) in *Mermaid Beach and Racquet Club Ltd.* However, if there was inordinate or inexcusable delay then in relation to question (5)

I do not agree with Mr. Spurling about prejudice caused to Mr. Pettingill. In my view, this is not the type of case similar to *Bailey* where Kawaley CJ found striking prejudice on the basis that the case had gone to sleep for such a long time that the defendant thought it had been abandoned. In my view, in this case the chronology demonstrates that the matter had not gone to sleep for such a long time.

32. Fifth, I agree with Mrs. Haworth that Mr. Pettingill has failed to state how he has been prejudiced or impacted on his ability to have a fair trial as caused by delay by HSBC. Mr. Pettingill has engaged in the litigation process to set the matter down for trial. In my view, this matter is not reliant on the memories of a range of witnesses as in *Kessell*. On the contrary, the matter is about the Guarantee, the funds advanced pursuant to the Facility, the demands made for repayment and the accounting for the outstanding sums. HSBC has presented its evidence in preparation for trial. Significantly, Mr. Pettingill has also presented his evidence for trial in which he makes statements that he *"clearly recalls"* certain events. In my view, it is clear on all accounts that Mr. Pettingill will have a fair trial. Thus, I find that in determining the questions posed by Kawaley J in *Mermaid Beach and Racquet Club Ltd* that if there was some delay, then it is not so prejudicial as to justify striking out he matter.

33. Sixth, I have considered Mr. Spurling's submissions about the Overriding Objective and the case management powers of the Court. He complains that HSBC at various points did not comply with various orders and even did not comply with its own Notices of Intention to Proceed. I have already set out that I have not found any inordinate or inexcusable delay on the part of HSBC or any prejudice to Mr. Pettingill in having a fair trial. In my view, it not appropriate at this stage, on the eve of the trial, to make complaint about HSBC failing to comply with one or more orders years ago. Mr. Pettingill could have addressed those circumstances when they arose by various applications including for unless orders or a strike-out. I rely on Subair Williams J in *Fidelity National Title Insurance Company* and *David Lee Tucker v Hamilton Properties* where she cited other cases on abuse of process and Lord Diplock in *Hunter v Chief Constable*.

34. Seventh, Mrs. Haworth referred to *Hofer* as a case which involved personal injury to Mr. Hofer and where proceedings started in 1997 and the matter was struck out in 2015 as an abuse of the process as a consequence of the Plaintiff having taken no action to progress the matter since 2010. Mrs. Haworth submitted that Kawaley CJ was clear to state that the claim was in fact struck out as an abuse or process because the Plaintiff had no means of progressing to trial. I note that in his judgment Kawaley CJ accepted that the plaintiff as a German national had faced genuine difficulties in funding his claim, which was necessary to fund experts in order to support the claim. Kawaley CJ found that it was not justifiable for the Court to privilege the plaintiff's right of access to the Court over the defendant's corresponding fair hearing rights. Further, the Plaintiff was seeking extensions of time to resolve various issues with the case and thus it was nowhere ready for trial after such a lengthy period of time. In my view, the circumstances of the present case are not the same as in *Hofer*. This case is set for trial next week and there are no difficulties or other issues before me preventing the trial to start as scheduled. In my view, there has not been an abuse of the process of the Court.

35. In light of the above reasons, I am not satisfied that I should use my inherent powers to strike out this case as I am not of the view that HSBC has misused the procedure of the Court to bring this matter to trial.

Costs

36. Mrs. Haworth submitted that Mr. Pettingill has a contractual obligation pursuant to clause 1 of the Guarantee to pay the expenses the Bank has incurred in obtaining the repayment of the Facility on a full indemnity basis which includes responding to this application. In the alternative, Mrs. Haworth argued that Mr. Pettingill should be ordered to pay HSBC's costs of the application as a consequence of his neglect in the conduct of these proceedings on the bases that: (a) Mr. Pettingill's delay in making this application until after directions were agreed; (b) his failure to attend the directions hearing on 12 May 2022; (c) his allegation of a conflict of interest; (d) his delay in exchanging evidence on this application; and (e) his failure to file the correct forms with the Court for the listing of the hearing of

this matter. As a consequence HSBC has had to incur significant costs in responding to this application and is entitled to recover those costs.

Conclusion

37. For the reasons above, I refuse Mr. Pettingill's application to strike out this matter.

38. HSBC seeks it costs on a full indemnity basis. However, I did not hear submissions from Mr. Pettingill on costs on the indemnity basis. Unless either party files a Form 31TC within 7 days of the date of this Ruling to be heard on the subject of costs, I direct that costs shall follow the event in favour of HSBC against Mr. Pettingill on the standard basis, to be taxed by the Registrar if not agreed.

Dated 9 November 2022

HON. MR. JUSTICE LARRY MUSSENDEN
PUISNE JUDGE OF THE SUPREME COURT