BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 201 of 2011

BETWEEN:

DARRYL'S AIR CONDITIONING & REFRIGERATION CONTRACTORS BARBADOS LIMITED — **CLAIMANT**

AND

SANDY LANE HOTEL CO. LTD — **DEFENDANT**

Before the Honourable Madam Justice Margaret A. Reifer, Judge of the High Court

Date of Hearing: 2017 July 14th
Date of Decision: 2018 January 3rd

Appearances:
Ms. Cicely Chase Q. C. and Ms. Shari-Ann Walker Attorneys-at-Law for the Claimant
Mr. Satcha Kissoon Attorney-at-Law for the Defendant

DECISION

Introduction

[1] The substantive application in this matter was filed by the way of Claim Form on February 15th 2011. It is a claim for wrongful repudiation/termination of a contract, the full details of which are set out in the Statement of Claim filed together with the Claim Form. The amount being claimed for loss and damage and interest thereon, consequent on the alleged unlawful repudiation/termination on that date is, $2,153,004.21.

[2] Essentially, the subject contract was one for the sale and installation of air conditioning, refrigeration and related systems equipment, with work commencing in the first quarter of 2008.

[3] The Defendant terminated the contract in December 2008 and refused to allow the Claimant to proceed further, or in any way access the site to execute any further works.

[4] The Defendant's Amended Defence and Counterclaim allege defective work using inferior material and inferior staff, delay, and generally, the Claimant's failure to proceed with the works in a good and workmanlike manner. The Defendant counterclaims for loss and damage incurred in remedial works, third party costs of completion of the said works, and interest on unspecified damages.

[5] The Defendant's stance is challenged in a Reply to Defence and Counterclaim.

The Subject Applications

[6] There are two applications presently before this Court, which must perforce be heard at the same time.

[7] First in time is that of the Defendant, filed August 9th 2016, together with an Affidavit in Support of even date. This is the 'Striking out' Application in which the Defendant seeks the following relief:

> "i. To strike out the Claim Form and the Statement of Claim pursuant to the Supreme Court (Civil Procedure) Rules 2008 and/or the inherent jurisdiction of the Court;
> ii. Judgment entered for the Defendant;
> iii. Alternatively, that the Claimant be debarred from relying on any witness statements and calling witnesses at trial of this action;
> iv. Alternatively, that the Claimant be required to provide security into court as a condition for being allowed to continue with the proceedings;
> v. Costs to the Defendant to be assessed".

[8] The grounds of the application include:

> i. The Claimant failed, refused and/neglected to comply with orders of the court for the filing of witness statements, statements of agreed facts and issues and listing questionnaire;
> ii. Protracted and unreasonable delay interfering with the Defendant's right to a fair trial as the delay now affects the ability of the parties to recollect and the availability of parties to attend;
> iii. The Court has the jurisdiction to grant the orders sought by the Defendant.

[9] The second is that of the Claimant filed November 1st 2016 together with Affidavit in support of even date. The Claimant seeks the following relief:

i. That pursuant to **Part 29.11** of the **Supreme Court (Civil Procedure) Rules 2008** that the Claimant be allowed to file all witness statements on which it intends to rely at trial and/or alternatively;
ii. That pursuant to **Part 27.8 (4) (a) of the Supreme Court (Civil Procedure) Rules 2008**, that the Claimant be granted an extension of time to file all witness statements in relation to its case which it intends or may rely on at trial;
iii. Under **Part 26.4** of the **Civil Procedure Rule 2008**, the Claimant be granted relief from sanctions in failing to comply with order made at Case Management Conference on February 1st, 2013.

[10] The Claimant's grounds of application are:

a. That seeking to file witness statements outside of the date ordered by the Court at case management would not prejudice the Defendant in its right to a fair trial;

b. The Court has the power to grant permission to the Claimant to file its witness statements outside of the date ordered by the Court if the Court considers it just in all circumstances to do so;

c. It is just in all the circumstances for the Court to grant said permission for the following reasons:

    i. By reason of the termination of the contract between parties, the conduct of the Defendant in so doing led to the Claimant's impecuniosity which prevented it from continuing with its claim but it is now in a position to do so;

    ii. The Claimant is prepared to comply with all court orders and directions and will comply with any future orders, Practice Directions, and direction of the court.

d. Based on Rule 27.8 (4) (b) of the CPR, the Claimant can apply for relief from sanctions for failure to comply with orders made by the Court at case management;

e. That the Claimant has a good and arguable case and there is a good prospect of success in this action.

f. the Defendant has paid no monies to the Claimant save and except for initial set up monies in spite of work done on the project.

[11] Several sets of documents were filed subsequent to and pursuant to the above Application, and by agreement of the parties it was established that the below-listed documents are relevant to the two Applications heard together:

i. Written Submissions of the Claimant and Defendant both filed on January 18th 2017;
ii. Affidavit in Response of Darryl Hannibal of January 20th 2017;
iii. Affidavit in Response (to the above) by Jo-Ann Roett filed January 27th 2017;
iv. Document titled Submission in Response filed by counsel for the Defendant on January 30th 2017;
v. Affidavit of Darryl Hannibal of January 31st 2017.

The Parties Submissions

The Defendant's Submissions

[12] The Defendant made 'delay' the main focus of its submissions, incorporating the time of termination of the contract (2008) through to the resumption of proceedings in 2016, submitting that there were no active steps undertaken by the Claimant to prosecute its claim until the Defendant filed its application to 'strike out' in August 2016. Counsel argues that the Claimant took action three months later by filing its application for relief from sanctions on November 1st 2016 under a Certificate of Urgency. The Defendant maintains that no affidavit has been filed in response to the Defendant's application.

[13] The critical period of inactivity was 2013 to 2016 and of this the Defendant states, that it drew to the Claimant's attention its failure to comply, firstly in November 2013, and on subsequent (unspecified) occasions thereafter, but the Claimant nonetheless neglected to prosecute the claim. Counsel submitted further, that the argument that the parties were in negotiations does not dispel the Claimant's breach as the requirement to file arose before negotiations commenced.

[14] On the issue of its own compliance, the Defendant stated: even though its witnesses were all out of the jurisdiction it was still able to file its witness statements and summaries on the 31st May and 3rd June 2013 respectively, more than three and a half years ago.

[15] The Defendant argues that the Claimant's delay has been gross and inordinate; that delay has caused the Defendant prejudice in that time will affect the recollection of the witnesses and their ability to be present for the trial; and that a fair trial is no longer possible.

[16] Counsel submits that the presence of an 'unless order' is unnecessary before the granting of an order to strike. In other words, there is no need to grant an 'unless order' before the Court takes the step to 'strike out' part or all of a statement of case, where there has been failure to comply with an order given by the Court in the proceedings.

[17] Counsel submitted that at the very least, if the Claimant is allowed to file witness statements he must be ordered to lodge security for the continued conduct of the action, especially in light of Darryl Hannibal admitting in his affidavit that the Claimant Company is impecunious; "… to ignore this fact would be to expose the Defendant to significant legal fees which would not be recoverable if the Claimant fails in its claim."

[18] Counsel sought to disregard the cases cited by the Claimant as "pre-CPR regime and dated". Counsel strongly recommended the application of more recent regional and United Kingdom authorities, inter alia, as follows: **Amar Holdings Limited v Development Finance Limited TT 2008 HC 52; Baksh v Doc's Homes Limited TT 2011 HC 135; Attorney General of Trinidad and Tobago v Universal Projects Ltd Civ Appeal No. 104 of 2009; Landmark Investments and Another v Dome Company Cleaning Services Limited [2015] EWHC 1168 (QB); Owners and/or Bailees of the Panamax Star v Owners of the Auk [2013] EWHC 4076 (Admiralty); Mealey Horgan plc v Horgan (1999) The Time 6 July 1999; Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA Civ 1537**.

[19] Counsel for the Defendant also submitted that "its costs of its application of August 9th 2016 and for the Claimant's application of November 1st 2016

should be assessed and paid as a condition of the litigation proceeding at all."

The Claimant's Submission

[20] The Claimant's Written Submissions filed January 18th 2017 and further oral submissions are extensive. Only the salient aspects of the same will be summarized.

[21] On the issue of 'striking out', the Claimant relied on the principles extracted from the case law where there has been delay, and states at paragraph [49] of Written Submissions as follows:

> "[49] From the case law, it is clear that the issues to be determined as to whether this claim should be struck out where there has been a delay on the part of the Claimant which resulted in non-compliance of the orders of Case Management are:
>
> 1. That the default has been intentional and contumelious;
> 2. That the delay has been:
> a. inordinate and;
> b. inexcusable;
> 3. And 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."

[22] The cases relied on by the Claimant in support of its submission that this claim should not be struck out are: **Allen v Sir Alfred McAlpine & Sons Ltd (1968) 2 QB 229; Birkett v James (1978) AC 297; Trill v Sacher (1993) 1 WLR 1379; Warshaw and Others v Drew (1986) 45 WIR 265;**

National Insurance and Guarantee Corporation Ltd v Robert Bradford & Co. Ltd. (1970) 114 SJ 436.

[23] Counsel for the Claimant submits that its delay has neither been intentional or contumelious, nor has counsel for the Defendant argued such.

[24] What constitutes inordinate and inexcusable delays depends upon the facts of each particular case: **Neill LJ** in **Trill v Sacher (supra)**.

[25] The Claimant submits the two reasons for the delay between 2013 and 2016:

(i) The parties were in settlement negotiations;
(ii) Impecuniosity of the Claimant.

[26] This Court, for obvious reasons, rejects the Claimant's submission that it should find that the Claimant's impecuniosity has been caused by the Defendant.

[27] Counsel submitted further that there was no prejudice or substantial risk to the possibility of a fair trial. On the authority of **Allen v Sir Alfred McAlphine & Sons Ltd and Another** and **Birkett v James (supra)**, counsel submitted that the burden lay on the Defendant to show that the 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 defendant either as between themselves and the plaintiff or between each other or between them and a third party."

[28] Counsel submitted that the Court has a discretionary power to allow the Claimant's witness statement to be admitted: **St. Kitts Development Ltd and Michael Simanic Civil Appeal No. 24 of 2003; Treasure Island Co. v Audubon Holdings Ltd (2004) Court of Appeal, BVI, Civ Appeal No. 22 of 2003**.

[29] On the issue of Security for Costs, counsel for the Claimant submits that the Defendant has failed to satisfy the requirements of **Rule 24.2 (3)** and **24.3**, essential conditions to be satisfied in an application for security for costs. Counsel submits further that the Defendant cannot satisfy any of the conditions set out in **Rule 24.3**. Reliance is placed on the decision of **Sir Lindsay Parkinson and Co. Ltd v Triplan [1973] 2 All ER 273**, which provides a non-exhaustive list of factors a judge should consider in determining whether to grant a defendant security for costs. Counsel submits further that the court should look at, inter alia, whether the Defendant's application for security is being made oppressively in order to stifle the Claimant's genuine claim, and whether the Claimant's lack of funds is caused by the Defendant's conduct.

[30] Overall, the Claimant relies on the policy and objective of the Overriding Objective as justification for the matter not being struck out.

[31] The issue as it relates to Hearsay Evidence in the Affidavits has been adequately answered by counsel for the Defendant in his Written Submissions, and will not be addressed further.

The Law

[32] The Court's jurisdiction to strike out an application is an ancient one; it is grounded in an inherent jurisdiction to stay or strike out proceedings before it which are obviously frivolous or vexatious or an abuse of its process; a "jurisdiction which ought to be very sparingly exercised and only in very exceptional cases": **Lord Hershell** in **Lawrence v Lord Norreys (1890) 15 App. Cas, 210 at 219; and Williams & Humbert Ltd. v W & H Trade Marks (Jersey) Ltd (1986) AC 368**.

[33] Counsel for the Claimant in her Written Submissions referenced the dicta of **Diplock LJ** in the case of **Allen v Sir Alfred McAlphine & Sons Ltd and Another (1968) 2 QB 229** at page 259 to 260 (pre CPR) on dismissal for want of prosecution, where he states as follows:

> "What then are the principles which the court should apply in exercising its discretion to dismiss an action for want of prosecution upon a defendant's application? The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the court is satisfied either that the default has been intentional or contumelious, or that the inexcusable delay for which the plaintiff or his lawyers have been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible at the earliest date at which, as a result of the delay, the action

> would come to trial if it were allowed to continue. It is for the defendant to satisfy the court that one or other of these two conditions is fulfilled.
>
> Disobedience to a preemptory order of the court would be sufficient to satisfy the first condition. Whether the second alternative condition is satisfied will depend upon the circumstances of the particular case; but the length of the delay may of itself suffice to satisfy this condition if the relevant issues would depend upon the recollection of witnesses of events which happened long ago".

[34] And again in **Birkett v James [1978] AC 297**, **Lord Diplock** expanded and approved the above principles in this House of Lords decision, and stated as follows:

> "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 preemptory 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."

[35] See also **Neil** in **Trill v Sacher [1993] 1 WLR 1379 at 1394,** cited by Counsel for the Claimant in her Written Submission of January 18th 2017.

[36] **Blackstone's Civil Practice 2011 at 33.6** has this to say about the Court's inherent jurisdiction:

> "Under the old rules it was well settled that the jurisdiction to strike out was to be used sparingly …it was accordingly the accepted rule that striking out was limited to plain and obvious cases where there was no point in having a trial".

[37] This jurisdiction was recognised in our 'old' Rules at **Order 18 Rule 19** (see discussion of rule 18 at paragraph 18/19 **The Supreme Court Practice (Whitebook) 1999 Vol. 1**. In our 'new' Rules, it can be found at **Rule 26.3 (1) (2)** and **(3)** under the Court's general powers of case management; and at **Part 15.2 (a) (i) Summary Judgment**, where "the Claimant has no real prospect of succeeding on the claim or issue".

[38] This Court addressed this issue in the following decisions: **Cheryl Holder v Life of Barbados, Civil Suit No. 701 of 2001 (unreported) (delivered November 10th 2014); CV 1280/2012, 1281/2012, 1316/2012 (Application to strike out) Richard Boyce et al v Commissioner of Police, Police Service Commission, Attorney General (delivered October 17th 2014)**. See also **Cornelius J**. in **Atkins v Restonic Caribbean Limited and Sealy (unreported) No. 2025 of 1999** (delivered on April 27th 2016).

[39] Our Court of Appeal very recently, (November 1st 2017) in the case of **American Life Insurance Company v Ainsley Corbin, Civil Appeal No. 35 of 2014**, articulated the Court's power under **Rule 26.3 (1)** to 'strike out' as, inter alia, discretionary, applicable for non-compliance with any order of a court, and a balancing of the 'various factors' fairly in the scale. Significantly, the Court of Appeal's position therein was that the pre-CPR law on 'striking out' is relevant, and applicable post CPR. Significantly, at

paragraph 57 the Court enumerated a non-exhaustive list of factors listed by the CCJ in **Barbados Rediffusion Services Limited v Asha Mirchandani, Ram Mirchandani and McDonald Farms Ltd, CCJ Appeal No. CV1 of 2005**, which a judge should consider when asked to make a strike out order. These factors are as follows:

i. The judge's discretion is a wide and flexible one, to be exercised "as justice requires" in a particular case;
ii. The judge should start by reminding himself/herself that to strike out a party's case and so to deny him/her a hearing on the merits is an extreme step not to be taken lightly;
iii. Broadly speaking, strike out orders should be made in two circumstances. The first is when it is necessary in order to achieve fairness. The second is when it is necessary in order to maintain respect for the authority of the court's order;
iv. In relation to an order to achieve fairness, "fairness" means fairness not only to the non-offending party but also to other litigants who are competing for the finite resources of the court;
v. If there is a real risk that a fair trial may not be possible as a result of one party's failure to comply with an order of the court, then that is a situation which calls for an order striking out that party's case and giving judgment against him;
vi. Even where a fair trial is possible, strike out orders should be made when it is necessary to maintain respect for the authority of the court's orders;
vii. While strike out orders made in order to maintain respect for the authority of the court's order may be described as punitive, strike out orders are not to be made as retribution for some offence given to the court but as a necessary and to some extent symbolic response to a challenge of the court's authority, in circumstances in which failure to make such an order might encourage others to disobey court orders and tend to undermine the rule of law. This is the type of behaviour that may properly be categorised as contumelious or contumacious;
viii. The correct approach required is a balancing exercise taking into account all the relevant facts and circumstances of the case. It is not a box- ticking exercise;
ix. In determining whether a party fails to respect the authority of the court's orders, an examination of the reason for non-compliance is paramount; (my emphasis)
x. Whether there was a breach of an unless order;

xi. Whether the previous conduct of the defaulting party discloses a pattern of non-compliance;
xii. Whether the non-compliance with the order was total or partial; and
xiii. Whether the complying party has suffered prejudice as a result of the non-compliance.

[40] Of note, is the observation of **Burgess JA** at paragraph [59] of the said judgment that "factors identified in the **Barbados Rediffusion** guidelines appear to us to encapsulate the objectives listed in **Rule 1.1 (2)**, namely, (a) ensuring that the parties are on equal footing; (b) saving expense; (c) dealing with cases in ways which are proportionate; (d) ensuring that the case is dealt with expeditiously and fairly; and (e) allotting to the case an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

[41] The Court made the significant observation at paragraph [64] of its judgment that a review of the **Barbados Rediffusion** guidelines shows that "evidence of non-compliance alone is not enough to support a finding that there is a real risk that a fair trial would be impossible. Those guidelines require, that, in addition, [ALICO] must adduce evidence to show that non-compliance created a real risk that a fair trial would be impossible".

[42] In considering the second test, that is, whether an order of striking out was necessary in order to maintain respect for the authority of the court's order, the Court made a useful assessment as to whether non-compliance could be classified as "contumelious or contumacious".

[43] Having posed that question in the context of this case, the answer would have to be in the negative. This Court rejects counsel for the Claimant's submissions that impecuniosity is an acceptable reason for the delay, but does accept that the parties entered into 'without prejudice' negotiations in an effort to settle this matter. In consequence, there was no defiant and/or persistent refusal that could be classified as 'contumelious' or 'contumacious', as per **Burgess JA**.

[44] This Court finds that the delay, such as it has been to date, is not of such a nature as to give rise to "substantial risk" that it is not possible to have a fair trial on the issues in this case. There is an abundance of documentary evidence from which the witness Jo-ann Roett confidently expresses the position of the Defendant in this matter; and if there was no Quantity Surveyor's Report undertaken before new contractors were installed, there is evidence of the local contractor as to what he found when he undertook the job, be it the stage of completion or lack thereof.

[45] Contrary to the submission of counsel for the Defendant/Applicant, this Court finds the delay in this matter was for the period June 2013 to August 2016 (a three year gap during which time the Claimant filed its Application). Prior to that period the Claim was being prosecuted by the Claimant.

[46] In analyzing and reviewing this matter, this Court paid particular attention to counsel's (for the Defendant) exhortation that this Court should adopt a **"Mitchell-esque"** approach as per **Andrew Mitchell MP v News Group Newspapers Limited [2013] EWCA Civ 1537**.

[47] This case spoke in terms, adopted by counsel for the Defendant in his Written Submissions filed January 18th 2017 and oral submissions, of the 'new dispensation' being adopted by the UK Courts. **Paragraph 46** of the **Mitchell** judgment speaks to it in the following terms:

> "The new more robust approach that we have outlined will mean that from now on relief from sanctions should be granted more sparingly than previously. There will be some lawyers who have conducted litigation in the belief that what Sir Rupert Jackson described as the "culture of delay and non-compliance" will continue despite the introductions of the Jackson reforms. But the Implementation Lectures given well before 1 April 2013 were widely publicised. No lawyer should have been in any doubt as to what was coming. We accept that changes in litigation culture will not occur overnight. But we believe that the wide publicity that is likely to be given to this judgment should ensure that the necessary changes will take place before long."

[48] In declining to follow the **'Mitchell-esque'** approach at this stage of our CPR implementation, I thought it critical to note the context in which those statements were made.

[49] These remarks followed the Jackson Report/Proposals which recommended a new regime for Costs Management in the UK. These proposals resulted in the amendment of the UK CPR 3.14, inter alia, as a precursor to this new regime/reform; that is, the new 'robust approach'.

It is noted that Sir Rupert Jackson was at pains to express in his Report that he was not in favour of the 'extreme course', by which he was referring to the stance than non-compliance would no longer be tolerated save in 'exceptional circumstances'. It is noted that these amendments [3.9] required the Court to consider "all the circumstances of the case, so as to enable it to deal justly with the application".

[50] Before adopting the new "robust approach" the **Mitchell** case shows that this position was preceded by Implementation Lecture[s] in March 2013; in other words, advance notice (publicity) was given before the implementation of the **'Mitchell-esque'** approach.

[51] We too must work towards the new culture, but we must work with our own circumstances, ever remembering that we must do better.

DISPOSAL

[52] In applying the **Barbados Rediffusion Guidelines**, namely, conducting a balancing exercise of the facts and relevant circumstances of this case, it is the view of this Court that the appropriate/fair result should be an "Unless Order" (and not a 'striking out' order) in the following terms:

1. That the Claimant to these proceedings file and serve all its witness statements in relation to its case on which it intends to or

may rely on at trial within fourteen (14) days of the date hereof, failing which, that this matter be struck out.

2. Pursuant to **Part 26.4**, the Claimant is granted relief from sanctions in failing to comply with the Order made at Case Management Conference on February 1st 2013.
3. That the time for the filing of the statement of agreed facts and issues is extended to January 31st 2018 and in the event that there is no agreed statement, that each party shall file a statement by February 9th 2018.
4. That the parties file and serve on each other
    a. a skeleton argument together with a chronology of relevant events and summary of legal propositions to be relied on at trial and an accompanying list of authorities which it is proposed to cite in support of these propositions by March 30th 2018;
    b. a core bundle of documents to be used at trial by April 30th 2018.
5. That the matter be set down for pre-trial review in the month of June 2018.

6. That the costs of these applications be awarded to the Defendant in the sum of $5500.00 to be paid no later than May 31st 2018.

[53] I do however accept the point that the Claimant should lodge security for the continued conduct of the action. This Court is not yet of the view that it should be a condition precedent to the continuation of these proceedings. The parties are invited to dialogue on the issue of quantum for Security for Costs, and failing agreement that a formal application be made no later than May 31st 2018.

MARGARET A. REIFER
Judge of the High Court