IN THE GRAND COURT OF THE CAYMAN ISLANDS
CIVIL DIVISION

CAUSE NO. G 65 OF 2017

BETWEEN: **DORTHY MESSAM**

Plaintiff

AND **KIRK MARKET LIMITED**

Defendant

Appearances: Plaintiff failing to attend
Mr. Paul Keeble of Hampson and Company for the Defendant

Before: Hon. Justice Richard Williams

Heard: 22 November 2019

Draft Judgment circulated: 25 November 2019

Date of Judgment: 26 November 2019

HEADNOTE

Personal injury - application dismissal for want of prosecution and/or inordinate delay - Effect of Overriding Objective in Grand Court Rules - GCR O.67/6/(1),Unless and until a copy of the order declaring that an attorney has ceased to be the attorney acting for the party is served on every party to the cause or matter he shall still be considered the attorney of the party until the final conclusion of the cause ort matter in the Court

JUDGMENT

Introduction

1. This case concerns the Defendant's application dated 12 September 2019 for an order that the Plaintiff's claim be dismissed for want of prosecution and/or inordinate delay. In the alternative to dismissal, the Defendant applies for an order pursuant to GCR O.14/12/(2) for summary judgment in favour of the Defendant dismissing the Plaintiff's claim.

2. The evidence in support of the Plaintiff's present Summons is contained in the Affidavit of Sulekha Tummala sworn on 21 November 2019 and the Affidavit of Lester Purvis sworn on 30 September 2019.

Procedural Background

3. On 7 April 2017 the Plaintiff filed her Writ of Summons and Statement of Claim in which she sought damages as a consequence of injuries allegedly sustained in the parking lot of the Defendant's supermarket, just under three years prior, namely on 3 May 2014. The limitation date for filing the same was only a month later, namely on 8 May 2017. It was therefore filed on the cusp of the limitation period and is an early indicator as to how the Plaintiff was going to approach these proceedings

4. On 12 April 2017 the Defendant promptly served its Acknowledgment of Service stating an intention to contest the proceedings. On 1 May 2017 the Defendant served a Request for Further and Better Particulars of the Claim. By letter of 9 May 2017 the Plaintiff's attorney responded, providing the Plaintiff's Reply to the Request. However, the Defendant contended that the Reply was incomplete. On 10 May 2017 the Plaintiff filed an Amended Writ of Summons and Statement of Claim. On 25 May 2017 the Defendant filed a Summons for Particulars of the Statement of Claim. On 9 June 2017 the Plaintiff's attorney wrote to the Listing Officer to say that she had filed a response to the Defendant's Request for Further and Better Particulars and she stated that she would agree to an extension of 28 days for the Defendant to file its Defence. It appears that on 12 June 2017 the Plaintiff's attorney wrote to the Defendant's attorney with additional

information about the locus of the alleged fall. On 4 July 2017 the Defendant filed its Defence to the Amended Statement of Claim.

5. Since that date the Plaintiff has done absolutely nothing to progress her claim.

6. On 18 January 2019 the Defendant's attorney wrote to the Plaintiff's attorney highlighting that he had heard nothing since September 2017 and he inquired into the Plaintiff's intentions. He stated that the action should be dismissed for want of prosecution. He invited the attorney to take instructions on a dismissal of the action by consent, but added that if such consent was not forthcoming a Summons for dismissal would be filed. No reply was received to this letter and a letter in similar terms was sent on 18 February 2019. No reply was received to that letter and a further letter was sent on 13 May 2019 asking for a reply to both of the earlier letters. No reply was received. On 30 August 2019 a further letter was sent stating that there had been no communication from the attorney since June 2017 and, in such circumstances, unless an agreement to a consent dismissal was received by 6 September 2019, a Summons for dismissal would be filed. On 4 September 2019 the Plaintiff's attorney replied stating that she had not had any communication from her client for over 18 months and that she may have to make an application to come off the record. In a further communication sent on that day she stated that she would *"let you know as soon as I hear anything back from my client."*

7. On 17 September 2019 Facey-Clarke & Associates filed a Summons to come off the record as the Plaintiff's attorney on the ground that *"communication has completely*

broken down between attorney and client." A draft of that Summons had been provided to the Defendant's attorney on 16 September 2019. In the affidavit in support of the Summons Ms. Facey-Clarke stated that she had *"no instructions to proceed the matter"* and that she had *"lost contact"* with her client. She stated that in September 2019 she obtained the Plaintiff's telephone number from her daughter. After sending the Plaintiff a WhatsApp message, the attorney received a telephone call from the Plaintiff from the provided telephone number. Ms. Facey-Clarke said that she could no longer represent the Plaintiff and that she would be applying to the Court to come off the record. She reported that the Plaintiff replied that *"she wasn't going to bother with the case and God will take care of her."* Ms. Facey-Clarke said that the phone conversation then abruptly cut off and that when she tried to call back immediately after, and on other occasions, she received no answer.

8. The Summons to come off the record came before me on 2 October 2019. I granted the leave sought and I made an order for substituted service to be via the Plaintiff's daughter. I forcefully suggested to Ms. Facey-Clarke that she should also serve an accompanying letter explaining to the Plaintiff that she must attend Court on the 22 November 2019 (the date for the hearing of the Plaintiff's Summons for strike out) and informing her that if she failed to do so, then the Court may go on at that hearing to make the orders sought in her absence. I directed that the attorney must write to the Defendant's attorney to inform him that substituted service, including the sending of the explanatory letter, had been effected.

9. On 12 September 2019 the Defendant's attorney sent a copy of the Summons to dismiss and a listing form to the Plaintiff's attorney. The Summons now before me was served, along with the Purvis affidavit in support, on the Plaintiff's attorney at 10:36 a.m. on 2 October 2019. At 4:10 p.m. on 10 October 2019 the Defendant's attorney was served with the order for Facey-Clarke and Associates to come off the record. These timings mean that, pursuant to GCR O.67/6/(1), when the present Summons was properly served on them, the attorneys were still on the record for the Plaintiff and that service is deemed to have been effective.

10. On 10 October 2019 Ms. Facey-Clarke wrote to the Defendant's attorney confirming that the Order, the Summons to dismiss and the affidavit of Lester Purvis had been served in compliance the terms of the substituted service order. She also confirmed that a separate letter had been sent to the Plaintiff *"advising her that it is imperative that she attends the court hearing on 22 November 2019."*

11. I am satisfied that the present Summons was properly served on the Plaintiff when it was served on her then attorney. I am satisfied that a copy of the Summons showing today's hearing date was provided by Ms. Facey-Clarke to her then client. As the Plaintiff is aware of the hearing date and has failed to attend and/or to communicate with the Court or the Defendant, I was satisfied that it was appropriate go on and hear this Summons.

The Law

12. 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.

13. 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."

14. 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."

15. 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."

16. 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:*
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> > *"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

17. 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. However, it is clear that the Plaintiff has failed to progress or engage in these proceedings in any manner since June 2017. There has been an abject failure by the Plaintiff to communicate with her attorney or with the Defendant since June 2017. I am satisfied that there has been delay and that P has not prosecuted her claim with diligence. 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."* Accordingly, I am satisfied a dismissal is warranted.

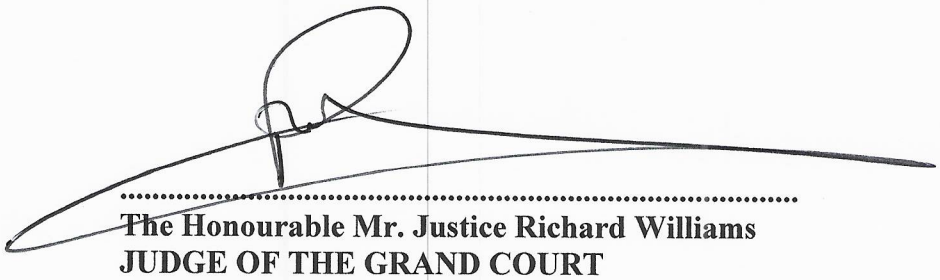
18. I have also considered whether there has been an abuse of process. It is clear from the manner in which she has conducted these proceedings and from her statement to her attorney on the telephone that she *"wasn't going to bother with the case"* that the Plaintiff has no interest in pursuing this action. There has been an abuse of process.

19. The Plaintiff 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***, she is then under an obligation to proceed with the case with reasonable diligence.

20. Accordingly, I order that this action is dismissed for want of prosecution.

Costs

21. The Summons was necessary solely due to Plaintiff's conduct of the proceedings. The Defendant has been successful and costs should follow the event. Accordingly, I am satisfied that the Plaintiff should pay the Defendant's costs related to this Summons and of the proceedings on the standard basis. The costs are to be taxed if not agreed.



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