

COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT
COMMON LAW SIDE
2001/CV/00732

between

ANASTACIA MINNIS
Plaintiff

and

INSURANCE COMPANY OF THE BAHAMAS LTD
Defendant

BEFORE: His Lordship The Honourable
Mr Justice K Neville Adderley

APPEARANCES: Mr Norwood Rolle for the Plaintiff

Ms Genell Sands, Mr Howard Thompson with her,
for the Defendant

21 August 2008, 30 October 2009

D E C I S I O N

Adderley J

1. This is one of those cases which have been surfacing from time to time where the “new” case management regime under Order 31A appears to come into conflict with the “old” procedure by Summons for Directions under the Rules of the Supreme Court (“the Rules”).

2. It is an appeal pursuant to Order 58 of the Rules against the Order of the Deputy Registrar dated 5 September 2007 and filed 10 September 2009 that reads as follows:

“IT IS HEREBY ORDERED that

1. This action is dismissed on the grounds that the Plaintiff has failed to comply with the order of the Court dated February 12, 2003 and filed March 21, 2003 and which failure the Court considers to be an abuse of the process of the Court and want of prosecution on the part of the Plaintiff and a failure to set the action down for trial,...

She also ordered costs and gave leave to appeal within 7 days with which the defendant has complied.

3. The order referred to was made on the hearing of the Summons for Directions whereby inter alia the court ordered mutual discovery and that the matter be set down within 60 days before a Judge. If the order had been complied with, the matter would have been set down by 21 March 2003.

4. No action was taken by the plaintiff and the court administered case management Order O31A of the Rules came into effect on 1 July 2004. This was about 1 year and 3 months after the order was to have been complied with. Similarly, up to the time the summons to strike out was issued the defendant had taken no steps to comply with the order, in particular had not made discovery to

the plaintiff in accordance with the order. The period of limitations expired on 6 February 2007.

5. On 14 June 2007 the defendant took out the summons before the Deputy Registrar to dismiss the action for failure to set down, for want of prosecution and for abuse of the process of the court.

6. When Order 31A came into force on 1 July 2004 since pleadings had closed the proceedings were at the stage where the Registrar was mandated to refer the matter to a Dispute Resolution Conference in accordance with Part II Rule (2) (1). Practice Direction No 1 of 2006 in clauses 1.1 to 1.3 requires the Registrar to notify the parties or their attorneys to attend a Dispute Resolution Conference. However although it is the primary duty of the Registrar clause 1.4 reads as follows:

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

7. In *Icebird Limited v Winegardner* Appeal No 32 of 2006 (“*Icebird CA*”) cited by Ms Sands which was an appeal against an order of a Judge striking out an action for want of prosecution in circumstances where the appellant failed for a period of roughly four years to issue a Summons for Directions upon the pleadings having been deemed closed, Longley JA said the following in relation to Order 31 A:

“Significantly, this is likely to be one of the last such applications in light of the new case management regime which came into being with the new order 31A of the rules of the Supreme Court. That provides automatic triggers for directions to be give for settlement and or trial of actions in the Supreme Court making the taking out of a summons for directions, for the most part, otiose...”

Unlike in this case there was no subsisting order of the court in *Icebird CA*.

8. In *Icebird Limited v Winegardner* [2009] UKPC 24 (“*Icebird PC*”) 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 of the delay only.

9. The learned Deputy Registrar appears to have conflated abuse of the process of the Court and want of prosecution. In *Icebird PC* in setting aside the decision of the Court of Appeal of The Bahamas, Lord Scott 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.

10. The breach of the order on the Summons for Directions to set the matter down for trial within 60 days was not a contumelious default within the meaning in *Icebird PC*, but the learned Deputy Registrar appears to have decided that the circumstances transformed that non compliance into an abuse of the process of the court. On the alternative ground the affidavit of Barrett H. McDonald filed 5 September 2007 in support of the application to dismiss does not rise to the level required to prove want of prosecution because it does not indicate the source of the substantial risk of prejudice to the defendant. Notice is taken that insurance companies investigate and keep good written records of accidents and the pleadings of the defendant disclose this. A substantial risk of prejudice cannot in this case be inferred from delay simpliciter or by the mere statement to that effect in an affidavit without having regard to all the circumstances.

11. In *Shtun v Zalejska* [1996] 1 WLR 1270 in the English Court of Appeal the headnote in summarizing the opinion of Gibson LJ gives helpful guidance on how the principle pertaining to fair trial and serious prejudice ought to be applied:

“...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....”

It seems to me that ***Albertha Bartlett & Devard Williams v Bahamasair Holdings*** Common Law Common Law Action No. 1019 of 1982 cited by Ms Sands remains good law only within the above context. It seems to me also that the approach does not conflict with Lord Woolf's dicta at page 191C to 192 A in *Arbuthnot Latham Bank v Trafalgar Holdings Ltd.* [1998] 2 All ER 181 with respect to the new more liberal approach to striking out actions.

RULING

12. For the above reasons, the court finds that the learned Deputy Registrar fell into error when she determined that the action should be dismissed for want of prosecution. However, it was open to her to conclude, as she did, that the failure to comply with the Order of the court, requiring the matter to be set down for trial, in the circumstances of the inordinate and inexcusable delay for over 4 years thereafter during which time the plaintiff took no steps in the action, was an abuse of the process of the court. On that basis the court affirms the decision of the learned Deputy Registrar and dismisses the appeal.

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

Dated the _____ day of _____ 2009

**K Neville Adderley
Justice**