IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION
2003:No. 297

BETWEEN:

MICHAEL ROBERTS
1st Plaintiff

-and-

STEPHEN HAYWARD
2nd Plaintiff

-and-

THE MINISTER OF HOME AFFAIRS & PUBLIC SAFETY
1st Defendant

-and-

THE CHIEF FIRE OFFICER
2nd Defendant

RULING

Date of hearing: April 18, 2007
Date of ruling: April 27, 2004

Mr. Alan Doughty, Trott & Duncan, for the Plaintiffs
Mr. Melvin Douglas, Attorney-General's Chambers, for the Defendants/Applicants.

Introductory

1. By Summonses dated November 15, 2006 and December 7, 2006 respectively, the Plaintiffs applied for an extension of time within which to file their List of Documents and the Defendants applied to strike-out the Plaintiffs' claim for want of prosecution.

2. The Plaintiffs issued a Specially Indorsed Writ claiming that the Defendants have discriminated against them on the grounds of disability on July 23, 2003. On November 21, 2003, the Defendants applied to strike-out the action on legal grounds. This application was dismissed by me on January 26, 2004. On April 8,

2004 Simmons J ordered by consent that the Plaintiffs should deliver their List of Documents within 21 days and that the Defendants should serve their List within 28 days thereafter and made other pre-trial directions.

3. Thereafter, the action went to sleep from the Court's perspective until on June 9, 2005 the Plaintiffs filed a Notice of Intention to Proceed by filing witness statements within one month. The action seemingly then returned to its slumber until November 15, 2006, when the Plaintiffs filed their application for an extension of time for filing their List of Documents.

4. It was common ground that unless the action was struck-out for want of prosecution, the Plaintiffs' application to extend time was bound to succeed. If the action was struck-out, the extension of time application would fall away. So argument focussed on: (a) the law applicable to striking-out for want of prosecution, and (b) whether on the evidence the Defendants' case was made out.

Legal principles governing striking-out for want of prosecution

5. Both Counsel relied on the decision of this Court in *Mermaid Beach and Racquet Club-v-Morris* [2004] Bda LR 49 as accurately reflecting the applicable general principles on striking-out for want of prosecution. However, that was a case where the application was made before the expiry of the limitation period requiring the Court to consider whether any fresh writ would itself be liable to be struck-out on abuse of process grounds. Here the limitation period has expired and so some care must be exercised to identify what principles properly apply.

6. In the *Mermaid Beach* case[1], the following general principles in *Halsbury's Laws*[2] is set out:

> "*The power to dismiss an action for want of prosecution, without giving the plaintiff the opportunity to remedy his default, will not be exercised unless the court is satisfied : (1) that the default has been intentional and contumelious; or (2) that there has been prolonged or inordinate and inexcusable delay on the part of the plaintiff or his lawyers, 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 have caused serious prejudice to the defendants either as themselves and the plaintiff or between each other or between them and a third party…*"

7. Later in the same case[3], I cited with approval the following dictum of Lord Diplock in the leading House of Lords case of *Birkett-v-James* [1977] 2 All ER 801 at 807:

> "*The court may and ought to exercise such powers as it possesses under the rules to make the plaintiff pursue his action with all proper diligence, particularly where at the trial the case will turn on the recollection of witnesses to past events. For this purpose the court may make peremptory orders providing for the dismissal of the action for non-compliance with its order as to the time by which a particular step in the proceedings is to be taken. Disobedience to such an order would qualify as 'intentional and contumelious' within the first principle laid down by Allen v McAlpine…*"

[1] Judgment, page 2.
[2] 4th edition, volume 37, paragraph 448.
[3] Judgment, page 4.

8. There is no question of breach of a peremptory order so the crucial question which arises in the present case is whether there has been (a) "*prolonged or inordinate and inexcusable delay*" *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 have caused serious prejudice to the defendants either as themselves and the plaintiff or between each other or between them and a third party*".

9. I also accept that the length of delay complained of in the present case is sufficient to qualify as "*inordinate*" if it is also "*inexcusable*". This principle is helpfully illustrated by the following passage from Lord Denning's judgment in *Reggentin –v- Beecholm Bakeries Ltd.* [1968] 2 QB 276 at 277, upon which Mr. Douglas relied:

> "*Delay in these cases is much to be deplored. It is the duty of the plaintiff's advisers to get on with the case. Every year that passes prejudices a fair trial. When a case goes to sleep as this one did for some thirteen months or more the defendants are entitled to take out a summons to dismiss for want of prosecution. If no sufficient reason is shown for reviving it can be dismissed*."

10. In addition to these principles bearing directly on the discretionary power to dismiss for want of prosecution, two further general principles, which were not relevant in the *Mermaid Beach* case, fall to be considered.

11. Firstly, since January 1, 2006, the Overriding Objective has been embodied in Order 1A of the Rules of the Supreme Court. The Court is required to apply the Overriding Objective of dealing with cases justly when applying or interpreting any rule. The central question raised by the cross applications is whether or not the Plaintiffs should be given the indulgence of an extension of time under Order 3 of the Rules, their having failed to comply with the time prescribed by the Consent Order of April 8, 2004 for serving their List of Documents.

12. In this regard, and in the context of the present case, the Court is required to (a) ensure that the parties are on an equal footing, (b) have regard to the importance of the case, (c) ensure that cases are tried expeditiously and fairly and (d) bear in mind that the parties are legally obliged to assist the Court to achieve the Overriding Objective: Order 1A rule 1(1)(2)(a),(c)(ii) and rule 3. The Plaintiffs are two firemen whose employment has been prematurely terminated by the Crown and /or an emanation of the Crown, and who are asserting a human rights claim. The Defendants are, on the face of it, clearly the stronger parties in financial resources terms.

13. Although the Overriding Objective did not formally apply during most of the period of delay complained of, in my judgment the current obligation of the parties to assist the Court to achieve that objective significantly undermines the traditional view (see e.g. *Russell-v- Stephenson* [2000] Bda LR 63) that one party can simply fold their arms, not enforce a time order, and then complain of the resultant delay. In my judgment the following *obiter dictum* of L.A. Ward C.J. (as he then was) in that 2000 case no longer represents the current legal position :

> "*A defendant is under no obligation to press a plaintiff to bring a matter to conclusion. Indeed, he may lull him into a false sense of security by refusing to challenge his misconceptions and thereby gain the benefit of any period of limitation, even though the ethics*

> *of such an approach may be questionable. Owen-v-Robinson, Bermuda Civil Appeal no. 14 of 1999…"*[4]

14. Secondly, the fact that the success of the delay complaint would prevent the Plaintiffs from exercising their own fair hearing rights in connection with a claim arising under the Human Rights Act is a factor which, absent a compelling case for striking-out, suggests that the Court should be initially reluctant to deprive the Plaintiffs of their day in Court. As I observed in a case concerning a constitutional delay complaint which was upheld (in part because the statutory framework did not empower the party complaining of the delay to take remedial action) , *Re Burrows*[2004]Bda LR 77[5]:

> "*What is the impact of the human rights context on the present application? Generally, it seems to me, the courts would give considerable weight to the dominant goal of the Human Rights Act, namely protecting and enforcing human rights. This broad goal is sought to be achieved by Chapter 1 of the Constitution itself. All other things being equal, one's first instinct would be to err on the side of permitting a human rights complaint to be heard on its merits, rather than depriving the complainant of his or her day before the board of inquiry. This would seem to be consistent with Lord Bingham's assertion*[6] *that in seeking to remedy an infringement of one civil litigant's delay rights, one must not infringe the equivalent rights of their opponent.*"

Factual findings: is delay complained of inordinate and inexcusable?

15. The delay complained of is clearly inordinate and excessive. The Plaintiffs agreed on April 8, 2006 to serve their List of Documents within 21 days, i.e. by the end of April, 2004. The List of Documents was not completed until September 14, 2006, and shortly thereafter a request was made to the Defendants' attorneys for a consensual extension of time. Without prejudice discussions took place in October, and in mid-November the extension of time application was filed. The explanation for the delay, also set out in the Doughty Affidavit of November 15, 2006 which I accept, is as follows. Shortly after the Consent Order was signed the lawyer with carriage of the matter left the firm of Trott & Duncan. The case was assigned to the deponent in or about October, 2004 and he commenced work on witness statements believing this was the next step to be taken. This is why the Notice of Intention to Proceed filed on June 5, 2005 made reference to the filing of witness statements.

16. In July, 2005, the attorney discovered that the List of Documents had not been completed and thereafter commenced preparation of the same. In December, 2005, the Plaintiffs' attorney discovered further documents needed to be obtained from the Human Rights Commission. These documents were obtained in mid-January, 2006, when it was discovered that an initially contested request for disclosure of the Plaintiffs' medical records to the Defendants needed to be resolved. The Plaintiffs' attorney eventually determined that the records ought to be disclosed, and obtained his clients' consent in June, 2006, eventually finalizing the List of Documents in September, 2006. Some 14 months of delay is explained by reference to administrative oversight. A further 13 months delay is explained by reference to not complete inactivity, but a rather slow-moving trial preparation

[4] Judgment dated October 11, 2000, pages 3-4. The following paragraph of the Chief Justice's Judgment, in which he held that a complaint of delay could not be made by a party who had positively contributed to the delay, is entirely consistent with the modern position that parties are under a positive obligation to ensure that cases progress in a timely and cost-effective manner.
[5] Judgment pages 13-14.
[6] *Dyer-v-Watson* [2004] 1 A.C.379 at 402-403.

process being managed by a junior[7] lawyer who was not being encouraged by opposing counsel to believe that time was of the essence. There is no suggestion that the Defendants made a telephone call or wrote a letter enquiring when the List of Documents would be served, let alone applied to Court for a peremptory order to compel compliance with the April 8, 2004 Consent Order.

17. In my view the delay complained of is, very marginally, not inexcusable in all the circumstances of the present case. The Defendants' application is accordingly liable to be dismissed.

18. However, in case I am wrong, I will proceed to consider whether, assuming it was inexcusable, the delay has so prejudiced a fair trial that the Plaintiffs' claim would be liable to be struck-out for want of prosecution.

Factual findings: has the delay complained of prejudiced a fair trial?

19. The Defendants complain that a fair trial will be prejudiced because two witnesses can no longer recall certain conversations which took place in 2003, documents are missing and another witness cannot locate certain medical records. The former Director of Personnel is said not to be able to "*recall at present the full conversations pertaining to the employment of the Claimants/Plaintiffs within Government prior to their retirement on medical grounds.*" It is said that this is relevant because it was customary to discuss alternative employment options within Government. However, the Plaintiffs' pleaded case is not based, or based to any significant extent, on any oral discussions with the Director of Personnel while the Defendants' own case is that (a) it was not possible to provide modified employment without unreasonable hardship and (b) such modified employment was not legally required in any event. It seems highly improbable that any important discussions would not have been reduced to writing at the time, or when the Respondents' legal advisers were obtaining instructions in relation to the Defence roughly three years after the relevant events.

20. The Second Defendant also deposes that various documents are missing from the Personnel files of the Plaintiffs and attributes this to the delay. Government retention policies cannot properly authorize the destruction of documents within the limitation period applicable to ordinary civil actions (not to mention statutory claims), so in my view any loss of documents occurring within the limitation period cannot be properly said to be a prejudice flowing from the post-action delay. It is far from clear that all or any of the documents are truly lost as they are referred to in the Plaintiffs' List of Documents in any event.

21. A former Senior Personnel Officer deposes that she has no recollection of any conversation with the 1st Plaintiff "*to which he refers in his Affidavit of 15 January 2007*." However, the alleged conversation does not support any admissions against interest in any regard. It is merely asserted that "*Ms. Osbourne* [sic] *…stated that under normal circumstances employees of the Bermuda Government accepted their retirement without issue.*" This is wholly consistent with the Defendants' pleaded case. Their inability to contradict this assertion, which seems largely peripheral to the central issues in controversy, does not in my view cause them any material prejudice.

22. The Chief Medical Officer deposes that he is now unable to locate relevant medical correspondence. The latter complaint has little weight, partly because it seems probable that the key medical records are in the possession of the Plaintiffs and will be discovered in due course. But, perhaps more significantly, this case

[7] It is a matter of record that Mr. Doughty was called to the Bar on June 4, 2004. His conduct of the case as of October 2004 strongly suggests that the Plaintiffs have limited financial resources as his firm has more senior (and more experienced) litigation lawyers on staff.

does not turn on medical evidence at all and the April 8, 2004 Consent Order gave comprehensive pre-trial directions including the exchange of witness statements without granting leave for expert medical or other evidence. The medical condition of the Plaintiffs, on the pleadings, is not in dispute. In any event the Plaintiffs' delay has no demonstrable link with the Crown's inability to locate records which should have been retained-if relevant to the present proceedings- until the present action was disposed of. No or no material prejudice has been shown to flow from the Plaintiffs' delay in this regard.

23. In summary, the Defendants cannot credibly blame the Plaintiffs' delay after the action was commenced for misplacing documents in the Defendants' own possession which they ought reasonably to have retained. And there is no plausible case that, in the present case, fading memories are likely to cause the sort of prejudice that would support a finding that a fair trial is no longer possible.

Summary

24. For the above reasons, the application to strike-out the action for want of prosecution is dismissed, with costs to the Plaintiffs. The application for an extension of time within which to serve the Plaintiffs' List of Documents is allowed, but the costs of this application are awarded to the Defendants in any event.

Dated this 27th day of April, 2007

_____

KAWALEY J