COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2015/CLE/gen/01079

B E T W E E N:

MIRIAM CALLENDER
d/b/a Silverline Tours

Plaintiff

AND

AMERICAN EAGLE AIRLINES

Defendant

Before: Deputy Registrar Mr. Renaldo Toote

Appearances: Lessiah Rolle for the Plaintiff
Keith O. Major for the Defendant

Hearing Date: 5th March, 2022

RULING

RSC Order 18 Rule 19 – want of prosecution for inordinate and inexcusable delay – whether the delay is an abuse of process – Limitation period.

[1]. This is the defendant's application to dismiss the plaintiff's writ of summons for want of prosecution due to the inordinate and inexcusable delay of prosecution.

[2]. The application was supported by the affidavit of Shayla Campbell on behalf of the defendant. The affidavit seeks to explain that the plaintiff has not proceeded with the prosecution of this matter with diligence and expedition, such that an inordinate and inexcusable delay has arisen, to the extent that the defendant would suffer serious prejudice.

[3]. The backdrop to the defendant's application is premised by the plaintiff's generally indorsed writ of summons filed on 21 July 2015, claiming damages for breach of a written contract dated 18 September 2012.

[4].]On 12 August 2015, the defendant entered an appearance and no other pleading was filed by the plaintiff. As a result, the defendant filed its summons to dismiss the writ for want of prosecution.

[5]. The initial hearing of the application was heard on 8 March 2022, where Mr. Lessiah Rolle, counsel for the plaintiff, stated that he was recently instructed by Ms. Callendar therefore required a further adjournment.

[6]. This court cautioned Mr. Rolle on the fact that there was no statement of claim filed after seven (7) years. At the conclusion of the hearing, the plaintiff was given an opportunity to reply to the defendant's submission to dismiss the claim for want of prosecution.

[7]. Instead of only presenting submissions in response, the plaintiff sought to file (1) notice of intention to proceed (2) affidavit of Bernard Ferguson (3) affidavit of Miriam Callender and (4) statement of claim.

[8]. No leave was given to the plaintiff to file the aforementioned pleadings in the face of the extant application. Notwithstanding, I reviewed the filings to determine what relevance if any should be applied to them.

[9]. The affidavit of Bernard Ferguson ("Ferguson affidavit") declares that it was incumbent of the defendant to file a notice of intention to proceed, which he argues makes the defendant's application irregular. I disagree. This is not the purpose of Order 3 rule 5. The onus to file a notice of intention to proceed is wholly on the plaintiff as it is the plaintiff's case to prove.

[10]. The Ferguson affidavit also averred that during the period of 2015 and the filing of the defendant's application in 2019, he was attempting to negotiate a settlement between the parties.

[11]. I deem it appropriate to address this point now rather than later.

[12]. It is inexcusable for a plaintiff to delay prosecuting her claim in the hope of negotiating a settlement. Once it is plain that a settlement will not be forthcoming, it is the duty of the plaintiff (after a reasonable time has elapsed) to get on with the action. See *Dictum* of **Widgery LJ in *Sayle v Cooksey*** (Kerr JA dissenting) [1969] Lloyd's Rep 618 at page 626 applied.

[13]. The affidavit of Miriam Callender purports to ventilate the factual matrix of the breach of contract and premised the inordinate delay on the illness of her first attorney who paradoxically was Mr. Bernard Ferguson.

[14]. I find it interesting that Mr. Ferguson was able to quickly produce an affidavit in support of this application but unable to file a statement of claim after several years.

[15]. It is the duty of the plaintiff's counsel to get on with the case. See **Reggentin v Beecholme Bakeries Ltd.** (1967) 111 Sol. Jo, 216. The right to a fair trial is bilateral and not unilaterally in favour of the plaintiff.

[16]. In any modern justice system it is unacceptable for any matter of this nature to be subject to delays of this magnitude. The public's confidence in the administration of justice is incumbent upon the ability to not only access the justice system but to have its matters adjudicated in a timely and expeditious manner. Anything less, can create severe prejudice for a defendant.

[17]. Indeed, the ability to dismiss a case for an inordinate delay and want of prosecution is a discretionary power of a judge and should be exercised judiciously considering all of the circumstances at hand.

[18]. Turning to the law, the Rules of the Supreme Court underscores a number of provisions relating to the timelines for which various steps must be taken in the process of an action from filing of the writ until the eventual trial. Equally so, the sanctions for defaulting on any of these procedural steps can amount to a dismissal for want of prosecution against a plaintiff or summary judgment, if the delay is against the defendant.

[19]. When considering whether or not to successfully strikeout a claim for want of prosecution as a result of an inordinate and inexcusable delay, the leading decision is still **Birkett v James** [1978] AC 297. There **Lord Diplock** opined:

> **"The power should be exercised only where the court is 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 process 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 each other or between them and a third party.**

[20]. In **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 2 QB 229 **Lord Dennin MR** held:

> **'On an application to dismiss for want of prosecution, except in a very clear case, it is desirable that <u>the plaintiff should file evidence explaining all the circumstances</u>**

> **relied on as excusing the delay, and exhibiting all relevant documents, and equally that the defendant should file evidence to establish the nature and extent of the prejudice occasioned to him by such delay**.' (Underline mine).

[21]. **Allen v Sir Alfred McAlpine & Sons Ltd.** *(ibid)* was reviewed and approved by the House of Lords in **Birkett v James** [1978] AC 297.

[22]. In short, the present case is not one of intentional or contumelious default (e.g. disobedience to an order). It is one in which it is necessary for the defendants to show (1) that there has been inordinate and inexcusable delay on the part of the plaintiff or her lawyers and (2) that such delay has given 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 have caused serious prejudice to the defendant.

[23]. This was explained by **Winder, J.** (as he then was) in **Major Consulting Ltd. v CIBC Trust Company (Bahamas)** 2014 2 BHS J No. 19 @ para. 16:

> **"On the question of inordinate and inexcusable delay, the state of the law also requires the defendant to demonstrate that the delay will give rise to a substantial risk that it is not possible to have a fair trial or that such delay is likely to cause, or to have caused, serious prejudice to the defendant."**

[24]. The circumstances of the extant action is similar to the reasoning in **Major Consulting** *(ibid).* There the defendant sought a dismissal of the action alleging delay by the plaintiff for almost 2 years.

[25]. Counsel for the defendant opined in his submission at para. 6.4 that "we see the court rarely dismiss applications for want of prosecution if the relevant limitation period has not expired by the time the application to dismiss is made".

[26]. This is not entirely so. The power to dismiss an action for want of prosecution is discretionary to the court and should be cautiously exercised so long as the defendant can prove that the delay will give rise to a substantial risk in which it is difficult to have a fair trial.

[27]. In **Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co.** [1968] 3 All ER 449, a case turning on the right to use a trade mark, the Court of Appeal struck out both the claim and the counterclaim for want of prosecution.

[28]. I am of the opinion, that the delay in the instant case was not only inordinate, but also inexcusable. *Albeit* reasonable for the plaintiff to hope for a settlement, she was duty bound to continue prosecuting her case after reasonable time had elapsed, particularly after acknowledgment of her original attorney's medical condition which made it difficult for him to diligently prosecute this action.

[29]. There remains, however, the other consideration: have the defendants

succeeded in showing that the delay has caused them serious prejudice, or been of such a sort that it is not possible to have a fair trial of the issues involved?

[30]. In reliance on the decision of **Winder, J**. in **Major Consulting Ltd.**, the onus is on the defendant to file evidence to establish the nature and extent of the prejudice occasioned by such delay.

[31]. The defendant contends that prior to the filing of its summons to dismiss, more than four (4) years have elapsed since the last step of the plaintiff's filing, the delay was prejudicial due to the fact that the defendant is a business and the delay is a going concern for the company. Additionally, the inordinate delay may possibly diminish the memory of potential witnesses.

[32]. In response, the plaintiff avers that the defendant will not be prejudiced because the claim is based solely on documentary evidence.

[33]. As far as I can discern from the filings (inclusive of the unfiled pleadings) before the court, the generally indorsed claim alleges an unlawful repudiation of a written contract between the parties and when considered as a whole, it does not turn so much on oral evidence, but on the construction of the terms of the agreement. This being the case, the possible prejudice to the defendant or the possible risk of not having a fair trial is significantly reduced.

[34]. Further, at no point did the defendant's submission seek to explain how the pending litigation is 'a going concern' for the defendant company so as to measure the severity of the prejudice and determine whether or not the defendant themselves would receive a fair trial.

[35]. Usually, the phrase 'going concern' when reference to the financial forecast of a business suggest that a business is making a profit. I am certain that this is not the effect that counsel for the defendant sought to infer in his use of the terminology. Therefore, without any explanation, I am uncertain as to what prejudicial effect is being reference as it relates to the expression 'a going concern'.

[36]. In the absence of any evidence to demonstrate its prejudice, I am bound to follow the Privy Council dicta in the decision of **Icebird Limited v Alicia Winegardner** [2009] UKPC 24 where an appeal was allowed on the basis that a two year delay *albeit* inordinate, had not given rise to the inability to have a fair trial.

[37]. Also, I am reminded of the sobering words in **Sayle v Cooksey** [1969] 2 Lloyd's Rep 618 wherein **Sachs LJ** observed (at page 625):

> '**For while it is of course for the court to take account of the need to avoid its machinery being abused by inordinate delays, it should also take account of the**

> **detriment to the interests of justice should a plaintiff innocent of blame suffer disaster by being driven from the judgment seat unless the justice of the case as a whole imperatively demands that course. The court is entitled, as Diplock LJ stated (in Allen v McAlpine) <u>to temper justice with humanity</u>.**' (Underline mine)

[38]. For the aforementioned reasons, I will exercise judicial temperament and make the following orders:

1. The plaintiff is granted leave to file and serve its statement of claim out of time by 26th August 2022.
2. UNLESS, the plaintiff files and serves its statement of claim by 26th August 2022, the writ of summons is dismissed for want of prosecution.
3. Cost of and occasioned by this application be fixed cost to the defendant in the sum of $1,000.00.

[39]. I departed from the usual order that cost follows the event, which would have awarded cost to the plaintiff, plainly on the fact that the plaintiff's delay in prosecuting this case was inordinate. Further, I am firmly of the view that had it not been for the defendant's summons, this sleeping dog may have still been asleep.

Dated this 16th day of August A.D., 2022

[original signed & sealed]

Renaldo Toote
Deputy Registrar