

**IN THE SUPREME COURT OF THE
TURKS AND CAICOS ISLANDS**

Case No.: CL 7/08

BETWEEN

**1. KIMBERY JUNE COX BAKER
(suing on her own behalf and as the minority
Shareholder of the Second Defendant)**

Plaintiff

-AND-

**1. JIMMY CHARLES BAKER
2. JUNE BUGGING ME LTD.
3. CHARLES BAKER**

Defendants

Heard: 24th April 2009

Circulated: 26th May 2009

For the Plaintiff: Ms T. Muhammad

For the 1st Defendant: Mr J. Katan

For the 3rd Defendant: Mr G. Chapman (on record but not in attendance)

RULING

THE APPLICATIONS

1. I am dealing with a Summons filed by Mr Jimmy Baker, the First Defendant, dated 25th September 2008, applying for an order that the Plaintiff's action:
"be dismissed with costs to be taxed and paid to the Defendant on the grounds that the Plaintiff has failed to apply for leave to continue the action as required by Order 15, Rule 12A(2) of the Civil Rules 2000 and that the costs of and occasioned by this application be the Defendant's costs in any event."
2. The Plaintiff filed a summons on 29th October 2008 applying:
 - (a) for an order pursuant to Order 15 Rule 12A that the Plaintiff do have leave to continue the derivative action claim CL 07/08.
 - (b) for an extension of the time for "the commencement" (Plaintiff's drafting should read "continuation") of the application to Order 15 Rule 12(A) subsection 10(b).
 - (c) for an order to indemnify the Plaintiff for costs incurred and/or to be incurred in the action out of the assets of the company.

A notice of hearing of this summons was not properly served on the First Defendant. Therefore, this Summons could not be fully considered at this hearing, especially as regards (a) and (b) above. However, when considering the First Defendant's Summons, common sense and expediency dictates that, if he fails in his application to dismiss, under Order 15 Rule 12A(10) (b) I should then go on to consider the Plaintiff's request for an extension of time to apply for leave to continue the action.

THE BACKGROUND

3. On 18th January 2008, the Plaintiff filed a Writ and Statement of Claim which was issued on 21st January 2008. The Plaintiff is a minority shareholder in June Bugging Me Ltd, the Second Defendant, and has brought this derivative action in her own name and on behalf of the Company. The First Defendant, the Plaintiff's former husband, is the majority shareholder of the Company. The Third Defendant is the

father of the First Defendant. It is contended by the Plaintiff that on 21st January 2008 leave was given to serve the Third Plaintiff out of the jurisdiction but gave insufficient time for service of the Acknowledgment. The Plaintiff, the First and Third Defendants are all directors of the Second Defendant company. The Plaintiff claims that the First and Third Defendants acted in breach of their fiduciary duties to the Company and “perpetrated an equitable fraud on the Company.”

4. A copy of the Writ of Summons and a copy of the Statement of Claim were faxed by the Plaintiff’s attorneys, Misick & Stanbrook (“M&S”), to Miller, Simons O’Sullivan (“MSS”), the Second Defendant’s attorneys, in January 2009 “as a courtesy.” The Plaintiff had twelve months after issue in which to serve the Writ. On 9th July 2008 “MSS” sent a letter pursuant to Order 12 Rule 8(a) of the Civil Rules 2000 requiring the Writ to be served within 21 days or for the action to be discontinued. Ms Muhammad informed the Court that she had telephoned Mr Katan informing him that there were problems locating the Writ in their client’s file. At the expiry of the 21 days, “MSS” wrote a further letter to “M&S” confirming that the Writ had not been served and therefore an application to dismiss the action would be made. It was only at that stage that the Plaintiff served the Writ. The impression given by the manner of the Plaintiff’s conduct of the proceedings thereto was, at best, that she was not anxious to progress these proceedings.

5. In or around January/ February 2009 a copy of the Writ and a copy of the Statement of Claim were served, with leave, on the Third Defendant who was out of the jurisdiction.

6. On 11th August 2008 the First Defendant filed his Acknowledgment of Service stating that he intended to contest the whole of the claim. As a consequence, Order 15 r 12A(2) placed a burden on the Plaintiff to apply 21 days thereafter¹ to the Court for leave to continue her action.

¹ Order 15 r 12A(4)

7. "M&S" filed an ex parte application for service outside the jurisdiction on the Third Defendant due to the difficulties with the aforementioned order of 21st January 2008.

8. The Plaintiff failed to file the Application for Leave to continue her action within the required time limit. As a consequence, the First Defendant filed the Summons which is before me on 25th September 2008. The Summons was given a hearing date of 23rd October 2008 and was served on the Plaintiff on 1st October 2008.

9. The Summons came before me on 23rd October 2008. Despite the nature of the application and the apparent criticism of the Plaintiff's approach to these proceedings, she had, by the date of that hearing, still failed to properly apply for leave to continue the proceedings. Mr Katan presented forceful submissions to the Court in support of his contention that the action should be dismissed. It was evident to the Court that Miss Muhammad was not in the position to properly argue the case. Her client, who had not filed an affidavit, was out of the jurisdiction and therefore Counsel was unable to take instructions in Court. In addition, it was clear that Miss Muhammad had only fairly recently assumed conduct of this matter and was not in a position to assist the Court by explaining in sufficient detail the reasons for the delay in the matter progressing. The Court, despite Mr Katan's opposition, granted an adjournment to allow the plaintiff to file an affidavit dealing with the issue of delay. The Court ordered that, "unless the Plaintiff files and serves on the First Defendant, by 4pm on October 31, 2008 a further affidavit dealing solely with the issue of delay this action will stand dismissed." The Court also ordered that the Plaintiff do pay the First Defendant's costs occasioned by that hearing and adjourned consideration as to the appropriate basis of taxation.

10. "MSS" wrote to the Registrar on 28th October 2008 requesting a listing to conclude the part-heard hearing of the First Defendant's Summons

11. From the face of the summons it appears that on 29th October 2008 the Plaintiff filed her Summons seeking leave to continue the action and to extend the time for commencement of the action pursuant to an undertaking given at the hearing

on 23rd October 2008.² The 2nd affidavit of Kimberly June Cox-Baker sworn on 22nd October (the day before the first day of the hearing of this Summons) was filed at 8am on 29th October 2008. It appears that a copy of this affidavit as well as the Plaintiff's Summons, which were eventually formally filed on 29th October 2008, were faxed to the court office after close of business at 16.50 on 22nd October 2008. Regretfully, some attorneys have developed and maintained a practice of sending by fax copies of draft proceedings or pleadings, which they intend to file, prior to formally filing the same. This is an ongoing practice that should cease, as it is in breach of Paragraph 3 of Practice Direction No.1 of 2002.³ Attorneys should also ensure that affidavits fully comply with Order 41 r.5(5). Although there is no completed endorsement showing the date of swearing and filing on the Plaintiff's affidavits, I give leave for the affidavits to be used.

12. The Plaintiff filed the ordered affidavit at 9.40am on the 31st October 2008 pursuant to an undertaking given at the hearing on 23rd October 2008. However, "M&S" were unable to retrieve copies from the Court by 4pm to enable service, as the Court had failed to process the same. Ms Muhammad had not retained a sworn copy of the affidavit on her file. Having regard to the situation that she found herself in, Ms Muhammad sensibly faxed an unsworn copy to "MSS" at minutes to 4pm on 31st October 2008. Regretfully, Ms Muhammad failed to mention in the letter accompanying the unsworn affidavit why she was sending it in this form and that the affidavit would follow. That said, a copy of the filed sworn affidavit was served on Mr Katan on the following Monday morning, which was the first day that it was ready for collection from the Court and was also the next working day. Having regard to all of these circumstances and Mr Katan's submissions to the contrary, I ruled, at the hearing on 24th April 2009, that there would be an extension of time for the filing to that Monday and that I would have regard to the contents of the affidavit.⁴ I will return to the contents of that affidavit later on herein.

² Ms Muhammad contends the summons was filed on 23rd October but was not issued until 29th October.

³ Practice Direction No.1 of 2002 – Correspondence with the Supreme Court Registry – 26th June 2002
- Chief Justice Richard Ground

⁴ Order 3 r 5(2)

11. Ms Muhammad wrote to the Court on 14th November 2008. In the email Counsel referred to a facsimile dated 13th November 2008 and sought to confirm that the Summons for an order pursuant to Order 15 Rule 12A has been re-listed. The letter stated that the Summons was filed in the Supreme Court on 23rd October 2008 and issued on 29th October 2008. Counsel requested that the Plaintiff's Summons be listed to be heard at the same time as the part heard First Defendant's Summons.

12. Both Ms Muhammad and Mr Katan wrote to the Registrar on 18th November 2008 requesting the Registrar to list the First Defendant's part heard Summons for hearing. Mr Katan wrote a follow up letter on 4th December 2008.

13. On 2nd December 2008, Mrs Muhammad filed the affidavits sworn by the Plaintiff in support of her Summons and answering the First Defendant's Summons. Mr Katan filed an affidavit sworn by the Plaintiff in reply on 8th December 2008.

14. Ms Muhammad wrote to the Court on 11th December 2008, with follow up letters on 15th and 16th December 2008 seeking a hearing for the Plaintiff's application for leave for substituted service on the Third Defendant. The Court considered the ex-parte Summons on 17th December 2008 and granted the sought leave. A copy of the order was not signed and sealed by the court until 2nd January 2009.

15. The Third Defendant filed his Acknowledgment of Service on 10th February 2009 stating that he intended to contest the whole of the Plaintiff's claim.

16. On 19th March 2009 Mr Katan wrote to the Court, referring to his letters of 18 November 2008 and 4th December 2008, requesting that the First Defendant's part heard Summons be listed for a hearing. The Notice of Hearing was formally filed on 24th March 2009 and the Summons listed for hearing on 24th April 2009. A copy of the Summons was served on "M&S" on 2nd April 2009

17. On 21st April 2009 Ms Muhammad wrote to the Court requesting that the Plaintiff's Summons be heard at the same time at the First Defendant's part heard Summons which was listed for 24th April 2009.

THE PLAINTIFF'S SUBMISSIONS

18. Ms Muhammad submits that the Plaintiff has a good arguable case and it would be wrong to dismiss the case without consideration of the merits of the substantive claim. The Court is urged to exercise its jurisdiction under Order 3 r.5 and Order 15 r 12(A) to extend the time to make the application for leave to continue these proceedings. It is submitted that to do otherwise would cause an injustice.

19. The Plaintiff contends that the Company sold property (20306/53 Cockburn Harbour, South Caicos) to Caicos Pride Products Ltd, a company in which the First Defendant had a beneficial interest. The Company was acting at the direction of the First Defendant and his nominee director, the Third Defendant, was acting under the First Defendant's control. It is contended that not only was the sale an equitable fraud but this was compounded by the fact that the First Defendant and Third Defendant allowed the property to be sold at an undervalue despite a better offer to purchase from the Plaintiff. It is further contended that the proceeds of sale were used for non-company purposes. The derivative action has been brought as it is contended that the First Defendant is the majority shareholder of the Company, is able to have resolutions passed in his capacity as director with the complicity of the Third Defendant and the Company is not in a position to make the application to the Court for relief.

20. The plaintiff contends that there has not been a deliberate default in compliance with any order of the Court in relation to this claim. It is contended that there has been a slight delay in the lodging of the application for the leave to continue the action and that this has not caused prejudice to the First Defendant that would merit a dismissal.

21. The Plaintiff contends that although they had had as matter of courtesy faxed a copy of the Writ and statement of claim to the First Defendant in January 2008, he was only served on 31st July 2008 following his attorney's notification that they would accept service of the same. Ms Muhammad told the Court that she had informed Mr Katan that she was having difficulties locating the writ in her client's file and that it might not be served within the required 21 days. It is contended that this service in July was a clear indication of the Plaintiff's wish to continue the action within the requisite twelve month period. The Plaintiff acknowledges that the application for leave to continue should have been filed in September 2008. However, the hurricanes that hit the Islands at that time caused difficulties for the Plaintiff to communicate with her attorneys. In addition, Ms Muhammad reminded the Court that there were other matters being litigated at the same time between the same parties. Ms Muhammad submitted, only after receiving instructions in Court, that, as a consequence, the Plaintiff believed that the other matters were being dealt with or concentrated on before this matter was to progress further. Ms Muhammad indicated that part of the problem was caused by the change of attorney with conduct of the matter.

THE FIRST DEFENDANT'S SUBMISSIONS

22. Mr Katan conceded that the Plaintiff did have 12 months in which to serve her Writ. Despite this, it is contended that the Writ should have been issued soon after receipt from the Court or, at the very least, after their letter written pursuant to Order 12 rule 8(a) had been sent. Mr Katan submits that this, coupled with the fact that the Writ was only served after the threat to issue a summons to dismiss the action, is evidence of the Plaintiff's approach which is to delay proceedings. It is contended that no explanation has been given for the reasons why the proceedings have been conducted in such a manner resulting in delay.

23. Mr Katan submits that the Plaintiff has not only failed to properly address the issue of delay prior to the service of the Writ but also following the service of the First Defendant's summons on 1st October 2008.

24. It is contended that the delay has prejudiced the Plaintiff. He has not, for over two years, been able to have access to funds which are held in the name of June Bugging Me Limited. It is submitted that he has been further prejudiced by having litigation hanging over his head for this period of time. This has been exasperated by the fact that, rather than the Plaintiff conducting her action in a proactive matter, it has had to be the First Defendant who has had to “chase” her “on numerous occasions to get her to do what she is obliged to do under the procedural rules...”

25. Mr Katan contends that the submissions made by Ms Muhammad have failed to adequately address the issue of delay. Mr Katan invites the Court to look globally at the approach to the proceedings by the Plaintiff rather than looking at certain acts post service of the writ in isolation.

THE LAW

26. Under Order 3, r 5(1) “the court may, on such terms as it thinks just, by order extend or abridge the period within which a person is required or authorised by (the) Rules..... to do any act in any proceedings.” It is clear that this Court has a discretion which may be exercised to extend time for the application for leave to continue the action. This discretion may be exercised if it avoids an injustice to the parties.

27. The principles to be applied were reviewed by the Court of Appeal in **Costellow v Somerset County Council [1993] 1 WLR 256**. The Plaintiff was claiming damages for personal injuries after slipping on some loose chippings. A letter before action was sent two days before the expiry of the limitation period, and a generally endorsed writ was issued the next day. The writ was served two days before the expiry of the four months of its validity. Three and a half months after the Statement of Claim should have been served, the defendants issued a summons asking for the action to be dismissed for default in serving the Statement of Claim, alternatively for failing to serve the medical report and schedule of damages under Order 18, r. 12(4), alternatively for want of prosecution. The plaintiff issued a cross –

summons seeking leave to serve the Statement of Claim out of time under Order 3, 5.5, but had no excuse for the delay. Sir Thomas Bingham MR stated:

“Cases involving procedural abuse or... questionable tactics...may call for special treatment. So, of course, will cases of contumelious and intentional default and cases where a default is repeated or persisted in after a peremptory order. But in the ordinary way, and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff’s action for want of prosecution unless the delay complained of after the issue of proceedings has caused a real risk of prejudice to the defendant. A similar approach should govern applications made under Orders 19, 24, 25, 28 and 34. The approach to applications under Ord.3, r.5 should not in most cases be very different. Save in special cases or exceptional circumstances, it can rarely be appropriate, on an overall assessment of what justice requires, to deny the plaintiff an extension (where the denial will stifle his action) because of a procedural default which, even if justifiable, has caused the defendants no prejudice for which he cannot be compensated by an award of costs. In short, an application under Ord.3, r.5 should ordinarily be granted where the overall justice of the case requires that the action be allowed to proceed.”

28. Following *Costellow*, the question came again before the Court of Appeal in the case of **Mortgage Corporation Limited v Sandoes [1996] TLR 751, 1996, Court of Appeal Transcript, 1634**. The principles in the *Costellow* case were reinforced. In that case, the plaintiff was seeking an extension of time for the exchange of witness statements and expert reports. The appeal was from a decision to refuse leave on the footing that unless there were good reasons for the failure to comply with the rules or directions of the court, the discretion to extend time would not be exercised. The Court of Appeal rejected the argument that the absence of good reason was always in itself sufficient to justify the court in refusing to exercise its discretion⁵, and held that the true position was that, on the approach should be that once a party was in default, it was for him to satisfy the court that, despite his default, discretion should nevertheless be exercised in his favour for which purpose he could rely on any

⁵ Approach that was followed in *Savill v Southend Health Authority [1995] 1 WLR 1254*

relevant circumstances. At page 752, the Court of Appeal laid down guidance as to the appropriate approach and these were reviewed and quoted as follows in **Finnegan v Parkside Health Authority [1998] 1 All ER 595 at page 602:**

“The court was acutely aware of the growing jurisprudence in relation to the failure to observe procedural requirements. There was a need for clarification as to the likely approach of the court in the future to non-compliance with the requirements as to time contained in the rules of directions of the court. What his Lordship said now went beyond the exchange of witness statements or expert reports: it was intended to be of general import.

Lord Woolf, Master of the Rolls, and Sir Richard Scott, Vice-Chancellor, had approved the following guidance as to the future approach which litigants could expect the court to adopt to the failure to adhere to time limits contained in the rules or directions of the court:

1. Time requirements laid down by the rules and directions given by the court were not merely targets to be attempted; they were rules to be observed.
2. At the same time the overriding principle was that justice must be done.
3. Litigants were entitled to have their cases resolved with reasonable expedition. The non-compliance with time limits could cause prejudice to one or more of the parties to the litigation.”

29. I note the guidelines 4 to 9 and set out guideline 10 as follows:

“In considering whether to grant an extension of time to a party who is in default, the court would look at all the circumstances of the case including the considerations identified above.”

30. The Court of Appeal in *Finnegan* followed the *Costellow* and *Mortgage Corporation* cases. The Court rejected the stricter approach that if no good reason was given that was the end of the matter. The Court of Appeal concluded:

“when considering an application for an extension of time....the court had the widest measure of discretion. Accordingly, in the absence of a good reason for any delay, delay was not in itself sufficient to justify the court in refusing to exercise its discretion to grant the extension, but the court was required to look at all the circumstances of the case and to recognise the overriding principle that justice had to be done. Since prejudice formed part of the overall assessment and was a factor that needed to be taken into account in deciding how justice was to be done, it followed that the judge had erred in entirely disregarding it.”

CONCLUSION

31. The timetable for various steps to be taken in proceedings may be extended by the Court. The correct approach is that followed by the Court of Appeal in England and Wales and in particular the guidance given in the Costello, Mortgage Corporation and Finnegan cases. It is important for litigants to realise that the time limits laid down in the Supreme Court Rules are intended to regulate the progress of litigation and to resolve disputed issues as speedily as possible. The Court should then look at the delays and shortcomings on the Plaintiff’s side and see what prejudice has been caused to the Defendant. When reviewing all the circumstances of the case the Court must have regard to the interest of justice.

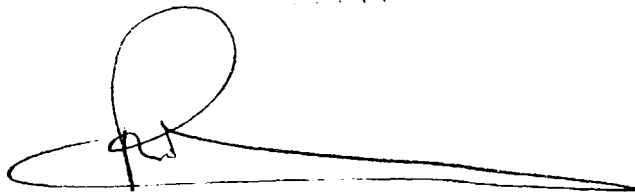
32. The Plaintiff after issuing the Writ, although in compliance with the rules, did not seek to progress this matter with any degree of urgency. The matter only moved on when the First Defendant sent a letter pursuant to Order 12 Rule 8(a) requiring service of the Writ. This was not served within the required 21 days but following a further later was the promptly served. The Writ was served shortly after. Ms Muhammad told the Court, which was not challenged, that during the 21 days period she had notified Mr Katan that she was having problems locating the Writ in the Plaintiff’s file. The further delay of just under two months to file the application for leave to continue the application pursuant to Order 15 r.12A(2) was partly due to the hurricanes that struck the Islands. The Plaintiff resides on the Island of South Caicos and it is reasonable to accept that the line of communication with her attorney would

have been affected. The Court is also cognisant of the fact that there are a number of other concurrent proceedings between these parties and this may have caused confusion as to which matters were being prioritised. However, the Court also notes that, even by the hearing on 24th April 2009, the Plaintiff had failed to properly serve her summons applying for an order for leave to continue the action for an extension of time.

33. The Plaintiff failed to file an affidavit in compliance with an unless order of 23rd October 2008. This has been dealt with in paragraph 11 above. Although there may be some criticism for the filing of the affidavit on the last day set out in the order, the late service has not caused delay or any prejudice to the First Defendant.

34. I do find that there have been some delays and shortcomings on the Plaintiff's side. However, it does appear that some criticism may be 'laid at the door' of the Plaintiff's attorneys rather than of the Plaintiff herself. Although I have carefully considered Mr Katan's forceful submissions, I do not accept that the default has caused the First Defendant any prejudice which cannot be compensated by an award of costs. I find that it would be too harsh on the facts of this case to deprive the Plaintiff of her claim because of the set out defaults, partly of her advisers, in complying with the rules. Having regard to the interests of justice, the right course is to allow the action to continue. I grant the Plaintiff an extension of time to apply for leave to continue this action.

35. I will hear from the parties in relation to any order as to costs.

A handwritten signature in black ink, consisting of a large, stylized loop at the top and a long, horizontal stroke extending to the right.

Richard Williams (J)