In The Supreme Court of Bermuda

CIVIL JURISDICTION
2013: No. 11

B E T W E E N:

HSBC BANK BERMUDA LIMITED

Plaintiffs

and

(1) GIANNI CLAUDIO VIGILANTE
(2) MARK PETTINGILL
(3) REHANNA PALUMBO
(4) ALESSANDRE PALUMBO

Defendants

and

CHRISTOPHER TROTT

Third Party

Before:	**Hon. Alexandra Wheatley, Acting Puisne Judge**
Appearances:	**Erik Penz of Kennedys, for the Third Party**
	Grant Spurling of Chancery Legal, for the Second Defendant
Date of Hearing:	17 April 2024
Date Draft Circulated:	5 December 2024
Date of Ruling:	6 December 2024

RULING

Rules of the Supreme Court – Order 16; Strike Out of Third Party Notice; Contumelious Delay; Abuse of Process; Want of Prosecution

WHEATLEY, ACTING JUSTICE

INTRODUCTION

1. Counsel for the third party filed a summons on 7 July 2023 seeking, *inter alia*, that the Third Party Notice issued against Mr. Trott (hereinafter referred to as the **Third Party**) be struck out, dismissed or otherwise set aside (**Strike Out Application**). Mr. Penz summarized the basis for this application as follows:

    a) The Second Defendant caused the third party proceedings to go to sleep for nine and one-half years and his failure to observe the Third Party's rights as a third party amounts to abuse of process, for which the Third Party has suffered prejudice and for which the court shall strike out the Third Party Notice;

    b) The Second Defendant's delay was contumelious as it was an intentional decision "*to let sleeping dogs lie*" in the face of the progress of the main action, and therefore the court should exercise its discretion to dismiss the third-party proceedings for want of prosecution;

    c) Even if the delay was not intentional, it was inordinate and inexcusable, and there is both serious prejudice and a substantial risk that a fair trial would be impossible such that the third-party proceedings should be dismissed for what the prosecution; and

    d) The Second Defendant's inordinate and inexcusable delay was in complete disregard of the Rules of the Supreme Court 1985 (**the RSC**) and with full awareness of the consequences, such that it can properly be regarded as both an abuse of process of the court and contumelious conduct.

BACKGROUND

2. The First Defendant, Gianni Claudio Vigilante, was the Maître D' at the Waterloo House hotel located on Pitts Bay Road, Pembroke. Mr. Vigilante stepped out of this role choosing to venture in operating restaurants himself. One of Mr. Vigilante's restaurants included Opus Café and Lounge (**Opus**).

3. Mr. Vigilante obtained loans for his restaurants from the Plaintiff bank (**HSBC**), which he was ultimately unable to repay when his restaurants ran into financial difficulties.

4. The Second Defendant was a 30% shareholder in Bar One Ltd, which owned Opus. By written guarantee (**the Guarantee**) dated 4 February 2010, the defendants in these proceedings, including the Second Defendant, unconditionally guaranteed on demand to pay HSBC all monies advanced to or paid to or on account of Bar One Ltd not exceeding $650,000. The Second Defendant was also, for a time, the Third Party's attorney in respect

of certain proceedings resulting from the failure of Mr. Vigilante's restaurants. The Third Party became involved with Mr. Vigilante and his restaurants as he was the owner of Bristol Cellar Limited (**Bristol**) which provided beverages to some of Mr. Vigilante's restaurants.

5. Given the failure of Mr. Vigilante's restaurants, he relocated from Bermuda permanently and is understood to now reside in the United Kingdom. Consequently, HSBC pursued various others alleged to have guaranteed the loans to Mr. Vigilante's restaurant businesses, including the Second Defendant and the Third Party.

6. The following Supreme Court civil actions, in addition to this matter, all resulted from Mr. Vigilante's failure to repay the loans to HSBC and his subsequent relocation to the UK (hereinafter, collectively referred to as **the Other Actions**):

    i. Vigilante v Trott; 2011 No. 414

    This was a case Mr. Vigilante took against the Third Party in relation to a promissory note. The Third Party was represented by the Second Defendant in these proceedings. Judgment was entered against the Third Party on 12 April 2013.

    ii. HSBC v Bristol; 2013 No. 198

    In this case, Bristol issued third party notices against Mr. Vigilante, Rosemarie Madeiros and the Second Defendant.

    iii. HSBC v Vigilante and Trott and Madeiros; 2013 No. 200

    In this action HSBC were seeking $250,000 (plus interests and costs) from the Third Party under the terms of a guarantee allegedly executed by the defendants in this matter.

7. In 2014, the Third Party reached a settlement with HSBC at or following a mediation session which resolved *HSBC v Bristol* and HSBC's claims against the Third Party in *HSBC v Vigilante and Trott*. Pursuant to the settlement, the Third Party paid HSBC at least $750,000 and understood that he had finally resolved all claims affecting him arising out of the failure of Mr. Vigilante's businesses.

8. The Third Party's involvement in the Other Actions was between the period November 2011 and April 2014 when the Third Party reached a settlement with HSBC. The Third Party had no further involvement in respect of this matter and the Other Actions for the period April 2014 to 17 March 2023. Consequently, the Third Party was of the view that there were no outstanding monies owed by him in relation to this matter until 17 March 2023 when he was served with a Summons for Directions in respect of the Third Party Notice by Counsel for the Second Defendant.

9. On 23 June 2022, the Second Defendant filed an application for HSBC's claim to be struck out for want of prosecution and/or an abuse of process (**the Strike Out Application**) on the basis that HSBC had delayed in moving the action forward. Mussenden J (as he was then) heard the Strike Out Application and issued his Ruling on 9 November 2022 (**the Ruling**[1]). At paragraphs 26 through 34 of the Ruling Mussenden J set out his reasons for his findings that there was (1) no contumelious delay by HSBC, (2) there was no inordinate and/or inexcusable delay by HSBC, and (3) given the first two findings, that there was no delay by HSBC so prejudicial that the action should be struck out.

10. Following the Ruling, the intended trial of this matter was due to commence on 14 November 2022. On this date, the Second Defendant entered a consent judgment with HSBC for the sum of $250,000 (**the Consent Judgment**).

PARTIES' POSITIONS

11. Based on the chronology of these proceedings, the Third Party argued that the Second Defendant, despite HSBC's indications beginning with the issuing of the Summons for Directions, the Second Defendant took no action to notify the Third Party that:

    a) the main action was proceeding to trial and directions given;

    b) a trial was listed for 14 to 17 November 2022; or

    c) he intended to pursue his Third Party Notice.

12. The RSC provide direction as it relates to third-party notices in Order 16 which states as follows:

> "***16/1 Third party notice***
>
> ...
>
> *(3) Where a third party notice is served on the person against whom it is issued, he shall as from the time of service be a party to the action (in this Order referred to as a third party) with the same rights in respect of his defence against any claim made against him in the notice and otherwise as if he had been duly sued in the ordinary way by the defendant by whom the notice is issued.*
>
> ...
>
> ***16/4 Third party directions***
>
> *4 (1) If the third party enters an appearance, the defendant who issued the third party notice must, by summons to be served on all the other parties to the action, apply to the Court for directions.*

[1] HSBC Bank of Bermuda Ltd v Pettingill [2022] SC (Bda) 88 Civ.

(2) If no summons is served on the third party under paragraph (1), the third party may, not earlier than 7 days after entering an appearance, by summons to be served on all the other parties to the action, apply to the Court for directions or for an order to set aside the third party notice.

(3) On an application for directions under this rule the Court may—

...

(b) order any claim, question or issue stated in the third party notice to be tried in such manner as the Court may direct; or

(c) dismiss the application and terminate the proceedings on the third party notice;

and may do so either before or after any judgment in the action has been signed by the plaintiff against the defendant.

(4) On an application for directions under this rule the Court may give the third party leave to defend the action, either alone or jointly with any defendant upon such terms as may be just, or to appear at the trial and to take such part there in as may be just, and generally may make such order said give such directions as appear to the Court proper for having the rights and liabilities of the parties most conveniently determined and enforced and as to the extent to which the third party is to be bound by any judgment or decision in the action.

...

16/6 Setting aside third party proceedings

6 Proceedings on a third party notice may, at any stage of the proceedings, be set aside by the Court." [Emphasis added]

13. Mr. Penz also relied on The Supreme Court Practice 1999, The White Book[2] which provides further guidance in relation to the timing of filing a summons for directions in accordance with Order 16, Rule 4. The following commentary is set out at page 282 of The White Book:

"***16/4/3 Summons for third party directions****—The defendant must issue a summons for third party directions... which must be addressed to and served upon the third party as well as upon the plaintiff, and also upon any co-defendant of the defendant giving the notice. It is for the defendant to obtain directions, and not the third party. ...*

...

[2] Sweet & Maxwell: Volume 1, 1998.

16/4/4 Time for application for third party directions—*The rule does not provide the time within which the summons for third party directions must be issued, but the application should generally be made immediately after the giving of notice of intention to defend by the third party, and at any rate should be made at a stage of proceedings when it is possible there may still be a trial of the action between plaintiff and defendant...*

Wherever possible, the summons for third party directions should be made returnable at the same time as the plaintiff's summons for directions, for this will provide a convenient occasion for the Court and all the parties to consider the directions best suited to the future course of the action." [Emphasis added]

14. It is the Second Defendant's position that as Order 16, Rule 4 has been complied with as an application for directions was filed on 17 February 2023 (**Summons for Directions**) and subsequently served on 17 March 2023. Mr. Spurling argues that there is no requirement within Order 16 providing a time frame for which the Second Defendant must have filed and served the Summons for Directions. Accordingly, the Second Defendant asserts that the RSC have been complied with as it relates to the Third Party Notice and as such should not be set aside for any suggestion that there has been a failure to comply with the RSC or that there has been any delay on the part of the Defendant.

15. In addition, Mr. Spurling asserts that it must be taken into account that the Second Defendant was subject to delay himself. As such, it would be manifestly unjust to allow HSBC's action to proceed against the Second Defendant, but then not permit the Second Defendant to proceed on the Third Party Notice. Mr. Spurling asserted that it was the responsibility of HSBC in this case to progress the matter and not the Second Defendant.

16. Order 19(1)(d) of the RSC provides the jurisdiction for which an action can be struck out for an abuse of process. Mr. Penz relies on the judgment of the former Chief Justice Kawaley in *Bailey v Wm E Meyer & Co Ltd* [2017] Bda LR 5. In this case, the action was struck out on the basis the plaintiff had not taken any action for eight years. Kawaley CJ stated at paragraphs 6 and 8 as follows:

> "*6. However, the Plaintiff not only allowed the action to completely go to sleep for 8 years (January 2008 – January 2016). It appears that the last documented attempt to move the global dispute (reflected in two actions in which the Plaintiff herein asserted a hugely bigger claim and counterclaim) forward in a manner which was communicated to the Defendant was the Plaintiff's attorneys April 10, 2006 correspondence. Having made the proposal to consolidate the two actions, the Plaintiff took no meaningful steps in Court at all to progress his Counterclaim in the 2002 Action thereafter. Between April 10, 2006 and January 19, 2016 (9.75 years), there was seemingly no communication from the Plaintiff to the Defendant signifying his intention of prosecuting the present action. It was more than 10 years after the April 10, 2006*

correspondence that the Plaintiff's new attorney unambiguously signified an intention of seriously proceeding by serving documents and requiring discovery on September 14, 2016.

...

8. Prejudice to a fair trial was complained of in a somewhat muted way. It is self-evident that memories will have faded. The Defendant cannot complain if it has rashly destroyed the documents without first taking steps to confirm that the Plaintiff had abandoned his present claim. However, the most striking prejudice to my mind was being required to defend a claim which had gone to sleep for so long a time that it was reasonable in all the circumstances for the Defendant to assume that it had been abandoned. The abuse of process which was complained of was a wholesale disregard for the Rules and an inferred absence of any intention to pursue the action over an 8 year (or more) period." [Emphasis added]

17. Kawaley CJ listed a summary of six factors which formed the basis for his finding that a plaintiff's conduct (delay) constituted an abuse of process at a level which caused him to exercise his discretion that the action should be struck-out for want of prosecution. The factors are set at a paragraph 25 as follows:

"*i. the claim was asserted in response to the Defendant's claim in the 2002 Action for a modest sum, appears shadowy and from the outset has been prosecuted in an unconvincing manner which strongly suggests (without analysis of the actual merits) that it is devoid of merit;*

ii. the same claim was asserted in two separate proceedings and so the present proceedings from the outset were potentially an abuse of the processes of this Court;

iii. the Plaintiff's failure to communicate any or any serious intention to pursue the present proceedings to the Defendant for over 10 years made it reasonable for the Defendant to assume the proceedings had been abandoned;

vi. there is no satisfactory explanation for the delay which entailed a serious breach of the Plaintiff's obligation (under Order 1A) to assist the Court to ensure that his claim was dealt with expeditiously;

v. the Plaintiff filed his Summons for Directions over 13 years after the time prescribed by the Rules (Order 25 rule 1 as read with Order 18 rule 10(1)(b)) without in the interim seeking any dispensation from the Court;

vi. *permitting proceedings which have been left asleep for so long to be revived would bring the processes of the Court into disrepute by allowing litigants to "warehouse" claims until they choose to pursue them rather than prosecuting them diligently.*" [Emphasis added]

18. The Second Defendant, in his Second Affidavit sworn on 31 July 2023 (**Pettingill Affidavit**), in addressing his failure to notify the Third Party that the main action was progressing and that he intended to pursue the third party claim at paragraph 15 states as follows:

> "*15. As I have indicated previously in this matter there was a significant delay and lapses of time due to the prosecution of the matter. In the circumstances, with little more than notices of intention to proceed (but until recently no actual proceeding) it seemed prudent and indeed reasonable to let sleeping dogs lie. Accordingly I had no reason to pursue Mr. Trott where there was no progress in the determination of the guarantee issue in the first place.*" [Emphasis added]

19. Mr. Penz also referenced the cases of *Re Burrows* [2005] Bda LR 77 and the Ruling in which both judges relied on and used the principles set out by Kawaley J (as he was then) in *Mermaid Beach and Racquet Club Ltd v Morris* [2004] Bda LR 49 (SC) regarding the test for dismissing proceedings for want of prosecution. The two-part test is summarized as follows:

(a) First, if there has been contumelious delay on the plaintiff's part, the court has a discretion to dismiss the action without regard to any additional prejudice suffered by the defendant.

(b) Secondly, in respect of inordinate or inexcusable delay that is not intentional, assuming the limitation period for issuing a fresh writ has expired, the Court will dismiss the proceedings if it is shown that there is serious prejudice or a substantial risk that a fair trial would be impossible.

20. Taking into consideration the test set out in *Mermaid Beach*, Mr. Penz argued that the Second Defendant's delay of 9½ years in pursuing the Third Party Notice is contumelious in that it was an intentional decision "*to let sleeping dogs lie*"[3].

21. Mr. Spurling further argued that the cases relied on are those where the strike-out application is between the plaintiff and the defendant and as such, says they are not applicable to this matter as the application is between a defendant and a third party.

[3] See paragraph 15 of the Pettingill Affidavit.

FINDINGS

22. In the Ruling, Mussenden J found that HSBC had not acted contumeliously[4] and that HSBC did not cause any inordinate or inexcusable delay in these proceedings[5]. As the Ruling was not appealed, the findings therein stand and any arguments that it was the Plaintiff who caused the delay in this matter and not the Second Defendant, is contrary to Mussenden J's findings and is rejected.

23. Furthermore, I do not accept that the principles regarding the factors to be considered for a strike out application set out in the cases of *Bailey v Wm E Meyer & Co Ltd*, *Mermaid Beach*, *Re Burrows* and the Ruling are distinguishable simply as they were applications which were determined between plaintiffs and defendants.

24. A defendant who wishes to issue a third party notice and make claims against that third party has the same obligations under the RSC and the common law not to abuse that process or cause delay, intentional or otherwise. Therefore, in my view the same principles set out in *Bailey v Wm E Meyer & Co Ltd*, *Mermaid Beach*, *Re Burrows* and the Ruling apply.

25. I also reject that it is HSBC who is responsible for progressing this matter as Order 16 puts a clear obligation on any defendant who has issued and served a third-party notice to apply to the Court for directions. The extract from The White Book referenced at paragraph 13 above, specifically addresses the lack of timeframe set to issue the third-party directions summons and says, "*the application should generally be made immediately after the giving of notice of intention to defend by the third party, and at any rate should be made at a stage of proceedings when it is possible there may still be a trial of the action between plaintiff and defendant*".

26. Accordingly, the first question to ask[6] is whether the delay of issuing the third-party Summons for Directions was contumelious or not by the Second Defendant. The Second Defendant explicitly accepted that he "*let sleeping dogs lie*"[7] when it came to the Third Party. Indeed, the Second Defendant failed to notify the Third Party that directions had been issued for trial and thereafter listed for a five-day trial in November 2022. This, along with the findings in the Ruling that HSBC had not caused delay in progressing these proceedings, it is evident that the Second Defendant's failure to take any action against the Third Party for a period of 9½ years was intentional.

27. Moreover, the Second Defendant did not provide any satisfactory explanation for the extraordinary delay in taking the necessary steps against the Third Party other than to erroneously place blame for such at the feet of HSBC. This is plainly wrong.

[4] Paragraphs 26 and 27 of the Ruling.
[5] Paragraphs 28 to 30 of the Ruling.
[6] See paragraph 19 above.
[7] See paragraph 15 of the Pettingill Affidavit.

28. There is no need to address the latter portion of the legal test as that only relates to circumstances where the delay has been found to be unintentional.

CONCLUSION

29. In light of the findings, the Third Party Notice is hereby struck out for want of prosecution. This is based on the Second Defendant's contumelious delay by waiting 9½ years until attempting to proceed against the Third Party which amounts to an abuse of process.

30. The costs of this application are awarded to the Third Party on a standard basis, to be taxed if not agreed.

DATED this **6th** day of **December 2024**

ALEXANDRA WHEATLEY

ACTING JUSTICE OF THE SUPREME COURT