

**IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION**

CAUSE NO. G 82 OF 2018

BETWEEN: **KADIAN SANDCROFT**
Plaintiff

AND **RELIABLE INDUSTRIES LTD**
Defendant

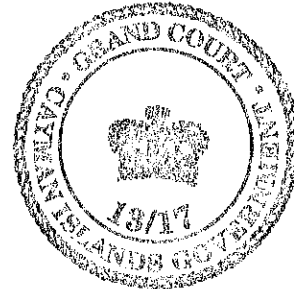
Appearances: Ms. Kim Grandage of KSG Attorneys-at-Law for the Plaintiff
 Mr. Paul Keeble of Hampson and Company for the Defendant

Before: Hon. Justice Richard Williams

Heard: 10 January 2019

Judgment delivered: 10 January 2019

Circulation of Transcript: 10 January 2019



HEADNOTE

Personal injury - application dismissal for want of prosecution and/or inordinate delay - Effect of Overriding Objective in Grand Court Rules - unless order made

TRANSCRIPT OF EX TEMPORE JUDGMENT

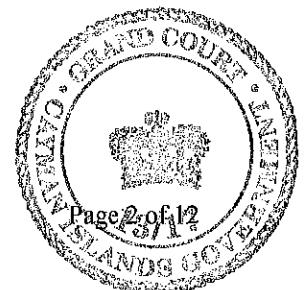
Introduction

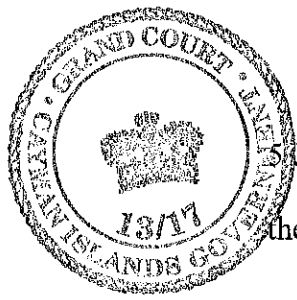
1. This case concerns the Defendant's ("D") application dated 19 October 2018 for an order that the Plaintiff's ("P") claim be dismissed for want of prosecution and/or inordinate delay. In the alternative to dismissal, D applies for an order pursuant to GCR O.18/12/(5) that P do provide Further and Better Particulars of her Statement of Claim sought in D's Request dated 18 September 2018 and an order pursuant to GCR O.3/5(1) extending the time for delivery of D's Defence pending delivery of the requested particulars from P.

Procedural Background

2. On 1 May 2018 P filed her Writ of Summons and Statement of Claim in which she sought damages as a consequence of injuries allegedly sustained in the workplace on 2 May 2015. The limitation date for filing the same was 2 May 2018.
3. In an email dated 16 May 2018 P's attorneys failed to inform D's attorneys that the Writ had been issued. On 22 May 2018 D's attorneys highlighted that fact and stated that they had "*taken the precaution of filing today the enclosed Acknowledgement of Service and Intention to Defend in the above action.*" It is submitted by D that, by doing so, it was voluntary appearing to the Writ of Summons and Statement of Claim.
4. In an email dated 24 May 2014 P's attorneys informed D's attorneys that "*the Writ was filed for protective purposes due to limitation and whilst we awaited a response from Reliable Industries (which you have since provided).*"¹ P's attorney added that they were taking their client's instructions on D's position and that "*in the event that proceedings are served we will of course advise you accordingly.*" In another email sent on that date P's attorneys confirmed to D that they would not "*take any steps in respect of the litigation before advising you and agree there is no requirement for service of your Defence until agreed otherwise between both parties.*"
5. On 21 June 2018 and 5 July 2018 D wrote to P's attorneys enquiring if they were in a position to advise about whether P wished to proceed with the action. A reply was sent on

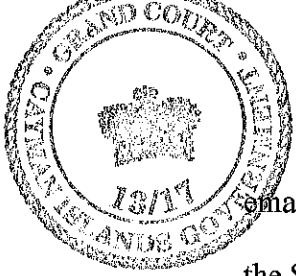
¹ A detailed response concerning the allegation was sent on 16 May 2018.





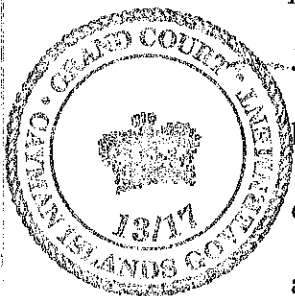
5 July 2018, indicating that P's attorneys were still awaiting instructions from P and that they would advise as soon as they were in a position to do so.

6. On 18 September 2018 D again wrote to P's attorneys enquiring if they were able to advise whether P wished to proceed with the action. Attached to this communication was D's Request for Further and Better Particulars of the Statement of Claim which they wished to be addressed prior to the delivery of the Defence in the matter.
7. As no response was received to the 18 September 2018 communication, D again wrote on 19 October 2018. Enclosed with the letter was a copy of the present Summons to dismiss, alternatively, for particulars and directions and the Listing Form. P's attorneys were again asked if they could advise about whether she intended to proceed in the matter.
8. On 22 October 2018 P's attorneys replied by email stating that they had "*no instructions to serve the proceedings in this matter and Ms. Sandcroft is now out of time to do so.*" By email dated 23 October 2018 D sought clarification as to whether P's attorneys were saying that P did "*not propose to pursue the matter further.*" In a reply sent on the same day, P's attorney stated that "*I do not wish to speak for Ms. Sandcroft, but my understanding is that she does not wish to pursue the matter as she has chosen not to serve the proceedings and has been given advice as to the consequences of not doing so.*"
9. In light of the above response, on 23 October 2018 and 30 October 2018, D wrote to P's attorney asking them to obtain instructions regarding a consent dismissal. In the latter



email he indicated that, if this was not forthcoming, he would be obliged to proceed to list the Summons to dismiss.

10. As no response was received to the emails mentioned in paragraph 9 above, on 6 November 2018 D filed the Summons which is now before me.
11. There has been no further communication from P's attorney to D's attorney. However, P's attorney has filed a Summons to come off the record, which is supported by an affidavit sworn by Ms. Grandage on 4 January 2018. That Summons has not been issued yet and cannot be heard today as there is a requirement to serve the same on P. Although no application for substituted service of that Summons has been made by P's attorneys, it is evident from Ms. Grandage's Affidavit that they are able to communicate with P via telephone and WhatsApp. It appears from paragraph 10 of Ms. Grandage's Affidavit that P receives her WhatsApp messages, as P telephoned her attorneys about a letter that had been sent on 13 December 2018 to her via WhatsApp enclosing D's Summons and seeking instructions and including a warning they may have to apply to come off the record. Therefore, I am satisfied that it would be appropriate to today make an order for substituted service of the Summons and Ms. Grandage's supporting affidavit by sending them by Whatsapp to the same number already being used by P's attorneys.
12. Ms. Grandage's Affidavit gives some insight into the dilatory approach being taken by P in relation to these proceedings. At paragraph 5 in her Affidavit, Ms. Grandage states that the Writ was filed "*under instructions from (P) in order to assist and protect her*



position." At paragraph 9 in her Affidavit, Ms. Grandage noted that P had left to live in Jamaica without advising her and that attempts had been made to take instructions from her regarding the service of the Writ, funding of the case and regarding the consent dismissal. She noted that P refused to agree to a consent dismissal. At paragraph 9 in the affidavit, Ms. Grandage confirmed that, although P had telephoned her in December 2018 to confirm receipt of the 13 December 2018 letter, no further instructions were then or have since been given by P.

13. Having heard from Ms. Grandage, I am satisfied that P has knowledge of today's hearing. Despite this, P has failed to personally attend at Court today and she has failed to provide her attorney with any instructions concerning the Summons before me. The Summons is supported by an Affidavit sworn by Sulekha Tummula on 3 January 2019. I have considered the content of that affidavit, as well as the oral and written submissions made by Mr. Keeble. Ms. Grandage, due to lack of instructions and through no fault of her own, has not been in a position to assist the Court.

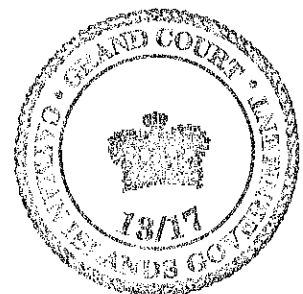
The Law

14. The principles upon which the jurisdiction to dismiss for want of prosecution is exercised were settled by the Court of Appeal in *Allen v Sir Alfred McAlpine & Sons Ltd.* [1968] 2 Q.B. 229, and approved by the decision of the House of Lords in *Birkett v James* [1978] A.C. 297. The power should be exercised only where the Court is satisfied either (i) that the default has been intentional and contumelious (for example disobedience to a peremptory court order or conduct amounting to an abuse of the process of the court); or (ii)(a) that there has been inordinate and inexcusable delay on the part of P or her

attorneys; 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 between each other or between them and a third party.

15. When considering whether there has been an abuse of process, I am conscious that to commence or to continue proceedings which one has no intention to bring to a conclusion may constitute an abuse of process. As Lord Woolf stated in *Arbuthnot Latham Bank Ltd v Trafalgar Holdings* [1988] I W.L.R. 1426 at p. 1437:

"Whereas hitherto it may have been arguable that for a party on its own initiative to in effect 'warehouse' proceedings until it is convenient to pursue them does not constitute an abuse of process, when hereafter this happens this will no longer be the practice. It leads to stale proceedings which bring the litigation process into disrespect. As case flow management is introduced, it will involve the courts becoming involved in order to find out why the action is not being progressed. If the Claimant has for the time being no intention to pursue the action this will be a wasted effort. Finding out the reasons for the lack of activity in proceedings will unnecessarily take up the time of the court. If, subject to any directions of the court, proceedings are not intended to be pursued in accordance with the rules they should not be brought. If they are brought and they are not to be advanced, consideration should be given to their discontinuance or authority of the court obtained for their being adjourned generally. The courts exist to assist parties to resolve disputes and they should not be used by litigants for other purposes."



16. In *Grovit and Others v Doctor and Others* [1997] 1 WLR 640; Lord Woolf repeated, in the following extract, remarks made by Deputy High Court Judge Crowley Q.C. who was:

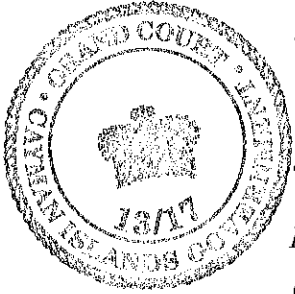
"Quite satisfied...on the evidence that he [the appellant] has had literally no interest in actively pursuing this litigation. So far as he was concerned, I am sure it was dead in the water."

The judge added:

"Does that mean that the courts are powerless unless the defendant can show prejudice? It is said that the sword of Damocles argument only ought to be used or acceded to in exceptional cases. I do regard this as a case where the court is fully entitled to say that the very existence of an action which the plaintiff has no interest in pursuing is intolerable and there is no reason why defendants, some of whom are no longer in any way connected with the corporation and may (to their great relief) not have to be concerned with any of the other litigation, should still have this hanging over them."

17. Lord Woolf then went on to state:

"I am satisfied that both the deputy judge and the Court of Appeal were entitled to come to the conclusion which they did as to the reason for the appellant's inactivity in the libel action for a period of over two years. This conduct on the part of the appellant constituted an abuse of process. The courts exist to enable parties to have their disputes resolved. To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an



application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in *Birkett v. James* [1978] A.C. 297. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.”

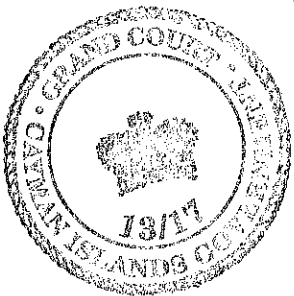
18. In *Wearn -v- HNH International Holdings Ltd* [2014] EWHC 3542 (Ch) Barling J. struck out a claim for delay, holding that the claimant’s delay amounted to an abuse of process. The judge considered the relevant principles in detail stating:

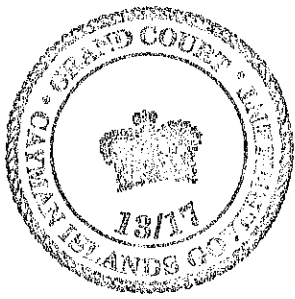
“65. There is little dispute as to the principles to be applied in a case such as this, although each side understandably emphasised different aspects of the case law.

66. In relation to 3.4(2)(b) Explanatory Note 3.4.3.5 in the White Book 2014 states:

“Rule 3.4(2)(b) is not strictly relevant where the complaint is one of delay rather than a complaint as to the form or content of a statement of case (*Western Trust & Savings Ltd v Acland & Lenson (a firm)* [2000] L.T.L June 19, 200 (QB). However, in *Habib Bank Ltd v Jaffer (Gulzar Haider)* [2000] CPLR 438, CA, a claim was struck out where delays were caused by a claimant acting in wholesale disregard of the norms of conducting serious litigation and doing so with full awareness of the consequences (cf. *Grovit v Doctor* [1997] 1 WLR 640; [1997] 2 All ER 417, HL, noted in para 3.4.5 below). Delay, even a long delay, cannot by itself be categorised as an abuse of process without there being some additional factor which transforms the delay into an abuse (*Icebird Ltd v Winegardner* [2009] UKPC 24). The principles of *Grovit* and *Icebird* were considered and applied in *Adelson v Anderson* [2011] EWHC 2497 (QB)...”

67. In the latter case at [16]-[32] Tugendhat J set out and summarised the relevant case law (including the *Grovit* and *Icebird* decisions referred to in the Note above) on the interaction between delay and abuse of process. The guiding principle is that delay alone, even if it is inordinate and inexcusable, cannot be an





abuse of process; but such abuse may arise when delay is combined with some other relevant factor (such as an absence of intention to take a case to trial)."

Conclusion and Observations

19. I am not satisfied that there has been any intentional default by P. There has been no deliberate non-compliance with an order of the Court. I am satisfied that there has been delay and that P has not prosecuted her claim with diligence. At this stage, I do not conclude that the delay has been inordinate, or in other words as stated in *Birkett v Jones* "materially longer than the time, usually regarded by professional courts as an acceptable period." Even if the delay could be regarded as being inordinate and inexcusable, I am not convinced that, at this time, there is substantial prejudice caused to D. Accordingly, I am not satisfied that, at this time, a dismissal is warranted.

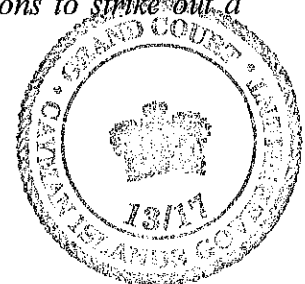
20. In reaching that conclusion I also considered whether there has been an abuse of process. I am not satisfied that I can reach a conclusion, at this stage, that P has no interest in pursuing this action. However, having in mind her non-attendance today, her failure to properly instruct her attorney and her inaction between May 2018 and this hearing, if she continues to fail to properly engage in the proceedings, especially by non-compliance with the directions given today, a Court may very well reach a conclusion in the future that she has no interest in pursuing her claim.

21. Although I have not dismissed the Writ, P must now recognise that she has a responsibility to progress this case in a manner consistent with the Overriding Objective

in the Grand Court Rules. This is particularly so as the Writ was issued late, just before the expiry of limitation. If a Plaintiff delays issuing proceedings towards the end of the period of limitation, as noted in *Birkett v James*, he is then under an obligation to proceed with the case with reasonable diligence. Accordingly, the Court may well look more strictly at any subsequent delay by P, which is in excess of the period allowed by the Grand Court Rules for taking a step or in excess of any dates set out in a court order.

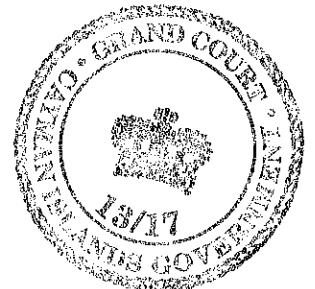
22. The Courts should strive to achieve greater control over delay. A Court may make unless orders with the effect that an action may be struck out unless certain steps are taken by specified time. This will place the onus on P to justify her continuing with the action, if she fails to diligently progress the action. This is consistent with the Court's obligation under the Overriding Objective. Although we do not operate under rules similar to the Civil Procedure Rules used in England and Wales, I note the observation made by May L.J. *Purdy v Cambran* [2000] CP Rep 67, when he said:

"46. The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim...."



23. What is extraordinary in this case is that one would expect P to be the one who is most anxious to get this matter disposed of either by settlement or a trial. I am satisfied, due to the approach being taken hitherto by P, that this is a case which I must actively case manage. A part of that management is to make directions which will make clear the requirement for P to diligently pursue the action and what the consequences will likely be if she fails to do so. For the avoidance of doubt I find that the requirement for P to serve the Writ and Statement of Claim on D has been met under GCR Ord 10(1). I therefore direct:

- (i) Unless within 21 days of service of this order, P files and serves on D Further and Better Particulars of her Statement of Claim pursuant to the Request dated 18 September 2018, the action shall be struck out and judgment entered for D with costs. A copy of that Request should be attached as Schedule 1 to this order;
- (ii) Time is extended for D to serve his Defence no later than 21 days after the receipt of the Reply to the Request for Further and Better Particulars;
- (iii) By no later than the time set in this order for P to serve her Further and Better Particulars of her Statement of Claim on D, P is to provide D's attorney with an alternative address or manner for service which is only to be used if her attorneys are successful in their application to cease to act as her attorney; and
- (iv) P's attorneys' Summons to cease acting for her is not to be heard until 28 days after service of this order or until after a satisfactory alternative address or means of service have been provided to D by P, whichever is the sooner.

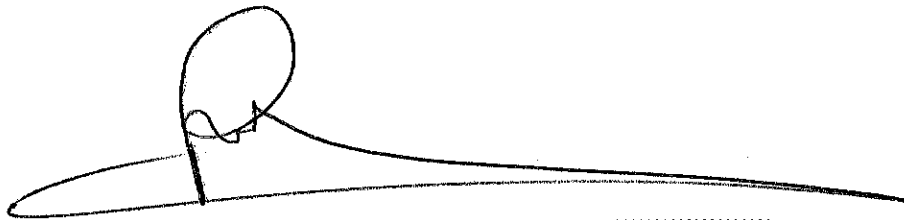


24. At the outset of this hearing I mentioned the orders set out in paragraph 23 above. Neither party opposed me making an order in those terms and they both agreed the dates contained therein.

25. The orders that I have made in this Judgment are designed to move this case forward in a manner consistent with the Overriding Objective. Inordinate and inexcusable delay alone may not amount to abuse of process. However, it may do so if it involves a wholesale disregard for the rules of court and court orders with full awareness of the consequences; see *Habib Bank Ltd v Jaffer* at [10] per Nourse L.J. P would be well advised to ensure full compliance. P's attorney must provide their client with a copy of this transcript so that she can be left in no doubt about the likely consequence of her hereafter failing to properly pursue her claim, especially as the limitation period has passed.

Costs

26. This hearing has become necessary solely due to P's conduct of the proceedings brought by her and her delay in pursuing her action. Accordingly, although the proceedings have not been dismissed, directions have been given pursuant to D's Summons and I am satisfied that P should pay D's costs related to this Summons on the standard basis.



The Honourable Mr. Justice Richard Williams
JUDGE OF THE GRAND COURT

