BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 861 of 1990

BETWEEN:

ASHA MIRCHANDANI	**FIRST PLAINTIFF**
(Familiarly known as Mrs. Ram Mirchandani)	
RAM MIRCHANDANI	**SECOND PLAINTIFF**
McDONALD FARMS LIMITED	**THIRD PLAINTIFF**
AND	
CARIBBEAN BROADCASTING CORPORATION	**DEFENDANT**

Before the Honourable Mr. Justice William Chandler, Judge of the High Court

Sir Richard Cheltenham Q.C, Mr. Clement Lashley Q.C. with Mr. David J. H. Thompson Q.C. and Ms. Onika Stewart for the Plaintiffs

Sir Henry DeB. Forde Q.C., Mr. John Connell Q.C., Mr. Hal Mc. L Gollop Q.C. and Ms. Lesley Barrow for the Defendant

Date of decision: 26th July 2013

DECISION

BACKGROUND

[1] The parties to this action are well known to the Barbadian public. The First and Second Plaintiffs are husband and wife. The First Plaintiff is managing director of the Third Plaintiff and the Second Plaintiff is the only other director thereof.

[2] The Third Plaintiff is a limited liability company registered under the ***Companies Act of Barbados, Cap. 308*** of the Laws of Barbados and previously carried on the business of slaughtering and processing chickens for wholesale and retail distribution.

[3] The Defendant, Caribbean Broadcasting Corporation ("CBC") is a corporation established under the laws of Barbados, duly licensed under the ***Wireless Telegraphy Act, Cap. 285*** of the Laws of Barbados and its business includes the transmission, for general reception, of radio and television programmes.

[4] By Writ of Summons dated and filed 26 June 1990 the Plaintiffs initiated an action for damages for libel in respect of the broadcast and publication of "The Madd Chicken Song" on the Defendant's radio stations and for the broadcast and publication of the same song during a television segment on the Defendant's television station on 1 July 1989 and 28 July 1989 respectively.

[5] The Defendant pleaded that the words complained of were true in substance and in fact and that they constituted fair comment on a matter of public interest.

[6] There was considerable action on the file from the period 1992 to 1999. Thereafter there was some inaction. It is the alleged period of post-writ delay that spawned this application.

THE APPLICATIONS

[7] There are two summonses before the Court:

1. The Plaintiffs' Summons

The Plaintiffs' Summons filed 7 May 2004 sought an order for the hearing and determination of:

(a) the Plaintiffs' Summons for Directions filed on the 23 June 1992;

(b) the Defendant's Notice for Directions under the Summons filed on the 27 January 1993; and

(c) the Defendant's Notice for Further Directions filed on the 30 June 1999.

2. The Defendant's Summons

The Defendant's Summons, filed 7 December 2004, sought an order to dismiss the Plaintiffs' action for want of prosecution on the ground that the Plaintiffs had been guilty of prolonged or inordinate and inexcusable delay in proceeding with this action to the prejudice of the Defendant.

[8] The parties agreed that the Defendant's Summons should be heard first.

THE ISSUES

[9] The major issue for the Court's determination is whether the Defendant's summons for dismissal of the substantive action should be granted. In this regard, there are two subsidiary issues, namely:

1. Has the Defendant established that the post-writ delay was inordinate and inexcusable; and
2. If so, has the Defendant established any sufficient prejudice to itself to warrant a striking out of the action for want of prosecution?

[10] I shall address these issues in turn.

THE APPLICABLE LAW

[11] There is no dispute as to the applicable law. The dispute is whether it ought to be applied in favour of the Defendant.

[12] The power of the High Court of Barbados to strike out a case for inordinate or inexcusable delay arises under its inherent jurisdiction. In ***Birkett v James*** **[1978] A.C. 297** ***("Birkett")*** the jurisdiction was described at **page 318, paragraphs E to G** as follows:

> "…In the three leading cases which were heard together and which, for brevity, I shall refer to as *Allen* v. *McAlpine* [1968] 2 Q.B. 229, the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to R.S.C., Ord. 25, r. 1 in the current *Supreme Court Practice*

(1976). 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."

EVIDENCE

The Defendant's Affidavit Evidence

[13] The affidavits sworn to by Mr. John A Connell Q.C., Attorney-at-Law, are referred to as "the Connell Affidavits". The affidavit of Ms. Karen Mahy is referred to as "the Mahy Affidavit". The affidavits of Sir Henry DeB. Forde Q.C. K.A. are referred to as "the Sir Henry Affidavits".

[14] The Defendant filed the following seven affidavits in support of their summons to dismiss the action for want of prosecution:

1. The first Connell affidavit filed on 7 December 2004;
2. The second Connell affidavit filed on 31 December 2004;
3. The Mahy affidavit filed 31 December 2004;
4. The third Connell affidavit filed on 3 January 2005;
5. The first Sir Henry affidavit filed 4 January 2005;
6. The second Sir Henry affidavit filed 29 March 2005; and
7. The fourth Connell affidavit filed 31 March 2005.

<u>The First Connell Affidavit</u>

[15] This affidavit deposed to the unavailability of named witnesses and to the potential diminished recall of other witnesses.

[16] Mr. Connell deposed that only one signed witness statement had been secured. This was from Mr. Darwin Trotman who was the Defendant's most vital witness. Mr. Trotman's

evidence, the deponent said, appeared to be of such a nature as to provide cogent support for the pleaded defences. He also said that, despite the efforts of the Defendants, they had been unable to establish contact with Mr. Trotman throughout the year 2004 and were, therefore, unable to review his statement or summon him to give evidence.

[17] He further deposed that the potential witness, Mr. Charlie Brown, had informed Sir Henry that he once had copies of various documents relating to the court proceedings but had destroyed them some years ago and his memory of the facts were very vague.

[18] Two potential witnesses, Mr. John Cumming and Mr. Litchfield Morgan, were now deceased.

[19] Mr. Connell further deposed that "There are other persons who could give evidence of ancillary matters. Efforts are being made to find them, but those efforts have not yet been completed."

<u>The Second Connell Affidavit</u>

[20] This affidavit alleged that Mr. Trotman, a senior supervisor employed by the Third Plaintiff, had seen and had given details of the unsatisfactory conditions at the Third Plaintiff's plant which prompted him to contact the Ministry of Health and the press.

[21] It further stated that Mr. Trotman went into detail about the processing and sale of sick chickens, the mess that was left outside the chicken pens, the slaughtering and processing of unhealthy birds when no health inspector was present and the processing and delivery of sick chickens to the fast food restaurant Kentucky Fried Chicken ("KFC").

[22] The Defendant was unable to ascertain the whereabouts of Mr. Trotman up to the time of filing of the affidavit.

<u>The Third Connell Affidavit</u>

[23] This affidavit was made in response to the second Lashley affidavit. Mr. Connell submitted that the whole or greater part of that affidavit should be struck out under the inherent jurisdiction of the Court or under ***Order 41, rule 6 of the Rules of the Supreme Court 1982 ("the RSC")*** as scandalous and/or irrelevant and/or oppressive and/or an abuse of the process of the Court and/or prejudicial. In relation to paragraph 2 of the second Lashley affidavit, he deposed, *inter alia*, that it was a question for the Court, and not Mr. Lashley, to determine whether the Defendant's publications were defamatory.

[24] He deposed to the death of Mr. C.A. Philips Q.C. and his consequent inability to respond to any statements attributed to him. Any discussions between Mr. Lashley and the late Mr. Philips were without prejudice and privileged.

[25] He further deposed that paragraphs 4 to 12 of the second Lashey affidavit purported to give a history of the Plaintiffs' efforts to obtain discovery of a videotape alleged to be possessed by the Defendant (but which the First Plaintiff admitted she had in her possession). He alleged that the Plaintiffs were responsible for the drawn out proceedings, culminating in the Court of Appeal's decision of 6 January 2000.

[26] He also deposed that a quotation of comments from King J's decision of 17 November 1997 ("the King J decision") was improper and prejudicial since that decision had been reversed. He deemed paragraphs 13 to 15 of the second Lashley affidavit irrelevant to the Defendant's application since the Defendant was not a party to the suits mentioned therein.

[27] In relation to paragraph 16 he alleged that Mr. Lashley had assumed the functions of the trial judge by implying that the only issues in the present case were the questions of damages and the proportionate part payable by the Defendant. With reference to paragraph 17, he submitted that the conclusion at 17(1) was not justified against a background of the Plaintiffs' witch hunt for a non-existent video.

[28] In addition, he placed the delay at the feet of the Plaintiffs. He deposed that he never gave Mr. Lashley any indication that the Defendant was condoning or acquiescing in the Plaintiffs' delays. The Defendant could not determine whether and how it would be prejudiced until completion of its enquiries as to the whereabouts of Mr. Trotman. Mr. Lashley, he said, did not attempt to explain the passage of about four and a half years after the Court of Appeal's decision of 6 January 2000. He denied that the Defendant was guilty of any breach of the Rules of Court.

[29] Mr. Connell further stated that Mr. Trotman's evidence was vitally important since health inspectors were usually present at the Third Plaintiff's plant during normal working hours and their reports were limited to their observations at those times. Further, he submitted, Mr. Trotman's unavailability rendered the Defendant's Attorneys-at-Law unable to review his statement, or assist him with his recollection of events and, therefore, he could not be summoned to give evidence.

[30] With reference to paragraph 22 of the second Lashley affidavit, Mr. Connell opined that, in law, the records of the Ministry of Health could not be introduced into evidence unless the party or parties who prepared the reports and provided the information were available to give evidence. Mr. Brown's documents were his personal papers and not those of the Ministry of Health.

[31] He also deposed that the case did not simply involve the construction of documents but required the attendance of witnesses to give evidence and be cross-examined especially in regard to the defences of justification and fair comment. The death and/or the absence of witnesses and their vague recollection of events rendered it impossible to maintain a fair trial.

The Fourth Connell Affidavit

[32] In this affidavit the deponent enumerated the Defendant's List of Documents. In paragraph 3 he noted that Mr. Litchfield Morgan's memorandum dated 22 March 1988 was material to the defence of justification. It was likely, he said, that Mr. Morgan's oral evidence, which the Defendant disputed, would have been the best evidence to: (1) enable the Court to weigh the evidence, (2) observe Mr. Morgan's demeanour and that of the First Plaintiff and (3) decide on the credibility of the witnesses. His death rendered this impossible.

[33] Mr. Connell further deposed that the Defendant's serious difficulties relating to its witnesses could not be resolved merely by issuing subpoenas to relevant personnel of the Ministry of Health.

[34] The Defendant possessed a letter dated 27 April 1988, from the Third Defendant to the Chief Public Health Officer, which disputed the facts in a report prepared by Mr. O. Gittens. He concluded that, in the absence of the availability of witnesses, a trial judge would experience difficulty in assessing the reliability of any disputed reports. The Defendant was still trying to trace the whereabouts of Mr. Gittens, interview him and ascertain whether he still had the notes on which his reports were based.

The First Sir Henry Affidavit

[35] Sir Henry deposed that, in late November 2004, Mr. Lashley made enquires of him relative to the issues outstanding on the Plaintiffs' Summons for Directions and to letters written to Mr. Connell and himself in connection therewith. He told Mr. Lashley to

converse with Mr. Connell, leading Counsel, on those matters. He did not say or do anything to lead Mr. Lashley to believe or understand that the Defendant was waiving any of its rights, including the right to move for dismissal of the action.

[36] The witness also deposed that Mr. Peter Williams Q.C., as he then was, had raised with him the Court of Appeal's delay in delivering the decision in ***Asha Mirchandani et al v Barbados Rediffusion Service Limited*** in which arguments were completed in July 2000.

[37] Mr. Williams enquired whether Sir Henry's client, Barbados Rediffusion Service Limited ("Rediffusion"), would consider settlement of the matters on a without prejudice basis. The discussions were exploratory, without prejudice and informal. Information was received and submitted to Sir Fred Gollop, then Chairman of The Nation Corporation which was the sole shareholder of and the major shareholder in Rediffusion and The Nation Publishing Company Limited ("the Nation"), respectively. No instructions were received to enable Sir Henry to reply to Mr. Williams' "without prejudice" letter of 5 November 2003 (reproduced at paragraph [130] below).

[38] Sir Henry enquired of Mr. Williams whether the figures submitted related only to the claim against Rediffusion and the Nation. Mr. Williams replied that the figures would also have affected other companies and defendants with whom the Plaintiffs were still litigating. That information was later passed to Mr. Connell.

[39] Neither Mr. Williams nor himself, at any time, indicated one to the other that either of their clients was, in any way, waiving their strict rights and he (Sir Henry) certainly did not indicate that the Defendant would not rely on any defence or remedy available to it.

<u>The Second Sir Henry Affidavit</u>

[40] This affidavit was made in response to the second Williams affidavit and, in particular, to paragraph 2 thereof. He deposed that none of the discussions between himself and Mr. Williams related to the present action or any action concerning the Defendant. He contended that Mr. Williams' "without prejudice" letter of 5 November 2003 contained general terms about the Third Plaintiff's losses.

[41] He deposed also that their oral communications related to the Nation and Rediffusion, save as to the discussions mentioned at paragraph [38] above. Further, pursuant to the oral and written communications, he wrote a letter dated 28 January 2004 to Sir Fred Gollop to which he received no response.

The Mahy Affidavit

[42] Ms. Mahy, a senior reporter of the Nation, stated that, at the Defendant's request, she made efforts to find Mr. Trotman and was unsuccessful. She was informed by Mr. Trotman's mother that he no longer lived in Barbados and that his whereabouts were unknown. Efforts to find Mr. Milton Pierce, Mr. Trotman's legal advisor met with no success.

The Plaintiffs' Affidavit Evidence

[43] The Affidavits of Mr. Clement Lashley Q.C., Attorney-at-Law, are referred to as "the Lashley affidavits". The Affidavits of Mr. Peter Williams Q.C., Attorney-at-Law are referred to as "the Williams affidavits" and the affidavit of Mr. Roderick Etienne is referred to as "the Etienne Affidavit".

[44] The Plaintiffs filed the following nine affidavits in opposition to the Defendant's summons:

1. The first Lashley affidavit filed 8 December 2004;
2. The second Lashley affidavit filed 31 December 2004;
3. The first Williams affidavit filed 3 January 2005;
4. The third Lashley affidavit filed 4 January 2005;
5. The second Williams affidavit 23 March 2005;
6. The fourth Lashley affidavit filed 1 April 2005;
7. The Etienne affidavit filed 1 April 2005;
8. The fifth Lashley affidavit filed 29 April 2005; and
9. The sixth Lashley affidavit filed 11 July 2005.

The First Lashley Affidavit

[45] Mr. Lashley deposed that the major cause of the delay had been "the Defendant's refusal and/or neglect to produce all relevant documents of its defamatory broadcast against the Plaintiffs and allow timely inspection of the same." In paragraph 6 he deposed that the alleged witnesses, Mr. Charlie Brown, Mr. John Anthony Cumming, Mr. Litchfield Morgan and Mr. Darwin Trotman, were irrelevant to any reasonable defence.

[46] He further deposed that, if the Defendant was prejudiced by any delays in the action, they could have made an application for urgent trial of the action.

[47] The deponent stated that the Defendant failed to pursue its Notices under the Summons for Directions. The Defendant's Counsel requested two adjournments of the matter. Further, the Defendant made no complaints in relation to the delays until one day before the matter was due to be heard. Mr. Lashley opined that the Defendant's present application was a tactical manoeuvre to pre-empt the hearing of the 7 May 2004 Summons and which had been pending for several months.

[48] Mr. Lashley had made several attempts to have the matters under the summons resolved and wrote letters to Mr. Connell, copied to Sir Henry, on 28 June 2004 and 25 November 2004. He received no direct response.

The Second Lashley Affidavit

[49] Paragraph 2 chronicled the events of the case. Mr. Lashley referred to the Plaintiffs' request for full discovery from early in the proceedings which had not been honoured up to the date this affidavit was filed.

[50] In paragraph 4 he spoke of (i) the Plaintiffs' concerns regarding the retention of tapes in the Defendant's possession; (ii) a Summons filed 16 November 1990 for a preservation order in respect of the said tapes against the Defendant and (iii) the refusal of the Chief Justice to grant the order on an assurance given by the Defendant's then Counsel. In paragraph 4.1, Mr. Lashley quoted from the King J decision which held that the Defendant was in possession of the relevant tapes and that no satisfactory substitute was forthcoming.

[51] Paragraph 7 spoke of both parties filing their Lists of Documents on 13 August 1993 and 7 January 1994 respectively. Paragraph 7.2 referred to King J's order of 3 January 1995 ("the 1995 order") that the Defendant provide facilities for the viewing of master tapes by the Plaintiffs or their representatives and making a dubbing of portions identified by the Plaintiffs.

[52] Paragraph 8 referred again to the 1995 order which provided, *inter alia*, that the Plaintiffs' Counsel attend for viewing of the video tape with the Defendant's technical operators and that the Defendant provide a suitable studio, or technical venue manned by

properly trained staff for viewing and making of the video. In paragraph 8.1 he deposed that he attended the Defendant's studios with the First Plaintiff to view the master tapes and what was shown was not satisfactory.

[53] In paragraph 9 he deposed "...that the interlocutory proceedings show the non-compliance of various orders by the Defendant resulting in the order of King J on the 17th November 1997."

[54] Paragraph 10 referred to the grant of leave to appeal the King J order and the Defendant's filing of its Notice of Appeal on 2 December 1997. Paragraph 10.1 deposed that, on 19 May 1999, the CBC's appeal was dismissed and paragraphs 14 to 22 of the Amended Defence struck out and costs certified fit for two counsel were awarded.

[55] At paragraph 13 he deposed that the instant action could not be considered in isolation since related cases had engaged the attention of the High Court and Court of Appeal from 1989 to the date of his affidavit.

[56] In paragraph 14 he noted that on 23 December 1997 the Advocate Company Limited ("the Advocate") and the Nation sought to consolidate both actions. This stalled all other actions since an effort was made to complete the Nation and Advocate cases which were regarded as the main cases. The Advocate's case was set down for hearing in 1995 but did not take place following various interlocutory applications and the application for consolidation. The decision in respect of consolidation was delivered on 26 October 2001 some three years nine months from the filing of the application.

[57] Paragraph 15 referred to Supreme Court Suits No. 1031 of 1990 McDonald Farms Limited et al v National Cultural Foundation and No. 1522 of 1989 Asha Michandani et al v Nigel Harper. In both these cases the Plaintiffs were successful. Suits No. 1702 of 1990 McDonald Farms Limited et v Barbados Rediffusion Service Limited, No. 324 of 1989 McDondald Farms Limited et al v The Nation Publishing Company Limited and Suit No. 344 of 1989 McDonald Farms Limited et al v The Advocate Company Limited ran parallel to the instant action.

[58] At paragraph 16 he estimated the Third Plaintiff's projected loss at BDS $1,876,621.00. He further stated that the question always was going to be what portion of the Third Plaintiff's projected loss the Defendant would pay. This was one of the factors discussed by the Defendant's Counsel in this application as well as the Nation and Rediffusion

cases. He opined, therefore, that an effort was being made to push the cases forward so that the Third Plaintiff's damages could be settled on a global basis.

[59] He alleged in paragraph 17 that the Defendant's conduct was a substantial cause of delay. The Defendant was in default in not having their Notices under the Summons heard and final orders made thereon.

[60] In paragraph 21 he noted that Mr. Connell's affidavit did not disclose the evidence which was to be given by the witnesses or "the respects in which the evidence was alleged to be material".

[61] At paragraph 22 he deposed that the documents to be produced by Mr. Brown were the property of the Ministry of Health and were disclosed in the List of Documents of both the Defendant and Plaintiffs. Mr. Brown was accompanied by Health Inspector Gittens when he visited the Third Plaintiffs' premises at Oldbury and ought to be available to give evidence. Mr. Clyde Harper, Health Inspector, was assigned by Mr. Brown to the Third Plaintiff's processing plant and was also available to give evidence.

[62] Mr. Trotman was residing in Barbados and had visited Mr. Lashley who declined to discuss the case with him. Mr Lashley wrote Sir Henry on 27 July 2004 and there were subsequent discussions concerning a proposed settlement with Mr. Connell who invited him to submit his claim.

[63] At paragraph 23(viii) and (ix) he also deposed to informal discussions with Sir Henry on the resolution of issues on his Summonses. There was nothing expressed or implied in the conduct of either Sir Henry or Mr. Connell to indicate that the Defendant's case was being prejudiced. He attached to his affidavit letters dated 23 June 1992 (**Exhibit "CL18"**) and, 21 September 1995 (**Exhibit "CL19"**) to show the Plaintiff's concern about the length of time their application for Further and Better Particulars was taking to complete and the delay in the proceedings.

[64] He submitted that there was no breach of ***Order 25, rule 4 RSC*** since the Plaintiffs had issued their Summons for Directions since 23 June 1992 and, thereafter, sought to resolve the issues thereunder.

[65] He further deposed that Mr. Cumming's death could in no way prejudice the Defendant's case. The statements of Betty Lynch and Pearline Gibson evidenced the roles they played at the 28 July 1989 Pic-O-De-Crop finals and they could fulfil Mr. Cumming's role.

[66] He further deposed that the health inspectors assigned to the Third Plaintiff's premises were government employees who could be subpoenaed. Much of their evidence was by way of documentation and was covered by expert reports. He also stated that any alleged delay was substantially the responsibility of the Defendant and the manner of allocation of the Court business.

The Third Lashley Affidavit

[67] This affidavit exhibited copies of correspondence referred to in his second affidavit.

The Fourth Lashley Affidavit

[68] Counsel deposed that paragraph 3 of the fourth Connell affidavit, which stated that Mr. Morgan's findings in his signed memorandum of 22 March 1988 were material to the defence of justification, was based on the false premise that the evidence from the officers of the Ministry of Health favoured the Defendant. He took issue with paragraph 4 of the fourth Connell affidavit and stated that it was simplistic to suggest that the Defendant's difficulties in relation to its witnesses could be resolved by issuing subpoenas to the personnel of the Ministry of Health. He further suggested that the submission that the persons compiling the reports should be available to give oral evidence and be cross-examined was misconceived. It assumed, without foundation, that the oral evidence of Mr. Morgan would have advanced the matter further than his written memoranda. However, that situation would only have arisen if the written memoranda were inaccurate or incomplete, thus rendering Mr. Morgan's evidence open to criticism. Mr. Lashley deposed that the Plaintiffs would be prejudiced if Mr. Morgan was not called as a witness or cross-examined.

[69] He also deposed that the Defendant should have secured written witness statements from their vital witnesses. The Plaintiffs were not responsible for the Defendant's negligence in this regard. The fourth Connell affidavit failed to reference the Etienne affidavit which deposed that Mr. Trotman had been located.

The Fifth Lashley Affidavit

[70] This affidavit deposed that Mr. Gittens was still employed with the Ministry of Health, and that, subsequent to the fourth Connell affidavit, he (Mr. Lashley) had been in contact

with Mr. Gittens. He did not accept that Mr. Gittens would have to rely on notes to determine the basis on which his reports were compiled.

[71] He further deposed that "…the Defendant produced no Poultry Inspection Reports prepared by Mr. Gittens the Third Plaintiff (sic) for the period when the Plaintiffs were defamed; as there were none." He produced copies of licenses issued to the Third Plaintiff to carry on the business of slaughtering poultry and operating a food business at Oldbury St. Philip and referred to a letter dated 16 February 1989 **("Exhibit CL27")** from KFC and stated that no sick chickens were processed and delivered to KFC.

The Sixth Lashley Affidavit

[72] The sixth affidavit produced three letters: (1) dated 18 July 2003 Mr. Williams to Sir Henry; (2) dated 5 November 2003 from Mr. Williams to Sir Henry in relation to the projected loss of the Third Plaintiff and (3) dated 7 July 1999 from Mr. Williams to Mr. Connell which showed that all documents were made available to the Defendant.

The First Williams Affidavit

[73] In paragraph 4 it was deposed that, at all material times, the Plaintiffs tried to settle the claim against the Defendant or have the matter tried as quickly as possible. He alleged that, between the period 11 June 1990, the date the Statement of Claim was filed, and 6 January 2000, the date of the Court of Appeal decision, there were several delays for which the Plaintiffs were not responsible. In paragraph 6, Mr. Williams deposed that the delay, which arose after 6 January 2000, was not inordinate in the context of the history of the action and other defamation matters involving the Plaintiffs. The delays could be explained and excused for the following reasons:

1. The Defendant's failure to produce necessary documents and agree documents for trial. He deposed that Mr. Lashley and the First Plaintiff made strenuous efforts to have an agreed version of the broadcasts prepared for trial, but received minimum cooperation from the Defendant.
2. Mr. Lashley attempted to agree a method of calculation of the damages of the Third Plaintiff with Sir Henry who represented all

the defendants in relation to these suits with the exception of The Advocate Company Limited. Mr. Connell met with Sir Henry in June 2000. He provided Sir Henry with a copy of the Accountant's Report of the Third Plaintiff's losses and impressed upon Sir Henry that, due to his pending appointment as a Justice of Appeal, the claim must be settled or ready for trial by the end of 2003. There was no communication on this point after the June 2003 meeting as Sir Henry was out of the jurisdiction seeking medical treatment and in those circumstances he did not wish to pressure him.

3. Due to Sir Henry's representation of the Nation and Rediffusion, it was hoped that the losses of the Third Plaintiff could be agreed. As a result no urgent action was taken to prosecute the claim to judgment.

4. At no time did Sir Henry or Mr. Connell state that the Defendant would be prejudiced in the trial of this action, nor did they state any reservations concerning the Plaintiffs' efforts to settle the action or concerning the Plaintiffs incurring further legal expenses and costs in bringing the matter to trial.

5. The Defendant's application was, therefore, inconsistent with their previous conduct by which the Plaintiffs could have reasonably believed that a failure to settle the matter would have resulted in the action moving to trial.

The Second Williams Affidavit

[74] The witness disputed that the focus of the meeting between himself and Sir Henry was in relation to the delay of the Court of Appeal in delivering the decision in the Rediffusion case. He said that the focus of the meeting was to agree a method of assessing the loss and damage of the Third Plaintiff. He also deposed that he provided Sir Henry with a copy of the Accountant's Report on the losses of the Third Plaintiff under the cover of a letter dated 5 November 2003.

[75] He reiterated that discussions focused on settlement of the Third Plaintiff's claim or movement of the same towards trial.

[76] In reference to paragraph 8 of the first Sir Henry affidavit, he deposed that the Defendant's Counsel never intimated that they were prejudiced by the Plaintiffs' course of action, nor did they suggest that the matter be set down for trial without further delay.

[77] He also disputed the Defendant's affidavit evidence in relation to the availability of witnesses and their potential diminished recall. Mr. Etienne's affidavit showed that Mr. Trotman was resident in Barbados as late as 26 February 2005. Further, Mr. Gittens was still employed by the Ministry of Health, as Mr. Lashley had deposed.

The Etienne Affidavit

[78] This deponent, an experienced investigator and process server, was instructed by Mr. Lashley, to locate Mr. Trotman. He deposed that he saw Mr. Trotman at Park Road, Bush Hall between August and December 2004 and again on 13 February 2005 and 26 February 2005.

THE DEFENDANT'S SUBMISSIONS

[79] Counsel submitted that its application was brought pursuant to the inherent jurisdiction of the High Court to dismiss an action for want of prosecution. This power was exercisable where delay was prolonged and inexcusable and was such as to do grave injustice to any or both of the parties. Such a finding had first to be made before the Court could consider the prejudice suffered by the Defendant or the fairness of the trial.

[80] The test of whether delay was inordinate was an objective one. Further, that delay must at least exceed the time limit prescribed by the RSC and any period of delay beyond that time limit should be substantial before it could be described as inordinate. Inordinate delay, he submitted, was *prima facie* inexcusable and, therefore, the burden of proof was on the Plaintiff to advance a credible excuse.

[81] Mr. Connell submitted that the Plaintiffs were guilty of prolonged or inordinate and inexcusable delay in proceeding with the action. He further alleged that serious prejudice had been caused to the Defendant as a result of the said delays, in consequence whereof a fair trial of the action was no longer possible.

[82] The Defendant contended that the continued delays caused by the Plaintiffs' inaction prejudiced their ability to call witnesses to give evidence on their behalf since:

1. Two of these witnesses died in the interim; and
2. Other vital witnesses could not be found or were otherwise unavailable to give evidence on their behalf.

[83] The Defendant annexed to their submissions a chronology of filings in this case which I now reproduce hereunder, amended by the insertion of item number 38.

1	Writ of Summons	26 June 1990
2	Statement of Claim	11 September 1990
3	Defence	31 October 1990
4	Summons by Plaintiffs for Injunction	16 November 1990
5	Affidavit in support of Summons	16 November 1990
6	Summons for Particulars of Defence	11 January 1991
7	Affidavit of Mr. Peter Williams	11January 1991
8	Summons for Leave to Amend Defence (returnable 4th June 1991)	6 May 1991
9	Supplemental Affidavit of Asha Mirchandani in support of Summons	6 May 1991
10	Supplemental Affidavit of Mr. Peter Williams in support of Summons	6 May 1991
11	Order by Belgrave J giving leave to amend Defence	4 March 1992
12	Amended Defence	18 March 1992
13	Summons for Further and Better Particulars of the Amended Defence of the Defendant	1 April 1992
14	Summons for Directions	23 June 1992
15	Particulars of Amended Defence	1 July 1992
16	Supplemental Particulars of Amended Defence	23 November 1992
17	Order on Plaintiffs' Summons for Further and Better Particulars of the Amended Defence and Summons for Directions	24 November 1992
18	Notice Under Summons for Directions	27 January 1993
19	Order by Chase J	2 March 1993

20	Particulars under paragraph 17 of the Statement of Claim	13 August 1993
21	A. Plaintiffs' List of Documents B. Plaintiffs' Notice under the Summons for Directions	13August 1993 13 August 1993
22	Affidavit of Peter David Hutson Williams	13 August 1993
23	Affidavit of Asha Mirchandani	13August 1993
24	Defendant's List of Documents	7 January 1994
25	Second Affidavit of Asha Mirchandani	12 October 1994
26	Order by King J. for inspection etc.	3 January 1995
27	Affidavit of Colin Williams	3 February 1995
28	Affidavit of Peter David Hutson Williams	13 February 1995
29	Third Affidavit of Asha Mirchandani	7 March 1995
30	Fourth Affidavit of Asha Mirchandani	8 June 1995
31	Notice to Produce Documents	22 June 1995
32	Order of Court of Appeal	19 May 1999
33	Notice for Further Documents, viz., (1) Order for Production of Documents (2) Order for further and Better List of Documents (3) Order for Discovery of Specific Performance	30 June 1999
34	Affidavit of John Andrew Connell in Support of Application for Further Directions	5 July 1999
35	Affidavit of Peter David Hutson Williams	7 July 1999
36	Hearing by Court of Appeal of Defendant's appeal	27 July 1999
37	Decision of the Court of Appeal	6 January 2000
38	Order of Court of Appeal	7 April 2000
39	Plaintiffs' Notice of Intention to Proceed	April 2002
40	Plaintiffs' Notice of Intention to Proceed	16 April 2004
41	Plaintiffs' Summons Re: Outstanding matters	7 May 2004

42	Defendant's Summons to dismiss action	7 December 2004
43	Affidavit of Clement Eyre Lashley Q.C.	8 December 2004

[84] The Defendant submitted that the Court of Appeal's decision of 6 January 2000 was followed by almost four and a half years of inaction by the Plaintiffs. The Plaintiffs filed two Notices of Intention to Proceed on 21 May 2002 and 16 April 2004 respectively (the first date is erroneously given as April 2002 in the chronology of filings).

[85] Counsel also submitted that "the plaintiffs omitted to take any effective steps in this action between the decision given by the Court of Appeal on 6 January 2000 (which restored the defence *in toto*) and the said 16th April 2004". The Defendant said that there were "some desultory and inconsequential communications" but stated that "these could not absolve the plaintiffs from their inexcusable delay for well over 4 years in prosecuting the action, especially since, at all material times, they were represented by two members of the Inner Bar".

[86] Mr. Connell further submitted that the Plaintiffs' summons "was ineffective to excuse the plaintiffs' inordinate delay or to arrest that delay in that (1) it was filed before the expiry of the calendar month following service of the notice of Intention to Proceed and was therefore in breach of the Rules and (arguably) null and void, and (2) the proper method of restoring the Summons for Directions and ancillary applications was by Notice under Order 25 Rule 2(5)."

[87] Counsel admitted that both parties were guilty of delay in filing documents and proceeding with the action up until 27 July 1999 (the date of completion of the hearing of the Defendant's appeal against striking out portions of the Defence). However, the Defendant contended that the Plaintiffs were "far more blameworthy than the Defendant". In support of this contention the following examples were provided:

1. In the Plaintiffs' List of Documents filed on the **13 August 1993**, the following statement appears at the end of Part I of Schedule 1: **"The Plaintiffs reserve the right to provide a further and better list with a financial report and other financial documents."**

The Defendant submitted that the Plaintiffs' financial documents had always been relevant to their claim for special damage and that

there was nothing to prevent their disclosure in the Plaintiffs' original list. The Defendant further submitted that **"it is almost 12 years later and the further and better List is still to be filed and served"**.

2. Paragraph 3.1 of the Asha Mirchandani affidavit, filed 12 October 1994, stated that the Plaintiffs' Summons of 13 August 1993 had not yet been heard and determined. The Defendant submitted that they could not bear any, or any significant, blame for the delay because of the facts set out in the said affidavit and because a party making an application to the Court "is in the driver's seat so far as concerns the date for hearing of the said application".

3. Paragraph 5.1 of the affidavit of Mr. Williams filed 7 July 1999 ("the 7 July 1999 Williams affidavit"), referred to the Plaintiffs' List of Documents wherein they reserved the right to provide a further and better list with a financial report and other financial documents. However, in the following paragraph 5.2, Mr. Williams made the bald statement that it was still premature to file a further and better list at that time without advancing any reason for further delay.

[88] The Defendant also pointed to paragraph 6.3 of the 7 July 1999 Williams affidavit in which it was deposed that "The First Plaintiff will disclose in its further and better List of Documents all relevant financial documents especially in view of the fact that a substantial part of the Defendant's defence has been struck out by the Court of Appeal and the major remaining issue on the case is the assessment of damages".

[89] The Defendant submitted that, in spite of this statement of intent and the restoration of the Defence by the Court of Appeal on 6 January 2000, the Plaintiffs had not, up to the time of filing of the summons for dismissal, filed a supplemental list (that is, 5 years and 9 months later).

[90] It was also submitted that the affidavit evidence in support of the Defendant's summons, combined with the chronology set out above, provided "on their face absolutely clear evidence of the plaintiffs' inordinate and inexcusable delay in prosecuting this action,

leaving aside the lengthy period of waiting for the Court of Appeal's decision dated 19 May 1999".

[91] The Defendant urged that "even that period of delay [waiting on the Court of Appeal decision] was caused indirectly by the plaintiffs by their will-o'-the-wisp search for a way of forcing the defendant to disclose a video-tape which the defendant never had but which the First Defendant (sic) admitted that she had – **as was proven by the Court of Appeal's decision of 6 January 2000**".

[92] Mr. Connell argued that, after almost four and a half years of inaction, the Defendant was entitled to conclude that the Plaintiffs were no longer pursuing their claim. Reliance was placed on ***Webster v Myer* (1884) 14 Q.B.D 231 *("Webster")*.**

[93] Despite this submission, however, Counsel also contended that upon the filing and service of their Notice of Intention to Proceed on 16 April 2004, the Defendant had to review the entire case and the state of its evidence, for which a reasonable period of time ought to have been allowed. In support of this submission the Defendant relied on the dicta of Lindley L.J. in ***Webster***.

[94] Mr. Connell submitted that the question of a fair trial might affect both parties. There must be causal link between delay and prejudice and/or the inability to have a fair trial. He gave the following as examples of prejudice:

1. failing recollection of witnesses;
2. witnesses dying; and
3. witnesses moving abroad or becoming untraceable.

[95] Counsel further submitted that, where a defendant's conduct induced the plaintiffs to incur further expense in pursuing an action, such conduct did not constitute a bar to a defendant's application to strike out a plaintiffs' claim but was a factor to be taken into account in the exercise of the Court's discretion whether or not to strike out the action. There was no concomitant duty on the Defendant to ensure that an action is prosecuted to trial.

<u>Death of Witnesses Mr. Anthony Cumming and Mr. Litchfield Morgan</u>

[96] Mr. Connell submitted that these witnesses died on 12 April 2004 and 4 April 2004 respectively. Their deaths rendered it impossible to have a fair trial of the issues since their evidence was vital to the defences.

Application to Strike Out Parts of the Plaintiffs' Affidavits

[97] The Defendant applied to strike out paragraph 6(1) of the first Williams affidavit on the ground that the claim therein was "clearly incorrect and cannot be sustained".

[98] The Defendant further submitted that reference to "the Defendant's broadcast" in the said paragraph referred to the videotape which the Court of Appeal found that the Defendant never had and, therefore, that issue was *res judicata* and ought to be struck out.

[99] Similarly, the Defendant submitted that paragraphs 2, 4, 4.1, 7, 7.2, 8, 8.1, 9, 10 and 10.1 of the second Lashley affidavit (see [49] to [54] above), relating to the possession of documents including the video tape, should also be struck out as *res judicata*.

[100] The Defendant also applied to strike out paragraphs 13, 14, 15 and 16, of the second Lashley affidavit (see [55] to [58] above) under ***Order 41, rule 6*** of ***the RSC*** on the ground that the Defendant was not a party to any of the proceedings mentioned therein and that the contents thereof were irrelevant and prejudicial in trying to influence the court by showing that the Plaintiffs had been successful in other related proceedings.

THE PLAINTIFFS' SUBMISSIONS

[101] Sir Richard, for the Plaintiffs, submitted that to discharge its burden of proof the Defendant must show:

1. that there had been inordinate and inexcusable delay on the part of the Plaintiffs or their lawyers, and
2. that such delay gave rise to substantial risk that it was not possible to have a fair trial of the issues in the action or was such as was likely to cause or to have caused serious prejudice to the Defendant either as between themselves and the Plaintiffs or between them and a third party.

[102] Counsel contended that 'inordinate' meant "materially longer than the time usually regarded by the profession and courts as an acceptable period" and that "it is easier to recognise than to define". He further contended that 'inexcusable' "ought to be looked at from the Defendant's point of view or at least objectively".

[103] It was further submitted that, on the facts of the case, the Defendant had not discharged that burden. In support of this contention, Sir Richard said that it was always the Plaintiffs' desire to proceed with the matter, hence the filing of a Notice of Intention to

Proceed on 21 May 2002 pursuant to ***Order 3, rule 6*** of the ***RSC.*** At that time, the Defendant did not apply to dismiss the action. A second Notice of Intention to Proceed was filed on 16 April 2004. The Plaintiffs had done everything in their power to "push the process forward".

[104] Counsel further submitted that an action could be dismissed under ***Order 25, rule 4*** of the ***RSC*** if there had been a breach of those rules or an order of the Court. That Order did not apply to the instant case since they were not in breach of any express rule or order of the Court to warrant the sanction of striking out the action for want of prosecution. The Plaintiffs had issued a Summons for Directions since 23 June 1992 and, thereafter, sought to resolve the issues on the said Summons. In support he cited the second Lashley affidavit.

[105] The Plaintiffs also contended that they made efforts to resolve the issues on their Summons. They forwarded five letters to Sir Henry in relation thereto and there was never a hint from the Defendant, in the form of a letter, of any alleged prejudice nor was there ever any opposition to the Plaintiffs' Summons of 7 May 2001. They contended that, at all material times, they tried to have the claim against the Defendant settled or tried as quickly as possible.

[106] Counsel further submitted that the Defendant could have applied to push the matter forward under ***Order 25, rule 1(1)(b)*** of ***the RSC***.

[107] The Plaintiffs pointed out that, between the date of filing the Statement of Claim and the Court of Appeal decision, there were many delays for which the Plaintiffs were not responsible. The example given was the fact that the judgment of King J, from which the Defendant appealed, took two and a half years to be determined (from 9 June 1995 to 17 November 1997).

[108] Further, the Plaintiffs submitted that the filing of a Summons by the Defendant to dismiss the case for want of prosecution was inconsistent with the Defendant's previous conduct from which the Plaintiffs could reasonably believe that, failing settlement, they could proceed to trial of the action.

[109] Counsel also contended that the Defendant's position was inconsistent with the positions it took in earlier proceedings. The Defendant was aware that the Plaintiffs were anxious to have the matter proceed to trial and said as much in their correspondence. The

Plaintiffs said that the culture in this jurisdiction was to allow adjournments if the attorney on the other side was indisposed and that, at all times, they were accommodating whenever an adjournment was requested.

[110] Counsel further submitted that the instant case should not be examined in isolation given the existence of other related defamation cases as outlined in the second Lashley affidavit. There was an application by the Advocate and the Nation to consolidate those actions which had the effect of stalling all the other cases since an effort was being made to complete the "main cases".

The Unavailability of Witnesses and Potential Diminished Recall

[111] The Plaintiffs refuted the Defendant's contention that its main witness, Mr. Trotman, was not available and relied on the Etienne affidavit to show that Mr. Trotman had been in the island at all material times.

[112] Counsel submitted, in the fourth Connell affidavit, that the Defendant had now shifted its position with respect to the importance of evidence from Mr. Trotman to that of Mr. Gittens whose whereabouts they were still trying to ascertain.

[113] In light of those revelations, there was absolutely no prejudice to the Defendant and there was nothing to prevent a fair trial from being achieved since the vital witnesses on whom the Defendant was relying were alive and could be subpoenaed. Further, the Plaintiffs pointed out that the relevant documents were with the Ministry of Health and could be produced and, as such, there was no prejudice to the Defendant. Sir Richard relied on the case of ***Department of Transport v Chris Smaller (Transport) Ltd [1989]*** **A.C. 1197** wherein it was stated that "where the evidence is substantially contained in documents still in existence the trial will not be prejudiced".

[114] Mr. Browne, at the time the submissions were filed, was still with the Ministry and Mr. Harper, although retired, was still available.

[115] Further, the Plaintiffs contended that the witnesses were irrelevant to the defamatory nature of the broadcast, which was a matter of law, and that the witnesses were irrelevant to any reasonable defence.

[116] Counsel further contended that the delays were caused by the Defendant's lack of cooperation as outlined in the Lashley affidavits which placed the blame on the

Defendant's refusal and/or neglect to produce and allow for timely inspection of all relevant documents.

[117] The Plaintiffs reiterated that several attempts had been made to resolve the issue on the Summons for directions to no avail.

DISCUSSION

[118] The applicable law has been set out at paragraphs [11] and [12] above. In ***Birkett*** the House of Lords held that the power of the Court to dismiss an action for want of prosecution should be exercised only (1) where the Plaintiff's default had been intentional and contumelious or (2) where there had been (a) inordinate and inexcusably delay on the plaintiff's or his lawyer's part giving rise to a substantial risk that a fair trial would not be possible or (b) to serious prejudice to the defendant.

[119] The Defendant did not submit that the Plaintiffs' delay was intentional or contumelious and, consequently, only the second limb of the ***Birkett*** principle falls to be considered in respect of this application.

[120] The Defendant must therefore prove, on a balance of probabilities, that (1) the Plaintiffs were guilty of inordinate and inexcusable delay and (2) that a fair trial of the issues is no longer possible as a result of that delay.

Was the delay inordinate?

[121] In order to determine whether delay has been inordinate the Court must objectively scrutinise the post-writ delay alleged against the Plaintiffs. It is a well-established principle that once a writ has been issued a plaintiff is under an obligation to abide by the rules of the court and prosecute his or her claim with diligence. In ***Birkett*** Lord Diplock L.J said at **page 323, para D**:

> "My Lords, once it is accepted that Limitation Acts confer upon a person who claims to have a cause of action a legal right to start his action at any time up to the expiration of the statutory limitation period it must follow that he has a corresponding right to continue to prosecute it to trial and judgment so long as he does so with reasonable diligence."

[122] In ***Stephen Ward and Victor Bowen (Deceased) v Annaliese Bayne*****, Civil Appeal No. 8 of 2008 (date of decision, 2 March 2012)** ***("Stephen Ward")*** the Court of Appeal

adopted the definition of inordinate as defined by the learned authors of the ***Supreme Court Practice 1999 ("The White Book")*** at **paragraph 25/L/5** as that which is "materially longer than the time usually regarded by the profession and courts as an acceptable period."

[123] The above chronology of filings is useful in illustrating the events which occurred since the filing of the Writ of Summons. On 28 June 1995, the Plaintiffs filed a summons for an order that the defence be struck out for failure to comply with the 3 January 1995 order of King J. There was then a four year post-writ delay between 30 June 1995, when the Defendant filed a Notice for Further Documents, and 30 June 1999 ("the first period of delay") when they filed a Notice for Directions under the Plaintiffs' summons. A further four year delay ensued from the 7 April 2000 order of the Court of Appeal until 7 May 2004 ("the second period of delay") when the Plaintiffs filed their summons for directions.

[124] I have also taken into consideration that during the second period of delay the Plaintiffs filed Notices of Intention to Proceed on 21 May 2002 and 16 April 2004 respectively. However, no action was taken by the Plaintiffs subsequent to these filings save and except the negotiations in respect of damages. It will be seen there were adjournments of the Plaintiffs' Summons on the application of the Defendants.

[125] There is no doubt that the second period of delay was inordinate. Since nothing occurred save and except the filing of two Notices of Intention to Proceed. Thereafter the Plaintiffs sought to have the outstanding summonses determined. In the circumstances, therefore I hold that the period of four years representing the second period of delay was inordinate in all the circumstances.

[126] In spite of that finding, I am of the opinion that the Plaintiffs were still under an obligation to prosecute their claim.

Was the delay inexcusable?

[127] In ***Stephen Ward*** the Court defined inexcusable delay as "delay for which there can be no objective excuse but which makes some reasonable allowance for the personal circumstances of the plaintiff."

[128] I will now consider the submissions in relation to the alleged attempts at settlement as an excuse for the delay in prosecuting the action. Paragraph 9 of the first Lashley affidavit

stated "Any delay in this matter by the Plaintiffs is regretted by them and they reserve the right, if necessary, to explain the same. The Plaintiffs have been trying to resolve the documentation and the claim without the assistance of this honourable court, but are now anxious to have the interlocutory matters completed so that a date for hearing can be obtained in the event that the claim is not settled."

[129] In his subsequent affidavits, Mr. Lashley deposed to the efforts made to settle the matter and to arrive at some common position with regard to the projected loss of the Plaintiffs, especially the Third Plaintiff. The first Sir Henry affidavit, particularly paragraph 6, speaks to the fact that Mr. Williams enquired whether Rediffusion would consider a without prejudice settlement of the matters involving Rediffusion. Those discussions were not directed specifically to the Defendant's position. Sir Henry went on to state "…I certainly have never communicated with Caribbean Broadcasting Corporation on the discussions mentioned other than that I inquired of Mr. Williams whether the figures submitted related only to the claim against Barbados Rediffusion Service Limited and the Nation Publishing Company Limited and he replied that the figures would also affect other companies and Defendants with whom the Plaintiffs were litigating. I passed that information on to Mr. Connell at a later date."

[130] Sir Henry previously deposed that he had asked Mr. Williams what exactly his clients were asking for and Mr. Williams stated that he would submit an accountant's report dealing with the Third Plaintiff's alleged loss. He further deposed that he submitted the information to Sir Fred Gollop, the Chairman of the Nation Corporation but had not received any instructions thereon which would have enabled him to reply to Mr. William's without prejudice letter of 5 November 2003. This letter is now reproduced below.

WITHOUT PREJUDICE

Re: Loss of McDonald Farms Limited

We apologise for the delay following our preliminary meeting in providing you with details of the loss of McDonald Farms Limited. However we should point out that an Accountant's special report on

McDonald dated July 25, 1995 was prepared by M. E. Murrell & Co and disclosed in the documents of the cases.

The figures have been revised and are set out for easy reference below:

1988/89	Estimated profit	$106,000.00	
	Less actual profit made	79,176.00	
	Amount claimed		$26,824.00
1989/90	Estimated profit	$116,000.00	
	Actual losses incurred	730,545.00	
	Amount claimed		$846,545.00
1990/91	Estimated profit		$125,000.00
1991/92	Estimated profit		$138,000.00
1992/93	Estimated profit		$152,000.00
1993/94	Estimated profit		$170,000.00
1994/95	Estimated profit		$192,000.00
1995/96	Estimated profit		$218,000.00
Total			$1,868,278.00
Plus:	Netbook value of machine Un-saleable	$387,577.00	
Less:	Proceeds from sale of Machinery	$23,000.00	
			$364,577.00

TOTAL SPECIAL DAMAGES CLAIMED $2,232,855.00

We are of the opinion that if agreement could be reached on a reasonable compensation for the loss of the Company, it would not be difficult to arrive at an appropriate level of compensation for Mr. and Mrs. Ram Mirchandani and to negotiate figures for interest and costs.

In view of the time constraints, the writer will contact you to discuss when we can meet again and the matter (sic) in which we can be best resolve this matter.

Your faithfully,
Yearwood Boyce

Per: …………….
Peter Williams Q.C.

[131] It is clear that the correspondence is not limited to the action involving Barbados Rediffusion Service Limited. This letter is captioned "Loss of McDonald Farms". It is not confined to any one case. The figures quoted by Mr. Williams covered the period 1988 to 1995-1996.

[132] Sir Henry, in his second affidavit, attached a letter dated 28 January 2004 addressed to Sir Fred Gollop in connection with **Asha Michandani et al v Nation Publishing Company Ltd** in the following terms:

January 28, 2004

Sir Fred Gollop
Chairman
Nation Corporation
Nation House
Roebuck Street
Bridgetown

Dear Sir,

<u>Re: Asha Mirchandani et al v Nation Publishing Co. Ltd.</u>

I have been delinquent in not submitting to you earlier Mr. Peter William's letter of 5 November, 2003 with the accompanying document. We had briefly talked about the matter on the telephone. Mr. Williams has again approached me with a view to discussing a possible settlement. I have informed him that I have not had an opportunity to discuss the matter with my clients, but the claim is exorbitant and beyond my clients' imagination and pockets.

I should be pleased if you would let me have a convenient time for us to meet to discuss the matter and to assess the chances of an amicable settlement which would be acceptable to both the Nation and Barbados Rediffusion Service Ltd.

Yours truly,

Sir Henry de B. Forde Q.C.

Encls.

[133] Sir Henry accepted that he was delinquent in not forwarding Mr. Williams' letter to his principal for just short of three months after the letter was written. Some allowance ought to be made for a response to be received or for the suggested meeting to occur. The final paragraph of Sir Henry's letter shows that he was still hopeful that the matter could be resolved.

[134] This letter is captioned "Asha Mirchandani et al v Nation Publishing Co. Ltd." Herein lies the rub. Mr. Peter William Q.C.'s letter is broad and general. Sir Henry's letter to his client is more confined to the matter in the caption thereof. The Court must look

objectively at the facts and draw a conclusion whether or not the negotiations were confined to one case or applied to the several matters in which Counsel were involved.

[135] Having regard to Sir Henry's concession in his first affidavit that the discussions were not specifically directed to the Defendant's position and that Mr. Williams Q.C had replied to him that the figures submitted would also have affected other Companies and defendants with whom the Plaintiffs were still litigating, I hold, on a balance of probabilities, that the discussions were concerned with settlement of the several matters before the Court and were not confined to the Nation cases.

[136] I am also of the view that the parties had made a concerted effort at settlement. This is borne out by the affidavit evidence filed on both sides. However, it is clear that, once attempts at settlement had failed, the Plaintiffs were under an obligation to prosecute their action with reasonable diligence. This was established in ***Warshaw v Drew*** **(1986) 45 WIR 265**. In that case Kerr J.A said that time spent in negotiating a settlement of a case may not *per se* excuse long delay. However there may be special circumstances, as was found in that case, which may provide a reasonable excuse for the delay.

[137] Sir Henry's letter is dated 28 January 2004 and the present application was filed 7 December 2004, just shy of 11 months thereafter. In the interim there had been two requests for adjournments of the Plaintiffs' summons for directions at the Defendant's request. One such adjournment was on 14 July 2004 pursuant to a letter from Sir Henry to the Registrar of the Supreme Court dated 7 July 2004 and copied to Mr. Lashley and Mr. Connell. In that letter it is noted that Sir Henry went to Canada in June 2004 for medical attention. He was due to return on 14 July 2004 but was advised to avoid strenuous or intensive work for a period of about two months. That two month period would have expired sometime in September 2004.

[138] The application to dismiss was filed on 7 December 2004, some four months after Sir Henry would have been fit to resume the hearing of this matter. Mr. Connell was, at all material times, lead Counsel for the Defendant and was so described by Sir Henry in his first affidavit.

[139] Mr. Connell requested the adjournments. It is not unreasonable, therefore, to conclude that the reason for the delay in prosecuting the summons for directions was due to the attempts at settlement and the accommodation offered to Sir Henry during his

indisposition. Even at that late stage, any reasonable person would be led to the conclusion that Sir Henry was still considering the possible settlement of the matters, even though he considered the figures to be beyond his client's pockets.

[140] There was no cross-examination of any of the deponents who filed affidavits in this matter. The Court notes that on 29 March 2005 and 20 June 2005 the Defendant filed Notices to Attend for Cross-Examination, requiring Mr. Lashley to attend for cross-examination in respect of his affidavits filed in opposition to the Defendant's summons of 7 December 2004. The Defendant's Counsel declined to cross-examine him. Mr. Williams was elevated to the Court of Appeal on 01 June 2003 and there seems to have been no further communication between himself (as lead Counsel for the Plaintiffs) and Sir Henry (as Counsel for the Defendant).

[141] In analysing the affidavit evidence, this Court is of the opinion that, given the factual matrix of this case and the suggestion that efforts were being made to find an out of court settlement in respect of the Third Plaintiff in related matters, there is support for the contention in the affidavits of both Sir Henry and Mr. Williams that the parties were trying to reach amicable settlement on all the matters.

[142] Given that finding I am of the view that the delay, though inordinate, could be excused on the basis that the parties were seeking to arrive at an amicable settlement and that the time within which they sought to do so was not unreasonable. However, the Plaintiffs were under a duty to move the case towards trial. Having regard to the efforts made by both sides to explore settlement, which obviously would have saved time and costs, that duty could only be exercised after a reasonable allowance had been made for the negotiations in relation to any proposed settlement ending with Sir Henry's letter to Sir Fred Gollop.

[143] In these circumstances, I hold on a balance of probabilities that the delay was excusable. In spite of this finding the Court is of the opinion that, for completeness, the issue of prejudice ought to be ruled upon since it was widely canvassed and is an integral part of the test in ***Birkett***.

The issue of prejudice

[144] In relation to the determination of prejudice, in ***Birkett*** Lord Diplock noted at **page 323, paragraph F**:

> "To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiffs tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step."

[145] In ***Hornagold v Fairclough Building Limited*** **[1993] P.I.Q.R. 400** ***("Hornagold")*** the Court of Appeal considered an application to strike out proceedings in respect of an action for personal injury where nothing had been done to prosecute the claim for a period of five years. In delivering his decision Glidewell L.J. said at **page 409**:

> "...to succeed in an application to strike out a plaintiff's claim for want of prosecution a defendant must produce some evidence either that there has been a significant addition to the substantial risk that there cannot be a fair trial caused by the post-commencement of proceedings period, or periods of inordinate and inexcusable delay, or that there has been a significant addition to the prejudice to a defendant either as between the defendant and the plaintiff, or as between that defendant and another party to the action caused by such delay or delays. By saying that, I do not say that inference has no part to play in the process of resolving the issue of "more than minimal additional prejudice" or that the court cannot draw inferences from evidence contained in affidavits, but there must, in my judgment, be more than the bald assertion that the delay has prejudiced the defendants, or that it has created a substantial risk that a fair trial will not be possible, or that it has to add to existing prejudice, or to the existing risk that a fair trial will not be possible."

[146] The decision in ***Hornagold*** puts into a more practical context the above dicta in ***Birkett*** and provides useful insight into the manner in which a court, faced with an application to strike out, ought to approach the issue of determining sufficiency of prejudice.

[147] ***Hornagold*** was applied in ***Slade v Adco*** **[1996] P.I.Q.R. P418** where the Court of Appeal considered the nature of the evidence required in strike out proceedings and the exercise of judicial discretion in relation to the same. Neill L.J., who with Sir Iain Glidewell formed the majority, said at **page 434**:

> "I have come to the conclusion that it is unwise to lay down any strict guidelines for the exercise of the judge's discretion in the individual case. The onus is on the person asserting prejudice or a substantial risk to a fair trial to establish it. He will have to show that the prejudice or risk has been caused by the inordinate and inexcusable delay since the issue of the writ. A mere assertion is not enough. But in my view the individual judge should be left to assess the prejudice and the risk and the adequacy of the evidence in the light of the individual circumstances of the case."
>
> ...The defendant's evidence of prejudice is simply insufficient to justify striking out the action on the ground that the delay was prejudicial and likely to prevent a fair trial of the matter."

[148] I am also guided by the decision in ***Trill v Sacher*** **[1993] 1 W.L.R 1379** ***("Trill")*** and the dicta of Neill J. at **page 1399, para G**:

> "...the Court will look at all the circumstances. It will look at the period of inordinate and inexcusable delay for which the Plaintiff and her advisors were responsible and then seek to answer the questions; has this delay caused or is likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade L.J. stressed in *Rath v. C. S. Lawrence & Partners* [1991] 1 W.L.R. 399, 410: "a causal link must be proved between the

delay and the inability to have a fair trial or other prejudice, as the case may be."

[149] It appears to me that the majority of West Indian Courts have adopted and followed the reasoning in ***Birkett***, ***Hornagold*** and ***Trill***. (See the Bahamian Supreme Court decision ***Edwards v Johnson*** **BS 2010 CS 56 (date of decision, 16 August 2010)**, the decision of the High Court of Trinidad in ***Dhanodad et al v Nelson et all*** **TT 2010 HC 274 (date of decision, 1 November 2010)** and the Bahamian High Court decision ***Harrison v Sands, Moss and Doctors Hospital Health System Limited*** **BS 2010 SC 120 (date of decision, 16 November 2010)**. The Barbados Court of Appeal decision ***Steven Ward*** suggests that the local courts have adopted the same position.

[150] Accordingly, this Court asks itself two questions on this issue. Firstly, has the Defendant established that it has suffered any prejudice as a result of any alleged inordinate and inexcusable delay and secondly, if so, would a fair trial of the issues be no longer possible?

[151] In relation to the first requirement, I have paid due regard to the affidavit evidence of Mr. Connell that due to the inordinate and inexcusable delay the memories of the surviving witnesses were likely to be faulty and/or that such witnesses might be unavailable to attend and give evidence on the Defendant's behalf and that, consequently, a fair trial of the issues may no longer be possible. I will now deal with these submissions.

Unavailability and Diminished Recall of Witnesses

[152] The Defendant submitted that it was unable to find the witnesses Mr. Darwin Trotman and Mr. O. Gittens. It is difficult to see how the memories of witnesses could be said to be diminished, as submitted by Counsel, if they are unavailable to attest to this fact. One cannot surmise that simply because an inordinate period of time has elapsed that memories are, *ipso facto*, diminished (See ***Hornagold***). This conclusion is based upon the presumption that, with the passage of time, it is presumed that memories will necessarily fade. This will be dealt with more extensively later in this decision. In any event, the reports compiled by these witnesses may be used as an *aide memoir*, to enable them to refresh their memories at trial.

[153] It also appears to me that there is some contradiction in the position taken by Counsel for the Defendant on this issue. In the third Connell affidavit it was deposed that, at the time of the deposition, the Defendant was still trying to locate Mr. Trotman. This seems to indicate that, in spite of the failure of Ms. Mahy to locate Mr. Trotman, the Defendant was still hopeful that it could locate him. The Mahy affidavit was dated 31 December 2004 and filed the same day. The third Connell affidavit was deposed to and filed on 3 January 2005. Having been unable to locate Mr. Trotman to interview him and establish whether his memory could be refreshed from his statement, the submission that his recall is likely to have diminished is without foundation and is speculative at best.

[154] The following observations of Lord Justice Roch in ***Hornagold*** are pertinent to this issue:

> "There must be some indication of the prejudice, for example, that no statement was taken at the time of the material events so that a particular witness who would have been called on a particular issue has no means of refreshing his memory, or that a particular witness who was to be called on a particular issue is of an advanced age and no longer wishes to give evidence, or has become infirm or unavailable in the period of the further inordinate and inexcusable delay."

[155] Any decision on this point must take into account the totality of the evidence adduced. The affidavits of Mr. Lashley, Ms. Mahy and Mr. Ettienne, filed on the Defendant's behalf, all illustrate that both Mr. Trotman and Mr. Gittens were located at various points in time. Mr. Lashley deposed that Mr. Trotman contacted him but he declined to speak with him. Mr. Lashley was not cross-examined. The affidavit evidence of Ms. Mahy, Mr. Ettienne and Mr. Lashley remains unchallenged. Mr. Ettienne is an experienced investigator and process server. Ms. Mahy was, at the time, a senior reporter lacking the expertise in the abovementioned areas. She did not follow up on locating Mr. Trotman's attorney, Mr. Pierce. Mr. Pierce is an Attorney-at-Law in private practice within this jurisdiction and can be found.

[156] I, therefore, place greater weight on the affidavit evidence of Mr. Etienne. In consequence, I find, on a balance of probabilities, that the witnesses, Mr. Trotman and

Mr. Gittens, were capable of being found at the time of filing of the 7 December 2004 summons and would have been available to give evidence and to be cross-examined. There is no evidence to the contrary at today's date.

[157] The Plaintiffs also contended that, if the evidence of the witnesses named in the first Connell affidavit were so vital to the Defendant's case, the Defendant should have secured written statements from those persons in a timely fashion. In the second Connell affidavit at paragraph 3, Mr. Connell deposed that Mr. Trotman was the only prospective witness who has given a signed statement. There is some merit, therefore, in Mr. Lashley's submission, since Mr. Trotman's statement would also have been available to enable the witness to refresh his memory therefrom (See ***Hornagold***). Had a statement been obtained from Mr. Gittens a similar observation would apply.

The Death of Mr. Cumming and Mr. Morgan

[158] The Defendant further submitted that the deaths of Mr. Cumming and Mr. Morgan rendered it impossible to have a fair trial of the issues since their evidence was vital to their defences. On 21 February 1994 a joint affidavit was filed by John Anthony Cumming, Pearline Valdene Gibson and Colin Anthony Williams Q.C.. Mr. Cumming deposed, *inter alia*, that he was the Deputy General Manager of the CBC and was responsible for the company's television operations. He deposed further that the Defendant had in its possession a master tape of the 1989 Pic-o-de-Crop Finals and that he made a dubbing of the section of the tape containing the recordings of the calypsos "Tit for Tat", "Pluck it" and "The Mad Chicken Song" at the request of Mr. Colin A. Williams Q.C.. He sent two copies of the tape containing the dubbings to Hutchinson and Banfield, the Defendant's then Attorneys-at-law.

[159] The Defendant, however, did not indicate what additional evidence Mr. Cumming would have been called upon to give. Such indication would have permitted the Court to evaluate the importance of his evidence in relation to the pleaded defences and also in relation to the claim for defamation. In the absence of such intimation, the Court would be called upon to hazard a guess as to what impact the likely evidence of this witness would have had on the Defendant's case, in particular, and the entire case in general.

[160] Support for this position is found in ***Hornagold*** where Glidewell L.J examined the issue of the passage of time on the ability of witnesses to recall evidence and possible resulting prejudice to a defendant. He held that if the court is to be asked to draw an inference in respect of prejudice, it must at least have evidence before it as to the nature of the evidence which the defendants seek to call on the issues in question, so that it can decide whether or not in the circumstances it is proper to draw such an inference.

[161] He opined at **page 416**:

> "It may be that in relation to either of the defendants there is some issue of this kind on which it could be said that witnesses are necessary and that the defendants are prejudiced as a result of the plaintiff's solicitors' inordinate and inexcusable delay, but the affidavits to which I have referred do not identify either such witnesses, or the particular categories of evidence of which this is true."

[162] A similar position was adopted in ***Birkett,*** **page 812, paragraph F** where Lord Simon distinguished between situations where the result of the case depended on the recollection of witnesses or upon their integrity and opined as follows:

> "When cases (as they often do) depend predominantly on the recollection of witnesses delay can often be most prejudicial to defendants and to plaintiffs also. Witnesses' recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is sometimes impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred; but this is not such a case for its result must depend chiefly upon the view which the court takes of the integrity rather than the memory of the plaintiff and the defendant."

[163] Every case depends upon its own peculiar facts. It is a question for the trial judge, in the exercise of his discretion, whether there is likely to be deterioration of recall of events and consequential prejudice to the defendant. I am of the opinion that, on a balance of probabilities, such prejudice has not been established by the Defendant.

[164] In the circumstances the Court rejects the Defendant's submission on this issue.

<u>Let Sleeping Dogs Lie</u>

[165] Mr. Connell Q.C submitted that the Defendant was entitled to remain inactive and "let sleeping dogs lie" since it had not commenced the action nor made a counterclaim.

[166] The genesis of this submission is found in the dictum of Lord Salmon in ***Birkett*** at **page 329, paragraphs C** to **E**:

> "Defendants' solicitors might no doubt have taken out applications to dismiss for want of prosecution or for peremptory orders to compel the plaintiffs to get on with their actions. Not unnaturally they rarely did so, relying on the maxim that it is wise to let sleeping dogs lie. They had good reason to believe that a dog which had remained unconscious for such long periods of time might well die a natural death at no expense to their clients; whereas, if they were to take the necessary steps to force the action to trial, they would merely be waking up a dog for the purpose of killing it at great expense to their clients which they would have no chance of recovering. Accordingly it was unusual for summonses to dismiss actions for want of prosecution or for peremptory orders to be taken out. I do not think that defendants' solicitors can be blamed for this practice nor that the plaintiffs or their solicitors should be entitled to derive any benefit from it."

[167] The application of the principle must take into account the particular facts of the case before the court. In this case, the Defendant on 30 June 1999 filed a Notice for Further Directions, *vis*, (1) an order for production of documents, (2) order for further and better list of documents and (3) order for discovery of specific documents. This application remained outstanding at the time the application to strike out was filed.

[168] Mr. Lashley obtained a date of hearing for his summons. He consented to two adjournments at the request of the Defendant. In the meanwhile, the Defendant filed its application to strike out the Plaintiffs' case and obtained a date of hearing without abandoning its pending application under the Notice for Directions. No prior intimation was given to the Plaintiffs that an application to strike out the case was being made.

[169] The first Lashley affidavit details the efforts made to have his summons set down for hearing and the adjournments granted at the request of the Defendant. He attached correspondence in support. Had Mr. Lashley not accommodated the Defendant, his summons would have been heard before the Defendant's present application was filed. Mr. Connell, like Sir Henry, is a member of the Inner Bar and could have made representation at the hearing of the Summons for further directions. This is especially so, since Mr. Connell drew, prepared and filed the Defendant's notice for further directions under the Plaintiffs' Summons for directions. As noted above, he was described by Sir Henry as lead Counsel.

[170] This Court is of the opinion that, on the facts of this case, the Defendant should not be permitted to "let sleeping dogs lie". The Defendant invoked the jurisdiction of the Court to make orders under the notices and ought not to have allowed those applications to remain unheard and yet pursue an application to strike out the Plaintiffs' claim.

[171] It follows, therefore, that I disagree with Mr. Connell's submission that the Defendants, after four and a half years of inaction, was entitled to conclude that the Plaintiffs were no longer pursuing their claim. ***Webster*** is distinguishable from the present case. That case concerned a plaintiff who sought to enter judgment more than one year after the Defendant had made default in entering an appearance to a writ. This case involves an application to strike out in an ongoing matter where applications remained outstanding on both sides. In ***Webster***, Lindley L.J. held that it would be unjust to allow judgment to be entered without allowing the defendant an opportunity to show that the plaintiff was entitled to proceed further. He said at **page 234**:

> "The fact of more than a year having elapsed since the last proceeding, seems to show that the plaintiff had intended to abandon the prosecution of the action, and it might be very unjust to allow him to sign judgment without giving the defendant an opportunity of establishing to the satisfaction of the Court that the plaintiff is not entitled to proceed further."

[172] I therefore find that the dicta in ***Webster*** are inapplicable to the present application in the manner sought by Counsel to apply it.

Delay Caused by the Defendant

[173] In an application to strike out for want of prosecution, a defendant cannot rely on a period of delay which he himself caused. This was established by Diplock LJ in ***Trill*** at **page 1398** where he said:

> "A defendant cannot rely on a period of delay for which he has himself been responsible. A defendant cannot rely on a period of delay if at the end of the period he "so conducts himself as to induce the plaintiff to incur further costs in the reasonable belief that the defendant intends to exercise his right to proceed to trial notwithstanding the plaintiff's delay."

[174] Related to this point is Mr. Connell's submission that, during the period of delay, there had been desultory and inconsequential communications which could not absolve the Plaintiffs from their inexcusable delay. Having read Mr. Williams' letter, which outlined the proposed figures for damages and Mr. Lashley's letters to Mr. Connell, which concerned the failure to have his summons heard, this Court is of the opinion that this correspondence cannot be characterised as desultory and inconsequential. They represent, in my view, a genuine and honest attempt to press on with the matter in spite of previous delays.

[175] In this factual matrix, Mr. Connell must have known that the Plaintiffs were not content to remain dormant but were pressing to have their matters heard. In addition, the Defendant made no allowance for the accommodations afforded to them as a result of the indisposition of Sir Henry. It is not an unusual practice in this jurisdiction to afford such accommodations. I am of the opinion that the Defendant cannot take advantage of the delay occasioned by requests of the Plaintiffs for adjournments.

[176] In the circumstances, the Court is of the opinion that the Defendant ought to have indicated to the Plaintiffs that the Defendant was no longer pursing its Notice under the Summons for Directions and would be applying to strike out the action in view of the fact that they had requested adjournments on the last two occasions. This would have allowed the Plaintiffs to press on with their application.

[177] The Defendant referred to **Order 25/1/8 of the Supreme Court Practice** which says, "it is not always easy to draw the line between proper inactivity and actual encouragement of

or contribution to delay. In many cases the prospects of a successful application are much improved by one or two reminders to the Plaintiff that he should either proceed with the action or abandon it". This comment is apt to describe this situation.

Waiver and Estoppel

[178] Allied to the Defendant's submission that it was entitled to let sleeping dogs lie is the issue of waiver and/or estoppel. In his written submissions, Mr. Lashley made reference to Mr. Williams' opinion that: "The Defendant's summons dated 7th December 2004 therefore is inconsistent with the Defendant's previous conduct from which the Plaintiffs could reasonably believe that failing settlement they could proceed to trial of the action".

[179] He also referred to paragraph 3(iv) of the Williams affidavit of 23 March 2005 in which Mr. Williams further opined that "the Defendant's counsel never at any time intimated that the Defendant was prejudiced by the Plaintiffs' course of action or suggested having the case set down for trial without further delay and as a matter of urgency which, in any event the Defendant could have done, or that the alleged delay would prevent a fair trial of the action or prejudice the same".

[180] Though not specifically articulated, Mr. Lashley seems to be raising a point of waiver or estoppel. In similar manner, Mr. Connell did not proffer submissions on this point. However, inferentially, there was opposition to the point at paragraph 8 of the first Sir Henry affidavit. Sir Henry deposed "Neither Mr. Williams nor I at any time indicated the one to the other that our clients were in any way waiving their strict rights and I certainly did not indicate that the Defendant in this suit would not rely on any defence or remedy available to it."

[181] I have already concluded that the correspondence between Sir Henry and Mr. Williams was a genuine effort to reach an agreement on the proposed figures for damages. Nowhere in the correspondence is there evidence that the Defendant had waived its rights to rely on any defence or remedy available to it.

[182] The point raised above in relation to the Defendant's filing of its present application is not to be construed as a finding that the Defendant had waived its right or is estopped from filing the present application. It is possible that the Plaintiffs could have reasonably come to the conclusion that the Defendant, after the adjournments, would proceed with

the Summons for Directions and the notices thereunder. However, there was no overt act or conduct from which a waiver or estoppel could be construed.

[183] The Defendant's actions are also consistent with its reservation of its legal rights in the matter. On a balance of probabilities, I do not construe the Defendant's position as a waiver of its rights or as creating an estoppel. The burden of proving waiver or estoppel rests with the Plaintiffs who alleged it and they have failed to discharge that burden on a balance of probabilities.

OTHER CONSIDERATIONS

[184] In determining whether or not to strike out the Plaintiffs' action, the Court must consider the justice of the case and the competing interests of the parties as manifested in the pleadings. The Plaintiffs' claim in defamation is based upon a song which is alleged to be libellous and the performance and recording of that song at an event. The defences of justification and fair comment must be given the fairest opportunity to be fully ventilated.

[185] Mr. Connell submitted that Mr. Trotman's statement was privileged, having been obtained by the Defendant for the purposes of these proceedings, but that the Defendant was willing to have it inspected by the Judge for the purposes of this application. The Court cannot accede to this course of action since the Court must not take into account any prospective evidence which has not been seen by the Plaintiffs. Such a procedure would lack transparency and would deny the Plaintiffs' Counsel the opportunity to test the veracity of the evidence by cross-examination.

[186] The Court must be mindful of its duty not to drive litigants away from the judgment seat. I have had regard to the case of ***Dyson v Attorney-General*** **[1911] 1 K.B. 410** at **pages 418 to 419** where Fletcher Moulton LJ said:

> "To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, excepting in cases where the cause of action was obviously and almost incontestably bad."

[187] In this case there was no allegation that the cause of action was obviously and incontestably bad, and I find no evidence to convince me otherwise.

[188] I have also had regard to the draconian nature of the court's power to strike out. It has long been established that the power should only be used in clear and obvious cases and should not be used if the court can find an alternative remedy (see ***Carl Zeiss Stiftung v Rayner& Keeler Ltd*** **[1970] Ch. 506** and ***Biguzzi v Rank Leisure Plc*** **[1999] 1 W.L.R. 1926**.)

[189] In the circumstances I am of the opinion, and hold, that the allegation that inexcusable or inordinate delay has led or contributed to prejudice to the Defendant has not been established.

The Plaintiffs' Submissions on Order 25 RSC

[190] I now deal with the submission of Counsel for the Plaintiff that the Defendant could have applied to push the matter forward under ***Order 25***. This rule provides:

> With a view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that
>
> (a) a
>
> ll matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with, so that
>
> (b) s
>
> uch directions may be given as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof,
>
> the Plaintiff may, within one month after the pleadings in the action are deemed to be closed, take out a Summons (Summons for Direction) returnable in not less than 14 days.

[191] Further, ***Order 25, rule 1(4)*** provides that:

> if the Plaintiff does not take out a Summons for Directions in accordance with the foregoing provisions of the rule, the Defendant or any Defendant may do so or apply for an order to dismiss the action.

[192] ***Order 25 Rule 5*** provided that:

> ...on an application by a Defendant to dismiss the action under paragraph 4 the Court may either dismiss the action on such terms as may be just or deal with the application as if it were a summons for directions.

[193] I have found the dicta of Lord Justice Diplock in ***Allen v McAlpine & Sons*** **[1968] 2 Q.B. 229,** at **page 257 paragraphs E** to **G** to be quite apposite:

> "The times within which these successive steps should be taken are laid down by the rules, though subject to extension by agreement of the parties or order of the court; but under the adversary system the only sanction for their observance by either party is dependent upon the other party's choosing to make an application to the court. **Where the delay is on the part of the plaintiff, there are some steps, such as obtaining an order for directions or setting down the action for trial, which the defendant may take himself; but it is seldom in the defendant's interest to press on with the trial of the action, whatever view he takes of the plaintiff's chances of success**." (My emphasis)

His Lordship continued at **page 258, para E**:

> "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**." (My emphasis)

[194] A summons for directions dated 23 June 1992 was taken out by the Plaintiffs and orders made thereon. Mr. Connell, for the Defendant, had also taken out a notice under the

Plaintiffs' summons which also remained outstanding. Had the summons for directions and the notices thereunder been heard, this would have helped to push the matter forward.

[195] It is for the Defendant to take such course of action as it considers the circumstances to warrant. Whilst it is open to the Defendant to avail itself of the provisions of ***Order 25***, the Plaintiffs may not mandate the procedure to be adopted by the Defendant. In this case, the Defendant opted to apply to strike out the action on the grounds of inordinate and inexcusable delay. This is the issue which the Court must settle, not an application which may have been available to the Defendant and not taken.

[196] I am of the opinion, therefore, that ***Order 25*** is inapplicable in these circumstances since the procedure had already been adopted.

[197] I, therefore, reject the Plaintiffs' submission on this point.

<u>Application to Strike out Parts of the Affidavits</u>

[198] Mr. Connell also applied to strike out certain paragraphs of the Plaintiffs' affidavits. It is unnecessary to repeat those submissions here. Counsel relied upon ***Order 41, rule 5*** and ***Order 41, rule 6 RSC*** which provide as follows:

> ***Order 41, rule 5(1)***: Subject to Order 14, rules 2(2) and 4(2), to paragraph (2) of this rule and to any order made under Order 38, rule 3, an affidavit may contain only such facts as the deponent is able of his own knowledge to prove.
>
> ***Order 41, rule 6***: The Court may order to be struck out of any affidavit any matter which is scandalous, irrelevant or otherwise oppressive.

[199] I have found ***Order 41, rule 5(2)*** to be useful. It provides:

> An Affidavit sworn for the purpose of being used in interlocutory proceedings may contain statements of information or belief with sources and grounds thereof.

[200] The affidavits filed in this matter were for the purposes of either supporting or defending the Defendant's summons to strike out the Plaintiffs' action. I must also state that Counsel's opinions as expressed in their affidavits, whilst useful, are not binding on the Court. Those affidavits, where they represent Counsel's characterisation of the facts or their opinions thereon, are irrelevant to my function.

[201] For example, Mr. Lashley's submissions that:

1. "paragraphs 3 and 4 of Mr. Connells's affidavit are based on a false premise, namely, that the evidence from the Ministry of Health favoured the Defendant and would have assisted in proving the defence of justification."; and
2. Paragraph 3 "is also misconceived because it assumes without any basis, that the oral evidence of Mr. Litchfield Morgan would take the matter further than the written memoranda in support of the defence."

are simply Counsel's opinion and have no evidential value, since these are some of the issues which the Court would have to decide upon in the final determination of the action. In this regard, the Court agrees with Mr. Connell's submission on this point.

[202] Similarly, this Court cannot be influenced by any alleged attempt of Counsel to show that the Plaintiffs had been successful in other related proceedings, as submitted by Counsel for the Defendant. I do not think that the paragraphs sought to be struck out can be described as scandalous, irrelevant or oppressive as required by ***Order 41, rule 6 RSC***.

[203] In view of my ruling on the substantive issue, I do not think that any useful purpose will be served by striking out parts of the affidavit as submitted by the Defendant's Counsel.

[204] Having regard to ***Order 41, Rule 5(2)***, I am also of the opinion that it is unnecessary to strike out the portions of the affidavit referred to by Counsel for the Defendant since they were filed for a limited purpose namely, in response to the application for striking out which has been disposed of by this Court and the affidavits are therefore of no further evidential value.

DISPOSAL

[205] In the circumstances, the Court orders as follows:

(1) The application to dismiss the Plaintiffs' action for want of prosecution is denied;

(2) The application to strike out parts of the Plaintiffs' affidavits is dismissed.

(3) The Court further makes the following directions for the future conduct of this matter:

a) That the applications under the Notice to Produce and the Summons for directions be set down for hearing on a date to be agreed; and

b) That there be a case management conference to resolve all outstanding issues so that the matter can proceed to trial with expedition.

[206] It is further ordered that the issues of costs and what, if any, future directions ought to be made, be adjourned until Wednesday, 31st July 2013.

William J. Chandler

Judge of the High Court