

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW SIDE
2000/CLE/GEN/00147

between

JOHN WOODSIDE
Plaintiff

and

CARIBBEAN HEALTH & FITNESS LTD.
(trading as Gold's Gym)
First Defendant

and

JOHN SITOMER
Second Defendant

and

STEPHEN HAUGHEY
Third Defendant

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr N Leroy Smith, for the Third Defendant, Applicant

Mr Randolph Dorsett for the First and
Second Defendants

Ms Kara G Turnquest, for the Plaintiff, Respondent

2 June 2007, 15 September 2008, 23 October 2009

DECISION

Adderley J

This is an application by summons pursuant to Order 25, rule 1(4) of the Rules of the Supreme Court and under its inherent jurisdiction on the part of the third defendant, that this action be dismissed for want of prosecution.

2. For the reasons following I hereby dismiss the application.

The Law

3. In *Icebird Limited v Winegardner* [2009] UKPC 24 (“*Icebird*”) Lord Scott delivering the opinion of the Committee (Lords Phillips of Worth Matravers, Scott of Foscote, Brown of Easton-under-Heywood, Mance and Neuberger of Abbotsbury) allowing an appeal from the Court of Appeal of The Bahamas reaffirmed the law in this area at paragraph 8:

“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)”

He went on to indicate that there must be evidence of prejudice; it is not enough to infer prejudice by virtue only of the delay.

4. In *Icebird*, Lord Scott also reiterated the difference between delay in prosecution and abuse of process. Supporting the approach of Lord Woolf in ***Grovit v Doctor*** [1997] 1 WLR 640 he stated at paragraph 7:

“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 Lordship’s respectful opinion, to be reduced by categorizing 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 commented and had no intention of prosecuting him to judgment.”

On principle also, before the limitation period has expired an action will not normally be dismissed for inordinate and inexcusable delay if fresh proceedings, for the same cause of action could be initiated.

5. On 1 July 2004 under the Rules of the Supreme Court (Amendment) Rules 2004, Order 31A came into effect. This Order was intended to govern the fair and efficient disposal of cases. Integral to this process was a mandatory Dispute Resolution Conference after the close of pleadings. Speaking to the Rules within the context of mandatory dispute resolution, the Chief Justice in his remarks at the Opening of the Legal year, 11 January 2006, had this to say:

“It is in the public interest that civil litigation comes to be directed by the court and not by the convenience of one of the parties and their lawyers and, to the extent that parties can be “encouraged” to resolve matters at this stage before incurring the additional expense and delay of a trial, dispute resolution is in every one’s interest. Judges are, therefore, expected and entitled to be as forceful as necessary in their attempt to reserve the trial process for matters which cannot be otherwise resolved.”

6. Practice Direction No. 1 of 2006 specifically dealt with the conduct of a Dispute Resolution [Conference]. Toward this end, I placed the responsibility on the Registrar to ensure that he or she is properly notified of the filing of the defence, notify the parties within 14 days of the close of pleadings if he or she intends to conduct a Depute Resolution Conference and later inform them of the date and time fixed for the conference. Clause 1.4 of the directions states:

“Notwithstanding, paragraph 1.2 any party may require that a matter be referred to a Conference at any stage.”

7. It has been stated that the defendant can sit back and let “sleeping dogs lie”. In ***Allen v Sir (Alfred McAlpine & Sons Ltd and Another)*** [1968] 2 Q.B. 229 Lord Diplock stated the following at [258]:

“It is thus inherent in an adversary system which relies exclusively upon the parties to an action to take whatever procedural steps appear to them to be expedient to advance their own case, that the defendant, instead of spurring the plaintiff to proceed to trial, can with propriety wait until he can successfully apply to the court to dismiss the plaintiff’s action for want of prosecution on the ground that so long a time has elapsed since the events alleged to constitute the cause of action that there is a substantial risk that a fair trial of the issues will not be possible.”

8. This, I believe, must be read within the context of Order 31A which relies at crucial points on the Registrar and not exclusively on the parties, and the practice directions which permit either party, not only the plaintiff, to make requisitions of the Registrar to carry out his functions .

9. In his affidavit filed 25 March 2008 in support of the summons the defendant states:

“in the event that this action should proceed to trial, I will stand to be badly prejudiced by the protracted delay and inaction herein on the Plaintiff’s part.”

He based this on the premise that it was unlikely to be able to locate material witnesses, and even if they were identified their memories would be so badly dimmed over time that it would substantially affect the cogency of any testimony which they might otherwise be in a position to give.

10. He reached this conclusion based on the triable issues set forth in a statement filed 2 November 2007 which I have read. He also noted that when the second defendant was asked on 28 February 2002 to identify the person that was responsible for removing any blood which the plaintiff would have left on the machine in question, the second defendant stated that he could not recall who would have been responsible for cleaning the gym's equipment some three years ago.

11. However, the plaintiff's affidavit filed 30 May 2008 states that at or around the time the action was commenced witness statements were taken from about 20 persons who can attest to the type and condition of the machine and it is intended to call four of these persons that he has contacted who were working with the first defendant on the evening of the accident who are willing to testify and who confirm that they have no difficulty in recalling the piece of equipment and the state of repair, that a surveillance camera was in place at the time and this as well as written records should be in the possession of the first defendant despite the fact that the operation was sold in 2004 or 2005. He also points out that recalling who was responsible for cleaning the machines may not be relevant to any facts in the issue.

12. In these circumstances and having regard to the precise details pleaded in the defence of the first and second defendants filed 13 June 2000 and that of the third defendant filed 28 December 2001, including inter alia that the leg press was the "Icarian" Leg-Press as distinct from the "Paramont" Leg-Press claimed by the plaintiff, and the details pleaded by the third defendant of how he proceeded to carry out the weight lifting exercise, I do not think that there is a

substantial risk that it is not possible to have a fair trial. There may be disputes of fact at the trial but they are not complex and very narrow and the burden of proof is on the plaintiff.

13. What about serious prejudice to the defendants? The prejudice to which the third defendant swears in paragraph 7 of his 30 May affidavit are based on the same matters which the defendants claim would militate against a fair trial and so this does not take us any further.

14. I accept the submission of Ms Turnquest that a bold assertion of prejudice or of a substantial risk that a fair trial is not sufficient and there must be some evidence on which the court can draw that inference. Depending on the circumstances, the fact of inordinate delay may not in itself be sufficient.

15. The Registrar had previously refused to strike-out the action primarily because of the coming into effect of Order 31A in 2004 and the Registrar's duty to initiate the next step. This decision was not appealed and as late as 22 November 2007 Hall CJ, as he then was, presided over an unsuccessful dispute resolution conference. Notice of Referral to Dispute Resolution Conference was issued by the Registrar 24 July 2007. Prior to the conference being held the summons to strike out was filed by the third defendant on 23 October 2007. Notice of Referral to Case Management Conference was filed by the Registrar on 8 January 2008.

16. The accident happened on 22 October 1999 and the writ was filed 9 February 2000. There is no doubt that after commencement there have been several periods of inordinate delay:

- (i) from the date of the commencement by writ up to the date that the third defendant was joined (2 years, 2 months);
- (ii) from the close of pleadings up to the date of the Registrar's Order refusing a strike out (3 years, 10 days);

- (iii) from the date of the registrar's Order up to the Dispute Resolution Conference (more than 2 ½ years), but they have not been in breach of specific orders of the court.

Some of the delays were caused by the plaintiff switching lawyers who for one reason or the other were not prosecuting the case quickly enough for the plaintiff who in one case had to pay a monetary sum before the lawyer would release his files. There is clear evidence that the plaintiff has been trying to get this matter to trial. No application has been made to strike out for abuse of the process of the court or to amend the summons in that regard. I must regard that as deliberate on the part of the applicant. I have therefore sought to apply the principles applicable to striking out for want of prosecution.

17. In *Shtun v Zalejska* [1996] 1 WLR 1270 in the English Court of Appeal the headnote accurately summarizes the opinion of Gibson LJ where he sought to clarify the principle pertaining to fair trial and serious prejudice:

“...in determining whether the plaintiff's inordinate and inexcusable delay gave rise to a substantial risk that it was not possible to have a fair trial, or was likely to cause or to have caused serious prejudice to the defendant as a result of the impairment of witnesses' recollections, the court had to examine all the circumstances with care, including the affidavit evidence, and the issues disclosed by the pleadings, that, while every case depended on its own facts, it was not essential that there should be evidence of the particular respects in which potential witnesses' recollections were impaired, nor did the impairment have to be attributed to any particular period of delay, but in an appropriate case the court was entitled to draw an inference that by reason of the delay complained of serious prejudice would be caused to the defendant as a result of the impairment of witnesses' recollections....”

RULING

18. In applying the principles to the particular facts of this case, I do not think that it is an appropriate case to strike out for want of prosecution and exercise my discretion to refuse the application. This case demonstrates, however, that the

administration may need to review Order 31A to put in place mechanisms to alert the Registrar in each action when it is time to carry out his functions under Order 31A and specifically what role, if any, counsel should be obliged to take in that process.

19. Costs will follow the event to be taxed if not agreed.

Dated the 23rd day of October 2009

**K Neville Adderley
Justice**