BARBADOS

IN THE SUPREME COURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No 1230 of 2005
Between

VINO RICHARDSON **PLAINTIFF**

-AND-

NORTH BEACH CO. LTD **DEFENDANT**
t/a MANGO BAY HOTEL & BEACH CLUB

Before the Honourable Madam Justice Jacqueline A.R. Cornelius, Judge of the High Court

2015: November 3;

Ms. Sharon Edgecombe-Miller for the Plaintiff
Ms. Michelle Russell for the Defendant

DECISION

[1] This is an application filed by the defendant seeking dismissal of the plaintiff's cause of action on the basis of inordinate delay and that continuing the action would amount to an abuse of process of the court. Counsel agreed that my determination should be made on submissions only.

[2] The plaintiff's cause of action arose on 22nd June 2002 when she slipped and fell during the course of her employment as a cook at the defendant's

premises. She fell in a pool of water on the kitchen floor. The plaintiff filed a Writ of Summons and her Statement of Claim on 17th June 2005. The defendant filed its Acknowledgment of Service on 6th March 2006. In 2008, the defendant retained new counsel and a defence was filed on 5th February 2008. It was not until September 2013 when the Summons regarding this current application was filed, that any steps were taken before the court to resolve this matter.

THE APPLICATION and SUBMISSIONS

[3] The defendant's application is based on three main heads: (1) inordinate or inexcusable delay; (2) prejudice to the defendant; and (3) Abuse of process. The defendant seeks orders pursuant to Order 18 Rule 9 of the ***Rules of the Supreme Court* 1982** to have the matter dismissed or alternatively and or in addition the grant of an Unless Order stipulating that the plaintiff make the next step in the proceedings within 30 days of the date of the Order failing which the plaintiff's action is to be automatically struck out

Inordinate or inexcusable delay

[4] The defendant submits that the court has power to dismiss an action if a plaintiff had been guilty of inexcusable or inordinate delay (***Birkett v James* [1978] AC 297 HL**). ***Birkett*** suggests that this power is exercisable only where the plaintiff's default has been intentional and contumelious or where

the delay was caused by the plaintiff's lawyers and it gave right to a substantial risk that a fair trial would not be possible or serious prejudice to the defendant. ***Birkett*** suggest further, submits the defendant, that the court had to exercise its power to make a plaintiff pursue its action with due diligence and that disobedience to peremptory orders as to the time for taking steps in the proceedings would amount to contumelious conduct.

[5] The defendant submits that more than 8 years have elapsed since the plaintiff took its last step in the proceedings and that even in response to this application no affidavit had been filed.

[6] The plaintiff submits that the delay in this matter was not intentional and contumelious. The parties were negotiating from the time of the filing of the Writ up until 2008. Whilst this was not a credible excuse, it showed that the neglect was not purposeful or willful. The plaintiff submits further that even if the delay was found to be inordinate, particularly post 2008, the delay was not without reason. She could not pay for the medical reports and assistance was not forthcoming from the defendant when requested. It was disingenuous for the defendant possessed with this knowledge and agreeing to attempt and out of court settlement to now claim inaction on the plaintiff's part. No application was made by the plaintiff's previous counsel for an interim payment and she was under the impression that the medical reports

had to be paid for from her personal resources, hence the delay from 2008 to 2013.

Fair Trial/ Prejudice

[7] The defendant submits that this matter has now been before the court for more than 11 years and the defendant had this matter over its head for that period of time. The extent of the plaintiff's case had not been stated in the Writ of Summons and the defendant's insurers had to continually make reserves for a matter that appeared to have no end in sight or for which the exact reserves were still uncertain. The prejudice to the defendants and its insurers had to be considered (***Antcliffe v Gloucester Health Authority*** **[1992] 1 WLR 1044**). The lengthy delay in this matter entitled the court to draw the inference that the defendant would suffer serious prejudice bearing in mind that the greater the delay, the less of a need to establish prejudice (***Barrat v Bolton*** **[1998] 1 WLR 1003**).

[8] The plaintiff submits that the defendant has admitted liability in its defence and that the only issues remaining were those of quantum. The memories of the witnesses was therefore irrelevant and assertions of prejudice and the unlikelihood of a fair trial were unwarranted and unsubstantiated. Issues of quantum depended primarily on the plaintiff's evidence and medical evidence.

[9] The plaintiff submits that the "onus was on the (defendant) to establish by evidence the nature and extent of any prejudice caused to them by the delay…" (***Warsaw and Others v Drew*** **(1990) 38 WIR 221 PC**). No information had been provided to the Court to allow it to say that it is more likely than not that the defendant would be prejudiced. In ***Warsaw*** there was inordinate and inexcusable delay but the application to strike out was dismissed with costs because the defendant failed to show prejudice.

Abuse of Process

[10] The defendant submits that even if they were unable to prove prejudice, the court still had power to dismiss the action in that it amounted to an abuse of process (***Grovit v Doctor*** **[1997] 1 All ER 417**). In ***Grovit*** the plaintiff commenced its action in 1989 and took no further steps in the proceedings after 1990. In 1992, the defendants applied to have the matter struck out for want of prosecution and were successful. **Lord Wolff** stated that

> '…both the court and the defendants have the means to achieve greater control over delay. Defendants do not need to wait until there has been inordinate delay belay they apply for peremptory orders.'

[11] The defendant submits further that the plaintiff has remained inactive for over 11 years notwithstanding having received correspondence from the defendant's counsel inquiring as to the status of the plaintiff's claim.

[12] The plaintiff submits that to substantiate a finding under this head, the defendant had to show that abuse existed and that the plaintiff used the legal process for a purpose or in a way significantly different from its ordinary and proper use (***AG v Baker*** **[2000] 1 FLR 759.** The reasons for delay in this matter were not within the realm of abuse. The defendant referred to ***Icebird v Wingardner*** **[2009] UKPC 24 per Lord Scott of Foscote** where it was stated thus

> Where however there is nothing to justify a strike-out order other than a long delay for which the plaintiff can be held responsible, the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorizing the delay as an abuse of process without clarity as to what it is that has transformed the delay into abuse and, where necessary, evidential support.

Plaintiff's further submissions

[13] The plaintiff submits that inactivity on her part or that of her counsel between 2008 and 2013 is not one over which she could exercise any control. With the advent of the new rules of the Supreme Court (***Supreme Court (Civil Procedure) Rules*** **2008**) on 1st October 2008 her matter should have transitioned to the new rules. Part 73 of the Rules set out transitional provisions and the next step was for the High Court Registry to schedule the matter for a case management conference thereby allowing the matter to transition under the new rules. There was nothing further that the plaintiff

could do to progress the matter, it was for action to the taken by the office of The Registrar of the Supreme Court.

ISSUES & DISCUSSION

[14] There is one major issue in this case: has the defendant proved the case for an Order to dismiss the plaintiff's case for want of prosecution to be granted?

[15] This is an application pursuant to Order 18 rule 19 of the 1982 Rules. The rule is in the following terms:

> The Court may at any stage of the proceedings order to be struck out or amended any pleading or the endorsement of any Writ in the action, or anything in any pleading or in the endorsement, on the ground that
>
> (a) It discloses no reasonable cause of action or defence, as the case may be; or
>
> (b) It is scandalous, frivolous or vexatious; or
>
> (c) It may prejudice, embarrass or delay the fair trial of the action; or
>
> (d) It is otherwise and abuse of the process of the Court,
>
> and may order the action to be stayed dismissed or judgment to be entered accordingly, as the case may be.

[16] The defendant's application relies on sub-paragraphs (c) and (d) of Rule 19 and the court's inherent jurisdiction to

> dismiss an action for want of prosecution where there has been prolonged or inordinate and inexcusable delay in prosecution of the action causing or likely to cause serious prejudice to the defendant or

> giving rise to a substantial risk that a fair trial would not be possible. (***Halsbury's Laws of England*** **Vol 37 4th Edition para 448**)

[17] The evidence in this matter is that the parties were negotiating for some time. The defendant refused and or neglected contrary to the custom in personal injury matters, to assist the plaintiff with her medical costs and the plaintiff, herself not being versed in legal happenings, took responsibility for the payment of her medical reports. The defendant has not referred to any of this in its submissions.

[18] There has clearly been inordinate delay in this matter and I am of the view that this matter could have been and should have been disposed of many years prior. I accept that the plaintiff was represented by other counsel previously but there is no reason why after the change of counsel, this matter should have remained in abeyance.

[19] In my view it is scandalous for the plaintiff's counsel to blame the delay post 2008 on the Registry of Supreme Court in circumstances where she could have simply written for a date to be set and for the matter to transition accordingly. It is not the duty of the Registry of the Supreme Court to run down litigants and their counsel who wish to have their matters dealt with. The rules do not provide for automatic transition and in any event the matter could have been completed at anytime under the provisions of the 1982

Rules. I wholeheartedly reject counsel for the plaintiff's suggestion that any part of the fault for the delay in this matter lies with the Registry.

[20] Having considered the evidence further, I cannot hold that the defendant has made out the argument for abuse of process. Whilst the delay is woeful, the defendant must show what has transformed the delay into abuse (***Icebird).*** It must also show the nature and extent of the prejudice caused and I accept that some prejudice has been caused in this matter to the defendant and its insurers. They should not have been in a position of having this matter unresolved for the extent of time that it has been so.

[21] Given that the defendant has already admitted liability, I see no reason why the plaintiff's previous counsel did not proceed to an assessment of damages with alacrity. Indeed the plaintiff's current counsel only became her counsel in January of 2014. The defendant accepted liability as far back as February 2008 and the payment of medical reports should not have been an issue after this.

[22] Despite the length of time this matter has remained unresolved, I am satisfied that the prejudice faced by the defendant in the circumstances does not outweigh that faced by the plaintiff and accordingly, I am not of the view that this matter should not be struck out in the circumstances.

DISPOSAL

[23] Despite my findings therein, I am not prepared to let this matter remain in abeyance. Finality must be brought to all proceedings before the Court and accordingly the Court orders as follows

(a) The defendant's application for strike-out is refused.

(b) However, unless the plaintiff takes the next steps in the proceedings within 30 days, the plaintiff's case shall stand as struck out.

[24] I would have been willing to make an Order for Costs against the plaintiff's former counsel as a third party had such application been made, but in the circumstances, the defendant will have its costs certified fit for one counsel to be assessed if not agreed.

Jacqueline A.R. Cornelius
Judge of the High Court