COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW & EQUITY DIVISION
2011/CLE/gen/01033

IN THE MATTER of the Estate of Ernest J. Wilson also known as Ernest Wilson. Probate Action Number 0079 of 2009.

BETWEEN

THELMA LOUISE WILSON STUART
(Administrator of the Estate of Ernest J. Wilson)

~~**CHRISTOPHER STUART**~~
~~**(Substituted by Order of the Court dated the 29th June 2016)**~~

Plaintiff

AND

JUDITH DAWKINS

Defendant

Before:	The Honourable Madam Justice Tara Cooper Burnside (Ag)
Appearances:	Bridget Ward for the Applicant
	Meryl Glinton for the Defendant
Hearing Date:	11 March 2021

RULING

[1] There are two applications before me. The First is an application by the Defendant by Summons filed 15 December 2020 (the "**Dismissal application**") for an Order that this action be dismissed for want of prosecution, abuse of process and on the basis that it is just and equitable to do so. The Second is an application by Summons filed 4 January 2021 (the "**Joinder application**") on behalf of Betty May Edwards for an Order that she be joined as a party to these proceedings pursuant to RSC Order 15, rule 6(2)(b)(i).

BACKGROUND

[2] The late Ernest J. Wilson (the "**Deceased**") died intestate on 21 August 2001 survived by his widow, Viola Wilson, and three children.

[3] A Grant of Letters of Administration was issued by the Court on 14 April 2009 to Viola Wilson, the widow. However, by Order dated 3 February 2011, Viola Wilson was removed as Administratrix and Thelma Louise Wilson Stuart, the Plaintiff, and Betty Mae Edwards, the applicant herein, were appointed Joint Administrators in her place.

[4] At the date of his death, the Deceased was seised in fee simple in possession of Lot Number 76 in the subdivision of Stapledon Gardens (the "**Property**").

[5] The Defendant is the daughter of the beneficiaries of the Estate and the Property is currently occupied by her children.

[6] On 9 August 2011, the Plaintiff, Thelma Louise Stuart, commenced this action on behalf of the Estate for an Order that the Defendant deliver up possession of the Property.

DISMISSAL APPLICATION

Has there been inordinate delay?

[7] This action was commenced in the year 2011 and it has yet to be set down for Case Management. As such, the delay in this case is obvious.

[8] Having examined the documents, I am of the view that both parties have contributed to the delay. Nonetheless, as this is the Plaintiff's action, the duty to diligently prosecute it is that of the Plaintiff. The procedural history follows.

[9] Although the Writ was filed on 8 August 2011, it appears that it was not served on the Defendant until 24 October 2014. That constitutes an approximate delay of 2 years.

[10] When the Writ was served, an application by the Plaintiff for summary judgment against the Defendant, which had been filed on 9 August 2011, was also served.

[11] The action then laid dormant until 2016, although, 2 Notices of Change of Attorney and a Notice of Intention to Proceed were filed during this time.

[12] On 3 March 2016, a Summons was filed by Christopher Stuart, the husband of the Plaintiff, for an order that he be substituted as the Plaintiff in the action on the basis that he had been granted an enduring power of attorney and the Plaintiff was mentally incompetent by reason of Alzheimer's. That application was heard *ex parte* and an Order (the "**Substitution Order**") substituting Christopher Stuart as the Plaintiff in this action in place of Thelma Louise Wilson Stuart was granted on 29 June 2016.

[13] After the Substitution Order, the Plaintiff filed an application on 22 July 2016 for leave to enter judgment in default of appearance against the Defendant. This application was served on the Defendant and apparently, caused her to spring into action. For on 10 August 2016, the Defendant entered an appearance to the action and filed an application (the "**Discharge application**") for the discharge of the Substitution Order. In addition, on 30 August 2016, the Defendant filed her Defence after which, the Plaintiff filed a Reply and Defence to Counterclaim on 30 August 2016.

[14] The Discharge application was heard on 9 November 2016. At that hearing, the Defendant successfully argued that the Substitution Order was granted in circumstances where there had been a material non-disclosure to the Court. That is, Mr Stuart failed to inform the Court that Betty Mae Edwards, as Joint Administrator of the Estate, was entitled to be appointed as a Plaintiff.

[15] In his ruling which discharged the Substitution Order, Hilton J stated:

> "I find that the omission by [Mr Stuart] in not disclosing that there was already a court appointed joint administrator who could be properly substituted for the incapacitated Thelma Louise Wilson Stuart, is sufficiently material to warrant the discharge...the Plaintiff is free to make a fresh application for the appointment of a substitute Plaintiff which should include the court appointed joint administrator Betty May Edwards".

He also ordered that the Defendant be paid costs.

[16] The action then laid dormant for a further period of approximately 4 years until a recent flurry of activity.

Legal principles

[17] It is well established that the Court has inherent power to dismiss an application for want of prosecution. Set forth below is a summary of the general principles.

(i) In a case where there has been no contumelious conduct by the plaintiff, the court, if it is to strike out an action for want of prosecution, must be satisfied (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 each other, or between them and a third party: (see ***Birkett v James*** [1978] AC 297 at 319 per Lord Diplock);

(ii) The delay that must be shown to have caused such risk or such likelihood of prejudice is the delay after the issue of proceedings (see ***Birkett v James*** supra at 322).

(iii) But where the plaintiff delays in issuing proceedings and by such delay causes prejudice, the additional prejudice which must be shown to justify dismissal of the action need not be great, provided that it is more than minimal (see ***Birkett v James*** supra at 323).

(iv) Further, once the plaintiff is guilty of further delay, the prejudice caused by the totality of the period of his delay can be looked at (see ***Roebuck v Mungovin*** [1994] 2 AC 224 at 234 per Lord Browne-Wilkinson).

(v) The prejudice may take a variety of forms, but one recognised form is the impairment of the memory of witnesses (see ***Birkett v James*** supra at 322). Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him (see ***Biss v Lambeth, Southwark and Lewisham Health Authority*** [1978] 1 WLR 382 at 389 per Lord Denning MR). But the court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action (see ***Dept of Transport v Chris Smaller (Transport) Ltd*** [1989] AC 1197 at 1209–1210 per Lord Griffiths).

(vi) Save in exceptional cases, an action will not be struck out for want of prosecution before the expiry of the relevant limitation period (see ***Birkett v James*** supra at 321).

(vii) The Court may exercise its power to strike out to prevent its process from being obstructed or abused. Abuse of process concerns the power which any court of justice must possess 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 of process can arise are wide and varied and depend on the facts of the particular case (see ***Hunter v CC of The West Midlands Police*** [1982] AC 529, 536 per Lord Diplock).

Disposition

[18] In the present case, Ms Glinton contends on behalf of the Defendant that the recent 4 year delay, taking into account the previous delays, is inordinate and warrants an order that the action be struck out.

[19] While her contention is persuasive, there has been no contumelious conduct on behalf of the Plaintiff or the Estate. However, a delay of 4 years might be regarded as inordinate

and as a result, I must consider whether such delay gives rise to a serious risk that a fair trial of the action is not possible or has caused serious prejudice to the Defendant.

[20] In her affidavit filed in support of the Dismissal application the Defendant states:

> "Allowing this action to continue is prejudicial to me, especially insofar as any searches of my name will reveal that this suit remains on going. It has left me in a continuing state of judicial and financial uncertainty."

[21] It is well established that there is prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial. In ***Biss v Lambeth, Southwark and Lewisham Health Authority*** Denning MR likened the uncertainty to the prejudice suffered by Damocles when the sword was suspended over his head at the banquet. Nonetheless, it is only in exceptional cases that such anxiety will be sufficient to justify an Order that the action be struck out. As Lord Griffiths in ***Eagil Trust Co. Ltd. v Pigott-Brown*** [1985] 3 All ER 119: put it (at page 124):

> "Any action is bound to cause anxiety, but it would as a general rule be an exceptional case where that sort of anxiety alone would found a sufficient ground for striking out in the absence of evidence of any particular prejudice."

[22] Having considered the evidence, I am of the view that the Defendant has not been seriously prejudiced and it is possible for there to be a fair trial. Furthermore, having regard to the Statement of Claim which pleads that the Plaintiff demanded the Defendant to vacate the property by letter dated 15 March 11, I am mindful that the limitation period within which the Plaintiff may bring this action is not yet expired.

[23] In all the circumstances, I decline to exercise the discretion of the Court to strike out the Plaintiff's action.

[24] Ms Glinton submits that, if the action is not struck out, it should be stayed pending payment of the costs ordered to be paid by the Plaintiff to the Defendant at the hearing of the Discharge Application, which costs have been certified by the Registrar at $8,500.00.

[25] Having reviewed the ruling of Hilton J it is evident that the order for costs was not an order for "costs to be paid", whereby the Defendant would have been entitled to have them taxed and paid at once. I therefore decline to make such an Order.

JOINDER APPLICATION

[26] Ms Edwards seeks to be added as a Plaintiff pursuant to Order 15, rule 6(2)(b)(i) which states:

"(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application—

(b) order any of the following persons to be added as a party, namely—

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon"

[27] On behalf of the Defendant, Ms Glinton opposes the joinder on the basis that Thelma Louise Wilson Stuart and Betty Mae Edwards were appointed as "joint administrators" of the Estate and as such, the subsequent incapacity of Ms Stuart prevents Ms Edwards from continuing as administrator. As she put it, the administration of the Estate has been "frustrated" as a result of Ms Stuart's incapacity.

[28] Ms Glinton has referred the Court to sections and 49 and 51 of the ***Probate and Administration of Estates Act***, which state:

"**49. Right of proving executors to exercise powers.**

(1) Where probate is granted to one or some of two or more persons named as executors whether or not power is reserved to the other or others to prove all the powers which are by law conferred upon the personal representative may be exercised by the proving executor or executors for the time being and shall be as effective as if all the persons named as executors had concurred therein.

...

51. Rights and liabilities of administration.

Every person to whom the administration of the real and personal estate of a deceased person is granted, shall, subject to the limitations contained in the grant, have the same rights and liabilities and be accountable in like manner as if he were the executor of the deceased."

[29] In light of those provisions, Ms Glinton submits that the act of one joint administrator is the act of all so long as they are all of sound mind. Further, joint administrators are accountable to each other; therefore, when one of two administrators dies or is incapacitated, it is necessary for the other to apply for the appointment of a successor.

[30] This is all very interesting but seems to be irrelevant for the present purposes. The issue before me is whether Ms Edwards is a person within the contemplation of Order 15, rule 6(2)(b)(i), i.e., one who ought to have been joined as a party to these proceedings or whose

presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon.

[31] This issue is addressed in *Williams & Mortimer Executors Administrators and Probate*, 15th Ed. (1970) at page 994 where the learned authors state:

> **"Which executors should join as plaintiffs**
>
> If there are two or more executors, all of those who are of full age and have proved the will should join as plaintiffs in an action. Unless they have acted, executors who have not proved should not be joined, even though they have not renounced. Nor is an absconding executor a necessary party.
>
> ...
>
> **Joinder of co-administrators**
>
> **Presumably the position is the same with regard to the joinder of persons to whom letters of administration have been granted.** Moreover, since an administrator has no cause of action as such, until he obtains a grant of letters of administration, a writ issued by him before such grant is a nullity." (my emphasis)

[32] On behalf of the applicant, Ms Ward has helpfully referred the Court to sections 45 and 59 of the ***Probate and Administration of Estates Act***. Those sections state as follows:

> **"45. Power to act when representation granted.**
>
> When representation has been granted in respect of any real or personal estate of a deceased person, no person other than the person to whom that grant has been made shall have power to bring an action or otherwise act as an executor or administrator of the deceased person in respect of the estate comprised in or affected by the grant until the grant has been recalled or revoked.
>
> ...
>
> **59. Devolution of real estate on personal representative.**
>
> Real estate to which a deceased person was entitled for an interest not ceasing on his death, shall, on his death and notwithstanding any testamentary disposition thereof, devolve on the personal representative of the deceased."

[33] Ms Ward contends and I agree that Ms Edwards and the Plaintiff are trustees of the Property and are answerable to the beneficiaries under the Estate and also to the Court with respect to their administration of the trust. Additionally, as Joint Administrator, Ms Edwards has an obligation to continue the prosecution of the action until it is resolved.

[34] Finally, I would add that the Defendant should not be permitted to have her proverbial cake and eat it too. In his ruling on the Discharge Application, Hilton said:

> "4. The Defendant filed an Affidavit in support of her summons on 10th August 2016 and submitted that while, Mr. Stuart, the Plaintiff was at liberty to apply to the court for substitution, he (and his counsel) ought to have disclosed that there was already a joint administrator appointed by the court who would have been entitled to be substituted in place of Thelma Louise Wilson-Stuart. Counsel further submitted that had the court been aware of this, it would not have been in the interests of justice to appoint Mr. Christopher Stuart to be substituted as there was already a court appointed administrator who should rightly be jointed in the action and substituted in place of Thelma Louise Wilson-Stuart."
>
> (my emphasis)

Having made the submissions indicated, it does not lie in the mouth of the Defendant to challenge the Joinder application.

[35] In all the circumstances, I find that Ms Edwards falls within the contemplation of Order 15, rule 6(2)(b)(i). In my view, having been appointed as Joint Administrator of the Estate, Ms Edwards is a person whose presence is necessary to ensure that this action is determined and adjudicated upon, *particularly* because Ms Stuart is incompetent. I therefore grant her application to be joined as a Plaintiff to these proceedings.

[36] The costs of both of the applications shall be costs in the cause.

DATED this 28th day of May, 2021

TARA COOPER BURNSIDE
JUSTICE (AG)