

**THE EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES**

IN THE HIGH COURT OF JUSTICE

SVGHCV2005/0114

BETWEEN

ADNAN MKHOUL

CLAIMANT

AND

THE GUYANA & TRINIDAD MUTUAL INSURANCE

DEFENDANT

Appearances:

Mr. Emery Robertson Snr. for the claimant.

Mr. Grahame Bollers for the defendant.

2016: Nov.16

JUDGMENT

BACKGROUND

[1] **Henry, J.:** In March 2005, Mr. Adnan Mkhoul initiated this claim against the Guyana & Trinidad Mutual Insurance Company ('Mutual Insurance') seeking a declaration that he is entitled to be issued with an insurance policy from them. The trial is scheduled to take place on 17th November, 2016. Mutual Insurance filed an application on 6th October, 2016, to strike out Mr. Mkhoul's case for abuse of process and failure to prosecute for a period in excess of 9 years. They allege that their main witness has died and they are unable to contact the other witness because he has migrated and his whereabouts is unknown. Mutual Insurance claimed that they are in this unfair position because Mr.

Mkhoul failed in his duty to take action to progress the case in an expeditious manner. They also seek costs.

- [2] Mr. Mkhoul has resisted the application. He submitted that the application is baseless. He deposed that any prejudice occasioned by the delay has been on his side because although a trial date was fixed in March 2006, no notice of trial date was issued to the parties and the trial did not proceed on that date. He countered that the Mutual Insurance has taken no steps to file witness statements or to move the case forward other than filing the instant application. He urged that the application be dismissed.

ISSUES

- [3] The issue is whether Mr. Mkhoul's case should be dismissed for abuse of the court's process or want of prosecution.

ANALYSIS

Issue – Should Mr. Mkhoul's case be dismissed for abuse of the court's process or want of prosecution?

- [4] Adnan Mkhoul filed his claim form on 7th March, 2005 against Kendall Durrant and Mutual Insurance. Mr. Durrant has since been removed as party to the claim. He passed away in 2010. He was an insurance agent, manager, servant and agent of Mutual Insurance at the material times. Mr. Mkhoul alleged that in October 1999 he held discussions with Mr. Durrant about obtaining insurance coverage for his business' stocks and supplies. He claimed that Mr. Durrant presented him with an insurance proposal form which he completed, signed and returned to Mr. Durrant. He pleaded further that he paid a premium of \$600.00 to secure the coverage from Mutual Insurance and was issued a receipt, by virtue of which his goods were covered and by which he became entitled to be issued a policy of insurance. He claimed that the stock from his business was subsequently stolen and that in breach of their agreement Mutual Insurance failed to honour his claim.

- [5] Mutual Insurance filed its defence on 14th April, 2005. They pleaded that a proposal form is an offer to an insurance company and does not constitute an acceptance to insure an applicant. They claimed that Mr. Mkhoul was informed that his proposal would have to be approved by their head office in Guyana and that he did not have insurance until his proposal was accepted by their head office. They pleaded further that they never issued Mr. Mkhoul with a cover note and insurance policy and his goods were therefore never insured by them. Mr. Mkhoul filed a response 5 months later.
- [6] On 5th October 2005, case management directions were made fixing the trial date for 12th April, 2006 and requiring the parties to file and exchange witness statements by 31st January, 2006. Other consequential orders were also made. Mutual Insurance filed two witness statements on 2nd March, 2006, one by police Constable Theodore Thomas and the other by Mr. Kendall Durrant. Mr. Mkhoul filed his witness statements on 2nd March and 25th May 2006. The case did not proceed to trial in 2006 as ordered. The case file contains no notation of the reasons for this failure.
- [7] Nothing further happened until 2013, a period of 7 years. By court order dated 20th March 2013, the learned master directed that a trial fixture of priority be issued in the matter 'given its vintage'. Inexplicably, this was not done. The case was next set down for status hearing on 22nd April, 2015. On that occasion, learned counsel on record for Mr. Mkhoul signaled his intention to withdraw from the case which he did the following month. Mutual Insurance also changed their legal practitioner in May 2015.
- [8] The matter was set down for status hearing on 3rd June, 2015. Neither party had made any application to the court in the intervening period. The record does not reflect that either party took any steps to ascertain the status from the court office, request a trial date or make other intervention. At the June hearing, the parties were invited to file written submissions on the legal basis for the claimant's case. Neither did. Final case management directions were given on 22nd June, 2016 scheduling the trial for 20th October, 2016.
- [9] When Mutual Insurance filed its present application on 6th October, 2016, contrary to established practice and procedures practice and procedures, they typed on the application form '20th October,

2016' (the trial date) as the hearing date. Fixing of the hearing date is an administrative function reserved for the court office. The court office subsequently re-scheduled the hearing date to 17th October, 2016. Neither Mutual Insurance nor its legal practitioner attended that hearing. It was adjourned to 19th October. On that date, Mr. Mkhoul requested an opportunity to file affidavits in response and he was granted leave to do so. The trial date was provisionally re-scheduled to 17th November, 2016. Hearing of the application was adjourned to 9th, November 2016 but did not proceed because heavy rains led to a closure of public offices that day.

Evidence

[10] The hearing proceeded on 16th November, 2016. The parties relied respectively on the affidavit testimony of Collin Cambridge, Mutual Insurance's local branch manager and Mr. Mkhoul. Mr. Cambridge was cross-examined. Mr. Cambridge deposed that in 1999, some 17 years ago, Mutual Insurance carried on insurance business in Saint Vincent and the Grenadines through an agent who operated as Durrant Insurances. He alleged that Mr. Mkhoul's delay in prosecuting his case has been inordinate and inexcusable and has prejudiced them, making it impossible to have a fair trial. He averred that Mutual Insurance's main witness who dealt with the claimant died on 23rd March, 2010 and their other witness no longer resides in the state and all attempts to contact him have been futile.

[11] Mr. Mkhoul deposed that Mr. Cambridge did not state when he became Mutual Insurance's local branch manager and he did not produce any documentary evidence of his authority to swear the affidavit on behalf of Mutual Insurance. Mr. Cambridge testified that he has been Mutual Insurance's branch manager in Saint Vincent and the Grenadines since 1st October, 2007. Mr. Mkhoul refuted that Mr. Durrant conducted business as Durrant Insurances. He attested that Mutual Insurance took no steps at any time to move this matter forward other than filing the instant application. In this regard, he averred that Mutual Insurance took no action in relation to Mr. Durrant's witness statement since his death and has failed to maintain contact with their other witness. He reasoned that this lack of communication by them cannot be used as an excuse to justify their application. He concluded that if the court grants Mutual Insurance's application, it would result in a manifest injustice to him since his case has been ready for hearing since 2006 and no order has been made that it is hopeless.

Submissions

[12] Mutual Insurance submitted that through inaction Mr. Mkhoul has been guilty of inordinate and inexcusable delay in prosecuting its case and that they have been so prejudiced by the delay that it is not possible for a fair trial to take place. They submitted further that the pleadings show that there are substantial disputes of fact that can only be resolved by Mr. Durrant's and Mr. Mkhoul's evidence. They argued that since Mr. Durrant is deceased they are not in a position to refute Mr. Mkhoul's testimony. They alleged that although their other witness provided a witness statement, he is unavailable to testify.

[13] Mutual Insurance asserted that Mr. Mkhoul had a duty to progress his action and make diligent inquiries over the years, including writing to the court to request a trial date or that the matter be set down for a status hearing or pre-trial review. They contended that Mr. Mkhoul cannot wait for 9 years and blame the court office for the delay. They allege that the only step taken since the 2006 adjournment was in 2015 when the case was listed for status hearing and subsequently on application by Mr. Mkhoul's then legal practitioner to be removed from the record. They cited the cases of **Birkett v James**,¹ **Icebird Ltd. v Winegardner**² and **J. R. Williams & Co. Ltd v Carolan & Anr.**³ in support of their submissions.

[14] Mr. Mkhoul filed his skeleton arguments on the morning of the hearing. He submitted that striking out a party's case is a drastic step to be taken only in exceptional circumstances. He contended that before doing so, the court must be persuaded that a party is unable to prove the allegations made against the other party, that the statement of case is incurably bad or discloses no reasonable ground for bringing or defending a claim or has no real prospect of succeeding at trial. He referred to the case of **Ian Peters v Robert George Spencer**⁴ as authority for the proposition that a statement of

¹ [1978] A.C. 297.

² [2009] UKPC 24.

³ [2000] EWCA 24.

⁴ No citation was provided.

case is not suitable for striking out if it raises a serious live issue of fact which cannot be determined by hearing oral evidence.

- [15] Mutual Insurance countered that these principles apply where the application for striking out is made pursuant to CPR 26.3(1) (b) and are of no moment in the case at bar. I agree. Mr. Mkhoul contended further that the application is made pursuant to CPR 36.3 (c) as stated in paragraph 1 of Mutual Insurance's submissions filed on 6th October, 2016. Mutual Insurance did not include in its application or affidavit in support any reference to the relevant provision of the CPR under which its application was made. The court recognizes that CPR 26.3 (1) (c) expressly authorizes the court to strike out a statement of case for abuse of the process of the court, one of the grounds of the present application. The court therefore infers that the application is made pursuant to that provision and it is therefore approached in light of that paragraph of the CPR. In doing so the court takes judicial notice of the provision and remains mindful of the overriding objective of the CPR to act justly as between the parties.

Applicable law

- [16] The **Birkett v James** and **Williams v Carolan** cases were decided respectively in 1977 and 2000 by the House of Lords and the Court of Appeal in the Civil Division of the English Supreme Court of Judicature respectively. It is important to note that the material facts in those two cases and procedural history took place before the introduction of the English Civil Procedure Rules. Ferris J. noted this in **Williams v Carolan** and remarked that the appeal would accordingly be determined in accordance with the principles and practice applicable before 29th April, 1999. Likewise, in the **Birkett v James** case, Lord Diplock noted that the rules of the Supreme Court expressly provide for dismissal of actions if the claimant fails to 'comply timeously' with important procedural steps such as setting down a matter for trial. He remarked that judges attempted to address the prevalent non-compliance by dismissing some such claims. In this regard, they invoked the court's inherent jurisdiction to do so where such delay was excessive and militated against the likelihood of fairness at trial.

[17] Lord Diplock then rehearsed the principles (as laid out in **Allen v Mc Alpine**⁵) under which the court would take the step of striking for want of prosecution. He cautioned that striking out should be ordered only where the court is satisfied that either:

- (1) 'the default has been intentional and contumelious'; or
- (2) 'there has been inordinate and inexcusable delay by' the claimant or his legal practitioners; and
- (3) 'such delay will give rise to 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 between themselves and the plaintiff or between each other or between them and a third party.'

[18] In the **Icebird Ltd. v Winegardner** a Bahamian case, the Privy Council acknowledged that the **Allen and Mc Alpine** case remains the leading authority regarding the approach to be taken in the disposition of an application to strike out for want of prosecution. The Board's decision was delivered in June 2009. It is worth noting that Bahamas Supreme Court's rules of procedure are based on the old UK rules which were also under consideration in the **Williams v Carolan** and **Birkett v James** cases. The rules which were applicable when those cases were decided and which under consideration by the Privy Council in the Bahamian case of **Icebird Ltd. v Winegardner** have since been replaced. The regime which obtains in the Saint Vincent and the Grenadines jurisdiction is prescribed by the Civil Procedure Rules 2000 ('CPR'), which in large part correspond with the existing procedures in English courts.

[19] Neither Mutual Insurance nor Mr. Mkhoul cited any cases which have been determined based on the new English or local CPR. The CPR outlines the procedures which govern the progress of claims through the courts. They replace the old rules of court and codify applicable principles and procedures which were previously invoked and followed under the court's inherent jurisdiction. In this regard, it is critical to recognize that once a procedure is codified, reliance on the inherent authority of the court is diminished or vanishes. Accordingly, the principles endorsed by the Board in **Icebird Ltd. v Winegardner** are therefore of limited applicability in the instant matter.

⁵ [1968] 2 Q.B. 229.

[20] Under the new CPR dispensation, the overriding objective of the rules is to ensure that justice is done between the parties. For these reasons, authorities which were decided under the old rules or by virtue of the court's inherent jurisdiction must be approached cautiously as they generally are not useful in determining how the new rules are to be applied except where the language of the rules is similar or identical or where the operation of the former principles were aimed substantially or solely at advancing the overriding objective.⁶ On this point May L. J. said:

‘The CPR are a new procedural code, and the question for this court in this case concerns the interpretation and application of the relevant provisions of the new procedural code as they stand untrammelled by the weight of authority that accumulated under the former Rules.’⁷

[21] There is no blanket prohibition against considering pre-CPR cases in relation to applications to strike out a claim. Likewise, they do not automatically apply in all cases. It is therefore necessary to determine if the cited cases are of general applicability under the old and new rules and specifically whether those principles are of binding effect in the instant case.

[22] The **Williams v Carolan** case affirmed the legal proposition that an action will not be struck out for want of prosecution where the limitation period has not yet expired and in what circumstances such a case may be struck out. The court noted that the determination as to whether to make a striking out order will be based on all the circumstances including whether:

- (1) the claimant was guilty of inordinate and inexcusable delay;
- (2) the defendants were prejudiced by the delay; and
- (3) the issues are complex and substantial.

[23] Judge L. J. remarked⁸ that such an order will be made only in exceptional cases including where:

- (1) it would produce practical benefit to the defendant;

⁶ Biguzzi v Rank Leisure plc [1999] 1 WLR 1926.

⁷ Vinos v Marks and Spencer plc [2001] 3 All ER 784, para. [17].

⁸ Ibid. at para. 41 of the Williams v Carolan case.

- (2) the form of the present litigation has 'ceased to provide a sensible vehicle for the resolution of the issues'; and
- (3) 'the claimant may elect not to pursue the defendant any further if the action is struck out'.

[24] The CPR empowers the court to strike out a claim or statement of case if it appears that:

- (1) there has been failure to comply with a rule, practice direction, order or direction given by the court;
- (2) the claim does not disclose a reasonable cause of action;
- (3) the claim is an abuse of the court's process or is likely to obstruct the just disposal of the case; or
- (4) the statement of case is prolix or does not comply with the requirements of a claim or defence.

The present application fits into the third category.

[25] In exercising its jurisdiction, the court must remain cognizant of the overriding objective to act justly and it must act judicially, taking into account any prejudice which either party may suffer as a consequence of its ruling. However, a finding that the applicant will be prejudiced is not a pre-condition to making of such an order. The decision will be made depending on what is just in all the circumstances of the individual case.⁹ The CPR is viewed as creating a more flexible approach to striking out. An order striking out of a party's statement of case has been characterized as 'draconian'¹⁰ and a measure of last resort. The court is therefore reluctant to make such an order save in exceptional circumstances.¹¹ It will instead endeavor to facilitate progression of the case to trial and utilize more appropriate and just sanctions for failure by parties to comply with orders, rules of procedures or practice. Less restrictive sanctions include orders containing case management directions or denying the offending party interest or costs have been recommended.¹²

⁹ AXA Insurance Co. Ltd v Swire Fraser Ltd [2000] CPLR 142

¹⁰ Biguzzi v Rank Leisure plc (1999) Times, 5 October.

¹¹ Julian Prevost v Rayburn Blackmore et al DOMHCV2005/0177.

¹² Annodeus Entertainment Ltd v Gibson [2000] All ER 115.

[26] Under the CPR the court is charged with actively managing cases including fixing timetables and controlling the progress of the case and giving directions to ensure that the case proceeds quickly and efficiently.¹³ The court must also fix case management conferences and schedule status hearings to have 'dead case' determined procedurally and 'live cases' put on track for determination.¹⁴ Scheduling of status hearings was intended to be an ongoing exercise whereby annual inventory of all cases are prepared and processed. CPR 1.3 provides that litigants have a duty to assist the court to give effect to the overriding objective including its mandate to deal with matters expeditiously. It does not appear that the instant matter was included on the annual inventory list between 2006 and 2012 and there is no indication that either party alerted the court to this, pursuant to CPR 1.3.

[27] Once a trial date has been fixed, the court must as a general rule issue notice to the parties at least 8 weeks in advance except in urgent cases and unless the court gives shorter notice.¹⁵ No such notice appears to have been issued in respect of the scheduled 2006 trial date. Similarly, no status hearing was scheduled in this matter between 2006 and 2012 or from 2013 to 2014. In this regard, the court office dropped the ball. Neither party raised an objection by letter or otherwise or applied for directions or a trial date. They failed equally in their duty.

[28] The CPR was modeled on the English rules. They both have as their central focus management of civil proceedings by the court as opposed to litigants. This is a departure from the culture and practice which existed before the introduction of the new rules. In both jurisdictions the CPR was ushered and underpinned by a desire to establish and maintain traction in the expeditious progression of cases. The rationale for the introduction of the new rules in England is outlined in the Access to Justice Final Report compiled by Lord Woolf.¹⁶ It recommended far-reaching proposals for reform of the civil justice system.

¹³ CPR 25 (j).

¹⁴ Practice direction No. 1 of 2002.

¹⁵ CPR 27.10 (2).

¹⁶ (London: HMSO, 1996).

[29] Those recommendations have in large measure been adapted by the rule making body in the Eastern Caribbean court system headed by the Honourable Chief Justice and they find expression in the CPR. The primary responsibility for managing cases rests squarely on the shoulders of the court staff with a concomitant expectation that litigants support and provide proportionate assistance to them. The learned authors of Blackstone's Civil Practice opine that this duty obligates the parties:

‘... to ensure that the court has the information required if effective directions are to be made, and must inform the court of events which may affect directions previously made which cannot be dealt with by the consent of parties.’¹⁷

[30] Applying those principles to the instant case, it follows that both parties had a duty to alert the court to the passage of the inordinate amount of time since the trial date was set, the periods which elapsed between case management hearings and in the case of Mutual Insurance, about the death of its witness. Such interventions should have taken place respectively in 2007 (after the trial date passed); in 2008 and each succeeding year up to 2012 when no status hearing was scheduled and in 2010 when Mr. Durrant died. It is unfair to lay the blame for such failure solely at Mr. Mkhoul's feet. The court and the litigants defaulted.

[31] Mr. Durrant died from natural causes at 60 years of age. The death certificate exhibited by Mr. Cambridge reflects that he was employed as an insurance agent at the time of death. No explanation is given why Mutual Insurance did not make application to have another witness substituted for Mr. Durrant after his demise. The court remains mindful that Mutual Insurance can make application even at this stage to have Mr. Durrant's witness statement used during the trial. No submissions were made on this. I note from Mr. Durrant's witness statement that he attached two documents to his witness statement which he described as faxes from the head office. Surely, another employee of Mutual Insurance could provide the related testimony and information regarding its policies on issuance of insurance coverage. They have not done so.

¹⁷ Blackstone's Civil Practice, 2013, para.42.1.

[32] While Mutual Insurance would benefit practically from an order striking out Mr. Mkhoul's claim, that is not a material consideration in the present case. Mr. Mkhoul would be deprived of the opportunity to make his claim¹⁸ if it is struck out for the reasons proposed by Mutual Insurance. Mutual Insurance would likely suffer prejudice if they are unable to present witnesses. They have not indicated what attempts were taken to locate Mr. Thomas or what consideration was given to identifying another member of staff as a witness or what difficulties (if any) was experienced. I am not satisfied that Mr. Mkhoul's inaction either solely or substantially created their difficulties, that their position is unsalvageable of that it would be unfair and an abuse of the court's process to permit the trial to proceed. Mutual Insurance is equally to blame for any difficulties facing them with presenting their case. I make no order striking out Mr. Mkhoul's claim.

COSTS

[33] Having found that the parties failed to bring to the court's attention the extended period of time during which no action was taken in this case, I consider it appropriate to make no order as to costs to signal the court's displeasure with the apparent indifference shown by the parties.

ORDER¹⁹

[34] It is accordingly declared and ordered:

1. The application by Guyana and Trinidad Mutual Fire Insurance Company Limited to strike out Adnan Mkhoul's claim is dismissed.
2. Each party shall bear its or his own costs.

[35] I am grateful to both counsel for their submissions.

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Esco L. Henry
HIGH COURT JUDGE

¹⁸ Which based on the pleadings seems to have a chance of success.

¹⁹ Decision was re-issued on 17th November, 2016 with a correction of the hearing and decision date (in the heading).