In The Supreme Court of Bermuda

CIVIL JURISDICTION

1997: No. 37

BETWEEN:

THOMAS HOFER

Plaintiff

-v-

THE BERMUDA HOSPITALS BOARD

Defendant

EX TEMPORE RULING

(in Chambers)

Date of Hearing: August 5, 2015

Mr. Allan Doughty, Beesmont Law Limited, for the Applicant/Defendant

Mr. Larry Mussenden, Mussenden Subair Limited, for the Respondent/Plaintiff

Introductory

1. The Defendant in this matter applies by Summons dated March 5, 2015 to obtain an order that the action in this matter be struck out:

    (a) "*Pursuant to the Inherent Jurisdiction of the Court for Want of Prosecution*"; and

(b) "*Pursuant to Order 18 Rule 19(d) of the Rules of the Supreme Court of Bermuda, 1985 and or through the Inherent Jurisdiction of the Court as the continued in inaction of the Plaintiff has amounted to an abuse of Court's processes*".

2. The application arises in relation to an action that was begun by Specially Endorsed Writ issued on the 21st November 1997. The Statement of Claim endorsed on the Writ was amended on the 20th November 1997. The nature of the claim is one for personal injuries and the injuries complained of are far from a trifling matter. The Plaintiff is a German national who on or about the 11th February 1994, having been admitted as an inpatient at the then St. Brendan's Hospital, sustained a broken neck and, less significantly, a cut to his chin.

Overview of Plaintiff's pleaded case

3. The case broadly summarized is that the Defendant was negligent in failing to properly supervise the Plaintiff while he was under its care. The Defendant filed and a Defence on about the 28th of July 1999 and that Defence admitted many of the foundational facts which underpin the Plaintiff's claim.

4. In paragraph 9 of the Defence the following averments appear. The Plaintiff was escorted by a male staff nurse and female psychiatric nurse to Adam's Ward where he was transferred into the care of a registered psychiatric male nurse. The said nurse there observed the behaviour of the Plaintiff, shouting screaming and throwing himself about his bedroom. Whereupon the said nurse decided to place the Plaintiff in a more secure seclusion room on Adam's Ward and to administer to the Plaintiff the tranquilizer called Chlorpromazine.

5. The Defence then goes on to make the following averments in paragraph 10. Upon entering into the seclusion room under escort by the said nurse the Plaintiff suddenly and without warning threw himself against a screened window in the room. Following impact the Plaintiff stood up and walked towards a mattress on the floor of the seclusion room before falling on to the mattress. The said nurse checked for evidence of injuries and saw none. The said nurse then administered a further dosage of the tranquilizer called Clorpromazine.

6. It appears to me based on the way in which Mr. Doughty addressed the issue of compensation in argument that the Defendant's case is that it was this impact that the Defendant says likely caused the injury. There was a subsequent event which was referred to in paragraph 14 most materially as follows. The Plaintiff was assisted in his preparation by a male nurse and while sitting up on the edge of his bed fell forward and hit his chin on the floor. The Plaintiff sustained a laceration to his chin

and arrangements were made by nursing staff for his transfer to KEMH for care and treatment of the laceration. It was after this incident that the fracture of the 5th cervical vertebra was discovered as a result of X-rays.

7. These averments are significant because they indicate that this is not a case where the Plaintiff's claim can be fairly characterized as a simple *res ipsa loquitur* case where it will be relatively easy to make out a case of negligence without the need for expert evidence. Indeed it is difficult to imagine if this were a simple and straightforward case that the matter would have been caught in the state of suspended animation that it has remained in for so many years, as we are now nearly approximately 18 years after the filing of the Writ and over 20 years after the accident itself.

The first (2008) strike out application

8. The next significant event for present purposes that occurred in the present action is that on the 22nd of April 2008, the Defendant issued a first Summons for dismissal of action for want of prosecution. And in response to that application, the Plaintiff's then counsel, Mr. Michael Scott, swore an Affidavit dated the 8th May 2008, which made a somewhat passionate plea for the Plaintiff to be given a chance to pursue the present claim.

9. The plea included in part reference to the fact that the Plaintiff had limited Legal Aid available to him. In paragraph 11 of the affidavit it was deposed that the Plaintiff was on a Legal Aid certificate for 10 hours and a report. The Defendant's invitation to settle placed the Plaintiff on a trajectory of having Mr Hofer examined and accessed by experts. This required money as an orthopaedic surgeon needed to be identified and secured. The experts identified were expensive and this would require funds to pay for the assessment of medical reports, travel to Germany to examine the Plaintiff and to prepare a report.

10. The Affidavit then goes on to explain that an attempt was made to resolve these difficulties in the first instance by making an application for interim payments. An application which the Defendant frustrated and which was never granted. It appears that some monies were possibly obtained from the German Government. London Queens Counsel was retained to provide certain advice, but Mr Scott was then confronted with a conflict of interest because he became a full-time Minister after the 2007 General Election.

11. Nevertheless he made a further averment which has some resonance today because it was repeated, albeit in somewhat different words, in argument by Mr. Mussenden, the Plaintiff's current attorney. In paragraph 21, the Plaintiff's original attorney (or former attorney) said this:

> "*21. That to the Defendant's core assertion of a fair trial being impossible that there has been cumtemelous*[sic] *delay and abuse of the court process, that the matter has not been set down for directions for 9 years, my response on behalf of the Plaintiff is that there was never any deliberate delay, as that term is understood by the rules, that the delay affecting this action has been on both sides, and while not an open and shut case of excusability* [sic], *my public duties on a full time basis conflicted with my ability to prosecute this action in the way that it should have been, is both understandable and compelling*."

12. He then asked that the application be dismissed in the following terms in paragraph 27:

> "*27. That in the premises the Defendant's application to dismiss this action for want of prosecution, on balance fails to take account of the overriding interest of justice, the Defendant's own conduct, plausible and compelling explanations and the circumstances of the delay, the call*[ing] *into question of any significant or arguable prejudice as alleged by the Defendant, arising in connection with the death of a potential witness and should in justice be dismissed, and substituted by appropriate Unless orders by this honourable court.*"

13. The application was heard on the 24th of June 2008 before Justice Bell, who was not persuaded to except the invitation to impose unless orders and, by necessary implication, a strict timetable for the matter to proceed to trial. He dismissed the action.

14. The Plaintiff appealed with Mr. Mussenden appearing and the Court of Appeal, by a majority, on the 18th March 2010 set aside the decision of Justice Bell and remitted the matter for trial. The majority judgment was given by Justice of Appeal Evans and amongst his significant findings was the following characterization of the issue that was then before the Court:

> "*33. The issue is whether the evidence establishes that, by reason of delay which is self-evidently inordinate and inexcusable, and rightly so found by the judge, there is 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 serious prejudice to the defendants.*"

15. That definition of the issue before the Court on that application is significant in two respects, Firstly, there is a finding which binds this Court that the delay as of the date of the hearing of the appeal in March 2010 was inordinate and inexcusable. But, secondly, it also signifies that the only ground for striking out that was relied upon on the first occasion was the ground that required proof of substantial or serous prejudice to the Defendants. In the present application, the alternative ground of abuse of process is also relied upon.

16. It is important to note that Stuart-Smith JA dissented and he dissented in large part because he felt that Justice Bell was right to conclude, despite a misunderstanding of the evidence as to the precise nature of the prejudice, that the Defendant would suffer prejudice from being forced to defend proceedings at such a late stage. Because Stuart-Smith JA felt that it was possible for the Court to infer prejudice in general terms without a detailed consideration of the particular impact of particular witnesses. In paragraphs 14 and 15 of his judgment he referred to English case law, in particular *Benoit-v-London Borough of Hackney*, February 11, 1991, and *Hornagold-v-Fairclough Building Limited* [1993] P.I.Q.R. 400 at 415. In the latter case Glidewell LJ agreed with Stuart-Smith LJ's observations in *Benoit* and said this:

> "*I do not read Stuart Smith LJ as saying that where a Court has found inordinate and inexcusable delay prejudice to the Defendant automatically follows. I understand him to be saying that in a claim for damages and personal injuries where the main issue depends upon evidence as to how the accident happened and the events surrounding it, if the court knows that the defendants wished to call witnesses as to those matters it would have little difficulty in inferring that as a result of inordinate and inexcusable delay after the issue of the writ, more than minimal prejudice to the Defendants had arisen as a result of the inevitable dimming of the witnesses memories. However if the court is to draw an inference it must at least have evidence before it as to the nature of evidence which the Defendant seek to call on the issues in question, so that it can decide whether or not in the circumstances it is proper to draw such an inference.*"

17. Notwithstanding those observations, it is only fair to point out that this Court is bound to note that the majority view expressed by Evans JA was that this was not the type of case where the dimming of memories was likely to be as significant as perhaps in other cases. Because there were some records or notes that were taken contemporaneously or shortly after the incidents in question.

18. The position in terms of prejudice very broadly is that one key eyewitness has died and the doctor who prescribed the tranquillizer has since the first strike out ruling died .and while Mr. Mussenden fairly criticized the Defendant for not taking a witness statement from Doctor Jones before she seemingly left Bermuda. The reality is that her primary role appears to have been to prescribe the tranquillizer, and it was not

until some years later, approximately 14 years later, when the Plaintiff was defending the first strike out application that a draft pleading (which is yet to be formally filed) was exhibited to the Affidavit of Mr Scott: advancing for the first time the claim of negligence in respect of the administration of the tranquillizer.

19. Be that as it may it seems self-evident that, some five years after the Court of Appeal's decision, the inherent degradation of the evidence, to use the phrase of Mr. Doughty, from the further passage of time cannot be said to be an insignificant risk.

The prosecution of the action after the Court's August 2010 pre-trial directions

20. After the case was restored by the Court of Appeal's judgment, the matter came before me on the 12th August 2010 when pre-trial directions were ordered which contemplated that the matter should be fixed for trial not before the 1st March 2011 with an estimated length of 7 days. A procedural timetable was set for discovery case management conference in December 2010 and also witness statements were to be exchanged together with expert reports 12 weeks prior to the trial date.

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.

23. The matter may have gone to sleep from the Court's point of view but it is only fair to point out that the activity out of Court did take place which involved, it appears to me, a combination of attempting to obtain reports on behalf of the Plaintiff and examination by the Defendant's attorneys of the Plaintiff's medical records. What is most noteworthy about this period is that there is no indication at all that the Plaintiff ever a full legal aid certificate intended to in fact carry the matter forward to trial.

24. On the 25th March 2013 the Legal Aid Committee wrote to Mussenden Subair deferring an application for funding in respect of reports pending the receipt of an estimate and on the 12th April the Legal Aid Committee requested an opinion on the merits given the passage of time and the likelihood of success. An opinion was forwarded on 12th May 2013 but on the 1st of November 2013 the Legal Aid Committee discharged the Legal Aid Certificate. That date appears to me to be a very significant one, because thereafter all that seems to have happened in terms of

progressing the action was a series of attempts by Mr. Mussenden or his firm to persuade the Legal Aid Committee to change its mind.

25. The frustration that the Plaintiff and his Bermuda attorneys must have felt can only be imagined; because it should not happen that a plaintiff is given support from the Legal Aid Committee in respect of an action filed in 1997 and in 2013 the Committee is still in the process of deciding whether or not to fully support the claim. But the merits of the Legal Aid Committee approach have no role to play in the present application, and are only mentioned as part of the background.

26. On the 13th May 2014 the Legal Aid Committee agreed to grant a further 20 hours support seemingly with a view to supporting settlement negotiations, but on the 25th March 2015 (by which time the present application had been filed) the Legal Aid Committee stated that the Certificate remained discharged.

Adjudication of application

The central issue for determination

27. The question that arises from these facts, taken from the chronology helpfully provided by the Defendant's counsel, is whether or not it was reasonable for the Plaintiff, against the background of an action which had narrowly survived being stuck-out for want of prosecution in 2010, to continue the matter without coming back to the Court and seeking fresh directions, or indeed without deciding to adopt the approach which was adopted at the present hearing. That approach was for the Plaintiff to proceed on a privately funded basis without relying on expert evidence at all.

Governing legal principles

28. At this stage it is helpful to have regard to what legal principles govern an application of this sort, and there is a fundamental question which is raised both for the application and against the application. And that is the question of whether or not a Plaintiff who delays an action due to lack of funding should be treated for practical purposes in similar way to a Plaintiff who fails to diligently prosecute and action simply because of neglect.

29. It is helpful to start out with the Overriding Objective and to acknowledge that the Overriding Objective does, as Mr. Mussenden submitted, place considerable emphasis on the Court dealing with cases in a way which takes into account both the concept of the quality of arms between the parties and also the more cold-hearted aim of efficiency and economy:

(a) Order 1A /1 (2)(a), speaks of "*ensuring that the parties are on an equal footing*";

(b) Order 1A/1(2) sub-paragraph (c)(iv) requires the Court to have regard to "*the financial position of each party*";

(c) sub-paragraph (d) speaks of the need to ensure that a case is dealt with "*expeditiously and fairly*"; while

(d) sub-paragraph (e) speaks of the importance of "*allotting to a case the appropriate share of the Court's resources while taking into account the need to allot resources to other cases*".

30. Equally important to those core principles, which form the basis of the Overriding Objective, is the requirement in 1A/3, which states as follows: "*The parties are required to help the Court to further the overriding objective*".

31. Mr. Doughty in his submissions summarized the applicable legal principles very broadly and comprehensively and he addressed the following issues. Firstly, he asked the question whether there had been a lack of any genuine intention on the Plaintiff's part to pursue his claim to trial and, if so, whether this can amount to an abuse of process. In the course of argument I put to him that this question perhaps needs to be assessed for it applicability to the present case where it appeared to me that the real difficulty that the Plaintiff has had is not in any practical way a lack of an intention to pursue the claim, but rather an inability to pursue the claim. And so in looking at the legal principles on which the Defendant relies it is necessary to ascertain whether or not those principles are broad enough to apply to the present case.

32. Mr Doughty first referred to the case of *Grovit-v- Doctor* [1997] 1WLR 640 and the judgment of Lord Wolffe where (at page 647F-G) he said this:

> "*…I am satisfied that both the Deputy Judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellants inactivity in the libel action for a period of over 2years.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 continue to continue litigation which you have no intention of bringing to a conclusion can amount to an abuse of process. Where this is a situation the party against whom the proceedings is* [sic] *brought is entitled to apply to the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action.*"

33. So in the present case the question which arises is whether or not it can said to be an abuse of process where it appears that a Plaintiff has in effect no ability to bring the case to an effective conclusion.

34. The present application also needs to be considered bearing in mind that this is the second application to strike out the proceedings. In this respect, Mr. Doughty relied upon the observations of Lord Woolf in *Arbuthnot Latham Bank Ltd.-v-Trafalgar Holdings Ltd.* [1998] 1 WLR 1426 where he said this (at 1435 H):

> "*If an action has already been struck out, the duty on a party to comply with the rules if the action is restored is heavier than it would be if the action had proceeded dilatorily without a previous intervention of the Court of this sort*."

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* [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."*

36. In addition he 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*."

37. In this case although Mr. Doughty sought to rely on breaches of various rules which in my judgment were somewhat technical, the broad complaint is that a non-

peremptory Order of the Court was ignored, namely my Order setting out trial directions in 2010. And if one accepts the approach of *Choraria*, that non-compliance can be regarded as contumelious or, alternatively, as an abuse of process.

38. On the question of abuse of process Mr. Doughty cited three passages, the first of which is perhaps sufficient to recite here. In *Hunter-v-Chief Constable of West Midlands Police* [1982] AC 529 at 536C-D, Lord Diplock said this :

> "*My Lords, this is a case about abuse of the process of the High Court. It concerns the inherent power which any court of justice must process to prevent misuse of its procedure in a way which, although not 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 process can arise vary. It would in my view be most unwise if this House was to use any occasion to say anything which might be taken as limiting to fixed categories the kinds of circumstances in which the Court has a duty (I disavow the word discretion) to exercise this salutary power.*"

39. Finally, I am assisted by the following observations of Nourse LJ in *Choraria-v-Sethia* [1998] C.L.C. 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.*"

<u>The Plaintiff's response to the strike out application</u>

40. Mr. Mussenden responded to these submissions in a very focused way which sought, it seems to me, to achieve two objectives. Firstly he sought to argue that the degree of prejudice which the Defendant complained that it would suffer at trial was not sufficiently particularized. And secondly, and related to that, he sought to persuade the Court that the Plaintiff's fair trial rights as the victim of a very serious injury should at the end of the day trump all.

41. He, very sensibly but very much like Mr. Scott before Justice Bell, conceded that the delay was inordinate and inexcusable, but argued that if one focused on what the case is really about then the Court ought properly to be satisfied that this case can still effectively proceed to trial, even the early as the Autumn of this year.

Determination of merits strike out application

42. Clearly this new enthusiasm for an expedited approach to this matter has only been formulated in response to the second strike out application. Indeed it is difficult to imagine that had the second strike out application not been filed that the Plaintiff would have taken any substantive steps of his own to prosecute this action any further. That may seem like a harsh judgment; but the reality is that the present offer to proceed without expert evidence is a little bit like a last throw of the dice in the 'last chance saloon'.

43. Because if one analyses the Plaintiff's claim as summarized by Mr Mussenden himself in paragraph 32 of his Skeleton Argument, the case involves the following issues:

    (a) "*The statutory duties of the Defendant*";

    (b) "*The systemic organization of the Board's mental hospital, St. Brendan's and its management, procedures and operations*";

    (c) "*Whether the Defendant had a system or a procedure to deal with the security or care of the mentally ill patient who was diagnosed as being in a paranoid psychotic state and prescribed anti-psychotic medication, for example was there a system of observation, seclusion, restraint and qualified staff.*"

    (d) "*Why, if such a system existed then was it in place or operation at the relevant time.*"

44. At least two of those four issues, items (c) and (d), it seems to me are issues which cannot be effectively advanced without expert evidence. And so in addition to seeking the Court's indulgence for inordinate and inexcusable delay, the Plaintiff is really seeking to pursue a claim which, even as a matter of pleadings, is presently a somewhat shadowy one.

45. Certainly on the face of the present Amended Statement of Claim that is before the Court, it is difficult to see how the claim is a solid one unsupported by expert evidence. There is a draft "re-Amended Particulars of Claim", so called, that was

produced before the first strike-out application and that claim also advances allegations which cannot credibly be supported without expert evidence.

46. Mr. Mussenden was forced to request the Court, in giving directions for the further conduct of the matter as an alternative to striking out, for time for the Plaintiff to consider precisely what pleaded case he wants to advance. That simply exemplifies how, in reality, the present claim is very far indeed from being ready for trial.

47. In looking at the question of how the Court should approach the exercise of discretion in this case, Mr Doughty also referred the Court to a case involving a not entirely dissimilar judicial discretion, namely the discretion to grant an extension of time within which to pursue an appeal. The authority he referred to was the case of *Woolridge-v-Bermuda Hospitals Boards and Doctor Council Miller.* And the judgment was an *ex tempore* judgment delivered on 18th June 2015 of Sir Scott Baker (P). Although only a draft of the judgment is presently available, it seems to me that since a judgment has already been handed down orally the Court can have regard to the main and general tenor of the draft Judgment[1].

48. In that case Sir Scott Baker made the following observations which are of some relevance here. First of all he notes that the Appellant in that case was unable to afford a medical report. And Sir Scott appears to have taken the view that the Appellant decided that he would not incur that expense until he knew that he was going to obtain permission to advance his appeal out of time. That illustrates in a very general way that a litigant's inability to fund his case is not something which compels the Court, against all other considerations, to bend over backwards to accommodate the litigant.

49. The other observation that was made in the Judgement was this:

> "*22. One of the desirable factors in litigation is that there should be finality so that the party will know where they stand after final orders of the kind that were made in this case, have been made. It is a hardship in our judgment for negligence and battery actions to be outstanding against professional men years after the event. They are entitled to finality as indeed is the Bermuda Hospital Board.*"

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

[1] The Judgment had in fact, as the present judgment was being delivered, been circulated in final form with a neutral citation of [2015] CA (Bda) 25 Civ (5 August 2015).

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 ½ 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 except 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.

Conclusion

54. And so for those reasons the Plaintiff's claim is Struck-out.

[After hearing counsel]

55. Costs reserved.

Dated this 10th day of August, 2015 _____
IAN R.C. KAWALEY CJ