COMMONWEALTH OF THE BAHAMAS **2012/CLE/gen/FP/00102**

IN THE SUPREME COURT

Common Law and Equity Division

SUPREME COURT REGISTRY
JUN 11 2021
FREEPORT,G.B.BAHAMAS

BETWEEN

BANK OF THE BAHAMAS

Plaintiff

AND

NICOLE LIGHTBOURNE

Defendant

BEFORE: The Honourable Justice Petra M. Hanna-Adderley

APPEARANCES: Mr. Dawson Malone along with Miss Kandice Maycock for the Plaintiff
Mr. Wendell Smith for the Defendant

HEARING DATE: May 18, 2021

RULING

Introduction:

1. This is an application by the Plaintiff by way of a Summons filed February 10, 2021 for an Order pursuant to Order 31A, Rule 20(1) (a) of the Rules of the Supreme Court ("**RSC**") striking out the Defendant's Defence filed on May 4, 2012 and giving Judgment for the Plaintiff on the basis of the Defendant's failure to comply with Directions Orders filed herein on May 11, 2018 ("**the 1st Directions Order**") and December 10, 2020 ("**the 2nd Directions Order**"), or alternatively, that the Defendant is guilty of intentional and contumelious delay in the prosecution of her Defence and intentional and contumelious default of the Directions Orders, or alternatively, an unless Order that, unless the Defendant files any and all Witness Statement(s) on behalf of the Defendant and the Defendant's Listing Questionnair and serves the same on Counsel for the Plaintiff within 7 days of the Order, that judgment be given as prayed by the Plaintiff in

the Writ of Summons filed on May 4, 2012, and that in any event the costs of and occasioned by this application be paid by the Defendant. The application is supported by the Affidavit of Mrs. Pearline Ingraham Wood filed herein on February 10, 2021. The Plaintiff filed Written Submissions on March 9, 2021 and the Defendant filed Written Submissions on May 12, 2021.

Statement of Facts

2. Mrs. Pearline Ingraham Wood states her affidavit, in part, that the 1st Directions Ordered, inter alia, the filing and service by the parties of the List of Documents, Agreed Bundle of Documents and an Agreed Bundle of Pleadings, Statement of Agreed Facts and issues, Witness Statements on various dates, culminating with the filing and service of the Listing Questionnaire on or before November 27, 2018. She states that notwithstanding the same, the Defendant failed to file and serve the Defendant's Bundle of Documents, Defendant's Statement of Facts and Issues, the any Witness Statements or a Listing Questionnaire. That October 2, 2020, during a Case Management Conference, Counsel on behalf of the Defendant advised that he would take instructions as to whether the Defendant intended to the defend the action and would file the outstanding documents if so intended. Notwithstanding the same, the Defendant's documents were never filed or served on the Plaintiff. That at the Pre-Trial Review hearing on December 10, 2020, the Defendant's documents were still not filed or served and Counsel for the Defendant indicated that he still was not yet in receipt of any instructions regarding settlement or otherwise and as such, the Defendant would be defending the action. Further, he agreed to the Bundle of Pleadings and the Bundle of Documents as presently filed by the Plaintiff, somewhat partially complying with the Directions Orders, and acknowledged that only the Witness Statements remain outstanding. He made no acknowledgment of the Listing Questionnaire not being filed. Counsel for the Defendant indicated that he would file and serve the Witness Statements on the Plaintiff on Friday, January 8, 2021.
3. Mrs. Ingraham-Wood states that the Defendant has failed to comply with the 1st and 2nd Direction Orders and that the Defence should be struck out and Judgment and costs be entered in favour of the Plaintiff.

Submissions

Plaintiff

4. Miss Kandice Maycock Counsel for the Plaintiff referred the Court to the decision of The Honourable Mr. Justice Milton Evans (as he then was) in the case of **Marvin Bethel et al v. Derek Bethel**, in 2008/CLE/gen/00712 by Decision dated 31st August, 2012 which incorporated the ratio of the English case of ***Grovit v Doctor*** and guidance of Wolf, LJ in respect of the court's inherent jurisdiction to dismiss cases as an abuse of process when there has been intentional and contumelious delay and, to Allen, P in the case of **Glen Colebrooke et al v. National Insurance Board,** SCCivApp No 127 of 2008, Judgment dated 8th May, 2012 at paragraph 17 with the adoption of the principles in *Pamplin v Fraser* [1984] QB 1385, particularly, that prejudice may be presumed from mere delay; and to the case of **R v Christie et al Ex Parte Coalition to Protect Clifton Bay**, 2013/PUB/jrv/00012, of Ruling No. 10 (Additional Evidence and Cross Examination) by the Hon. Madam Justice Rhonda Bain dated 4th October, 2016 in which the Court held that parties are obliged to comply with directions order and failure to do so may amount to contempt of court.
5. Miss Maycock Submitted that the Defendant has throughout been represented by Counsel and in full knowledge of the order of the court and RSC for many years has failed and or refused to comply with the court's orders therefore it is submitted that the intentional and or contumelious conduct and delay and accordingly, the Defence should be struck out and judgment entered for the Plaintiff as prayed.
6. Further, Miss Maycock indicated that the Plaintiff does not waive its objection/ insistence that the Defendant must, in order to maintain a Defence in this action, apply under **Order 31A rule 25** of the **RSC** for relief from sanction and/or also apply under **Order 3 rule 4** of the **RSC** or any other rule for an extension of time to comply with the orders.
7. Miss Maycock argued in the alternative that if the Court is not minded to strike out the Defence and enter judgment accordingly, the Plaintiff asks that the Court makes an Unless Order in the following terms pursuant to **Order 31A rule 21** of the **RSC:**

> *"an unless Order that unless the Defendant files any and all Witness Statement(s) on behalf of the Defendant and the Defendant's Listing Questionnaire and serves the same on Counsel for the Plaintiff within 7 days of the Order, that judgment be given as prayed by the Plaintiff in the Writ of Summons filed on 4th May, 2012;"*

8. Finally, Miss Maycock submitted that the Plaintiff be awarded its costs on a full indemnity basis and relies on the principles set out in **R v Comptroller of H M Customs Ex Parte Kelly's Freeport Limited,** 2010/PUB/jrv/FP00006, Judgment of Gray Evans, J (as she then was) dated 31st March, 2017. That the failure to comply with the orders of the court are contumelious and warrants such a costs order.

Defendant

9. Mr. Wendell A. Smith Counsel for the Defendant submitted that if the Court were to strike out her Defence at this stage, it would be a disproportionate response to her failure to comply with filing the Witness Statement and Listing Questionnaire. Further, it is submitted that the Court, before taking the draconian step of striking out the Defence, should take into account both parties' requirements for a fair trial, and can alternatively award the Plaintiff costs in lieu of striking out the Defence. Further, that the failure to comply with the filing of the Witness Statement is due to the Defendant's Extant Summons for leave to Amend the Defence herein, filed on August 13, 2014. That if the Court was to accede to the application for the amendment, it would necessitate changes in the content of the Defendant's Witness Statement for the trial herein. Mr. Smith referred the Court to **Grundy v Naqvi** [2001] EWCA Civ 139 at paragraph 26 where Lord Justice Simon Brown., stated *inter alia*:

> *"if an order debarring the defendant from defending and entering judgement accordingly in default for the sum claimed ("the supreme penalty"), is not appropriate in this case, when will it be? The short answer to that question is, in a case when the relevant breach of the* ***unless order****, here the failure to exchange witness statements, is not so intimately bound up, as this breach was, with the defendant's application to amend the defence and counterclaim. Whilst that application remained outstanding, it was hardly surprising that witness statements were not exchanged"*

10. Mr. Smith submitted that the Plaintiff's application is misconceived. That the commentary of the RSC (White Book 1999) at 25/L/3, an action may be dismissed for contumelious default when there is deliberate default in compliance with a **peremptory order** of the Court. The commentary further states that *"a peremptory order is one which makes clear to the other party, either from its terms or from the circumstances in which it is made, that exact compliance with no further argument, is required by the*

Court within a stated time, and indicating expressly or by implication, that default will incur serious consequences". Further, as noted in the commentary "*the exclusion from any further part in the proceedings of a party who deliberately disobeys a peremptory order of the Court, is appropriate where there is a real risk that the default will render the fair trial of the action impossible" .... the best practical form of a peremptory order is the unless order".* Specifically, with respect to the present case, there must be disobedience of an express, peremptory order. Mere failure to comply with a rule is not regarded as sufficient to exclude a party from a proceeding. (See principle cited in **Samuel v Linzi Dresses Ltd.** [1981] Q.B. 115 at 126-127, and **Janov v Morris** [1981] 1 W.L.R. 1389). That there has been no contumelious default, as there has not been a peremptory order made by the Court herein. Further, that in the alternative, the Court may make a peremptory (unless) order, to ensure the litigation herein is brought to conclusion, whilst preserving the fair trial of the action.

11. Mr. Smith further submitted that as noted in the commentary of the RSC at 25/L/4 with respect to inordinate and excusable delay, that there are two main requirements. Firstly, that there has been inordinate or inexcusable delay on the part of the defaulting party or her lawyers. Secondly, that such delay will give rise to a substantial risk that it is not possible to have a fair trial of the issues in this action, or that the delay is such as is likely to cause or have caused serious prejudice (**Birkett v James** [1978] A.C. 297 at 318). The Defendant submits that whilst the action herein was commenced in 2012, the Plaintiff did not seek a Summons for Directions until 2018, which resulted in the Directions Order of April 26, 2018. Further, the trial was vacated numerous times herein, due to several calamities most notably Hurricane Dorian, and the ongoing COVID-19 pandemic. The Plaintiff has not asserted that they have been prejudiced in anyway as a result of any delay herein and/or that there cannot be a fair trial of the issues, and it is submitted that any lapse in time would not be very prejudicial due to the commercial nature of the matter.
12. Mr. Smith's third submission addresses the Plaintiff's assertion that the Defendant must, in order to maintain a Defence in this action, apply under Order 31A rule 25 of the Rules of the Supreme Court for relief from sanction and/or also apply under Order 3 rule 4 of the Rules of the Supreme Court for an extension of time to comply with the Directions Orders. Mr. Smith submits that Order 31A rule 24 (1) of the Rules of the Supreme Court

provides that *"where the Court makes an order or so gives directions the Court **may** whenever practicable also specify the consequences of failure to comply".* That this Court has never specified at any Case Management Conference, the consequences of the Defendant failing to comply with the Directions Order herein, and as such there are no sanctions to apply for relief from. Further, in the alternative should the Court make a peremptory order herein, this would obviate the necessity for the Defendant to apply for an extension under Order 3 rule 4 of the RSC. He referred the Court to **Sayers v Clarke Walker (a firm)** (Practice Note) [2002] 1 WLR 3095, 3100 where the following observations were made Brooke LJ at paragraph 20:

> *"The philosophy underpinning CPR Pt 3 is that rules, court orders and practice directions are there to be obeyed. **If a sanction is imposed** in the event of non-compliance, the defaulting party has to seek relief from the sanction on an application made under CPR r 3.8, and in that event the court will consider all the matters listen in CPR r 3.9, so far as relevant"*

13. Mr. Smith makes a fourth submission, that an Unless Order be made for the Defendant to comply with Directions Order herein. The Defendant submits that the granting of an Unless Order herein, is the appropriate relief to ensure a fair trial of the issues in this action.
14. Finally, with respect to the issue of costs Mr. Smith submits that generally indemnity costs are only awarded in exceptional circumstances, and that it is said to be the presence of factors that take the case outside the run of normal litigation. He referred the Court to **Levine v Callenders & Co**. [1998] BHS J. No. 75, where Sawyer CJ (as she then was) held as follows:

> *"While I accept the general principle that the conduct of a party, in some cases, will justify an award of costs on an indemnity or solicitor and client basis, in my judgment conduct which would justify such an order would have to be egregious --for example, a breach of an undertaking by a party (as in the case of a Mareva injunction mentioned earlier --which is itself a specie of contempt) and contumacious contempt of court. A failure to comply with the rules of pleading is not, in my judgment, in and of itself, a reason to award costs on an indemnity basis."*

15. Mr. Smith submits that there has not been any contumacious contempt of court herein. Further it is submitted as held in **Levine** that the present application is for a failure to comply with the rules of pleading, specifically Order 31A, and is an application that flows out of the normal run of litigation. Accordingly, the Defendant submits that the costs to be awarded to the Plaintiff pursuant to Order 31A Rule 21 should be on a party and party basis.

Issues

16. The issues are:

(1) whether there has been inordinate and inexcusable delay and intentional and contumelious conduct on the part of the Defendant;

(2) whether 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 Plaintiff;

(3) whether an "Unless Order" would be appropriate in the circumstances.

Analysis and Conclusions

The Law

17. Order 31A Rule 20 (1) provides as follows:

"(1) In addition to any other powers under these Rules, the Court may strike out a pleading or part of a pleading if it appears to the Court —

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the Court in the proceedings..."

18. Order 31A Rule 21 (1) of the RSC provides as follows:

"(1) Where a party has failed to comply with any of these Rules or any Court order in respect of which no sanction for non-compliance has been imposed, any other party may apply to the Court for an unless order as defined in paragraph (7).

"(2) An application under paragraph (1) may be made without notice but must be accompanied by —

(a) evidence on affidavit which —

(i) identifies the rule or order which has not been complied with;

(ii) states the nature of the breach; and

(iii) certifies that the other party is in default;

and

(b) a draft order.

(3) The judge or Registrar may —

(a) grant the application;

(b) seek the views of the other party; or

(c) direct that a date be fixed to consider the application.

(4) Where a date is fixed under paragraph (3)(c), the applicant must give not less than 7 days' notice of the date, time and place of such date to all parties.

(5) The party in default should be ordered to pay the costs of such an application.

(6) Where the defaulting party fails to comply with the terms of any unless order made by the Court that party's pleading shall be struck out.

(7) In this rule and in this Order, an unless order is an order which identifies the breach and requires the party in default to remedy the default by a specified date.

(8) Rule 26 shall not apply to this rule."

19. Order 31A Rule 26:

"(1) This rule applies only where the consequence of failure to comply with a rule, practice direction or Court order has not been specified by any rule, practice direction or Court order.

...

(3) Where there has been an error of procedure or failure to comply with a rule, practice direction, Court order or direction, the Court may make such order as it deems necessary."

20. There is no dispute that the Defendant has not complied with the Directions Orders and it cannot be disputed that the Defendant was non-compliant up to and including the date of this hearing. Order 31A Rule 20 (1) empowers the Court to strike out the Plaintiff's pleadings in these circumstances. But the Court should always use its power to strike out a pleading as a last resort.

21. As argued by Mr. Smith, the Directions Orders were not peremptory orders. Order 31A Rule 26 empowers the Court where no peremptory order has already been made to make such order as it deems necessary.

22. The Defendant has failed to comply with the Directions Orders and to take the steps necessary to set down her application to amend her Defence. Mr. Smith's submission is that he failed to comply with the Directions Orders or to set down the application to amend because the parties were in settlement talks. The Court is aware that settlement talks were in progress and appreciates that saving costs is always a consideration but unless suspended by the Court Case Management Orders ought to be complied with. But I am not satisfied that the Defendant's conduct rises to the level of intentional and contumelious. There has been delay in progressing this matter by both parties. This action was filed, as submitted by Mr. Smith, in 2012. It was not referred to the Court by the Plaintiff for case management until 2018, 6 years later. The Defendant pointed out to the Court that between 2018 and 2020 the intervening events of Hurricane Dorian and Covid-19 slowed the progress of the litigation. I think that I am at liberty to take judicial notice of these events, particularly the fact that the Court's file and the Defendant's file were compromised and inaccessible as a result of the flood associated with Hurricane Dorian. I therefore do not agree with the Plaintiff that the delay on the part of the Defendant in progressing this matter was inordinate and inexcusable. Mr. Smith has also pointed out that the Plaintiff has not asserted that it has been prejudiced in anyway as a result of any delay herein and/or that there cannot be a fair trial of the issues. The Plaintiff will be prejudiced by the further delay of this matter but I am not satisfied that there exists a substantial risk that it is not possible to have a fair trial of the issues in the action as a result of the delayed trial. This is essentially a debt collection action and will be based on documents and bank records still accessible by the parties.

23. I am of the view that the Defendant's alternative argument, that an Unless Order would be appropriate where the Court is not minded to strike out the Defendant's Defence, is the proper order to make in the circumstances and one which the court is empowered to make pursuant to Order 31A rule 21 (1) of the RSC.

Costs

24. The Plaintiff seeks costs on an indemnity basis. The Defendant submits that costs on a party and party basis would be appropriate. In **EMI Records v Ian Wallace Ltd** (1983) 1 Ch 59 it was held that the court has power in contentious proceedings to order the unsuccessful party to pay the successful party's costs on bases other than party and

party common fund basis. Those other bases include orders on the indemnity basis as well as on the solicitor and own client basis.

25. Upon considering an application for costs to be awarded on a full indemnity basis Mr. Justice Rattee in **Atlantic Bar & Grill Limited v Posthouse Hotels Ltd** [2000] C.P. Rep. 32 adopted the following observations of Knox J in **Bowen-Jones v Bowen-Jones** [1986] 3 All ER 163: in which Knox J cited a passage from the judgment of Brightman L.J. (as he then was) in **Bartlett v Barclays Bank Trust Co. Ltd.** (No. 2)[1980] Ch. 515. Brightman L.J. had this to say at p.547:6

> **"...It is not, I think, the policy of the courts in hostile litigation to give the successful party an indemnity against the expense to which he has been put and, therefore, to compensate him for the loss which he has inevitably suffered, save in very special cases. Why this should be, I do not know, but the practice is well-established and I do not think that there is any sufficient reason to depart from the practice in the case before me"**

26. Mr. Justice Rattee continued:

> **"Knox J. applied that principle in the case before him. He relied also on the case of Wailes v Stapleton Construction and Commercial Services Ltd and Unum Ltd. [1997] 2 L.L.R. 112, in which Newman J said, at p.117:**
>
> > **'The circumstances in which an order for indemnity costs can be made, while an open ended discretion so far as the rules are concerned, is obviously one which must be exercised on judicial discretion.'**
>
> **Having then cited various authorities his Lordship went on to say:**
>
> > **'In summary, the position appears to be that, where there are circumstances of a party behaving in litigation in a way which can be properly categorized as disgraceful, or deserving of moral condemnation, in such cases an order for indemnity costs may be appropriate.'**
>
> **Newman J. went on to say this:**

'There may be cases otherwise, falling short of such behaviour in which the Court considers it appropriate to order indemnity costs. The threshold of qualification which a party would appear to have to establish is that there has been, on the party to be impugned by such an order, some conduct which can be properly categorized as unreasonable, and I would add to that in a way which the Court is satisfied constitutes unreasonableness of such a high degree that it can be categorized as exceptional. There are varying ways in which the course of litigation, parties to it could be categorized as having behaved unreasonably, but one would not, simply as a result of that, decide that they should pay costs on an indemnity basis.'

(See the Judgment of Charles, J in **Hong Kong Zhong Qing Development Company Limited v Squadron Holdings SPV014HK, Ltd. and Mr. D. Sean Nottage** 2016/CLE/gen/01295).

27. In **Excelsior Commercial and Industrial Holdings v Salisbury Hamer Aspden & Johnson(a firm) and another** [2002] EWCA Civ 879, at paragraph 32 analyzed Lord Woolf analyzed the circumstances in which indemnity costs may be awarded:

"[32] I take those two examples only for the purpose of illustrating the fact that there is an infinite variety of situations which can come before the courts and which justify the making of an indemnity order. It is because of that that I do not respond to Mr. Davidson's submission that this court should give assistance to lower courts as to the circumstances where indemnity orders should be made and circumstances when they should not. In my judgment it is dangerous for the court to try and add to the requirements of the CPR which are not spelt out in the relevant parts of the CPR. This court can do no more than draw attention to the width of the discretion of the trial judge and re-emphasise the point that has already been made that, before an indemnity order can be made, there must be some conduct or some circumstance which takes the case out of the norm. That is the critical requirement."

28. It is accepted that costs are in the discretion of the court. However, the general rule is that costs follows the event and when considering whether to order costs on an indemnity basis the Court has to take into consideration all the circumstances of the case. **Bartlett v Barclays Bank Trust Co. Ltd. (No. 2)** 1980 Ch 515 at 547.

29. Having concluded that the Defendant's conduct has not been intentional and contumelious or that the delay was not inordinate or inexcusable or prejudicial to the Plaintiff the Court is not satisfied that costs should be awarded to the Plaintiff on an indemnity basis. I also found the authority of **Levine v Callenders & Co**. helpful. A failure to comply with the rules of pleading is not in my view a reason to award costs on an indemnity basis.

Disposition

30. In conclusion, having read the pleadings filed in support of this application, the written submissions of Counsel, having heard Counsel for both parties, having considered the authorities relied upon by the parties and the relevant statutory provisions and in all the circumstances of the case, I accept the submissions of the Defendant's Counsel and dismiss the Plaintiff's application to strike out the Defendant's Defence. At the hearing Mr. Smith indicated that the Defendant still wished to pursue the application to amend the Defence. I hereby grant an Unless Order in the following terms: that unless the Defendant files and serves an Affidavit in Support of the Summons to Amend the Defence filed herein on August 13, 2014 together with written Submissions within 14 days the Summons shall be struck. The Plaintiff shall file any responsive Affidavit and Submissions in Response within 14 days of receipt of the Defendant's Affidavit. The said Summons to amend shall be heard on July 27, 2021 at 2:30 p.m.

31. Pursuant to Order 31A Rule 21 (5) the defaulting party should be ordered to pay the costs of this application to be taxed if not agreed and I do so order the Defendant to pay the Plaintiff's costs to be taxed if not agreed in any event, at the conclusion of the trail herein.

Dated this 25 day of May A. D. 2021

Petra M. Hanna-Adderley
Justice