



IN THE SUPREME COURT

TURKS & CAICOS ISLANDS

CLAIM NO. 3/2020

BETWEEN:

ANTOINE FLORISCA

FIRST PLAINTIFF

JANET PETIOTE

SECOND PLAINTIFF

-v-

JEAN HUBERT MIDI

FIRST DEFENDANT

~~ELIE VALENTIN~~

~~SECOND DEFENDANT~~

EUGENE JOSE

THIRD DEFENDANT

JUDGMENT

Before: Registrar Narendra J Lalbeharry

Appearances: Ms. Natalie Douglas for the Plaintiff

Ms. Shantae Francis for the Defendant

Hearing Date: 30th November 2023

Venue: Virtual

Delivered: 19th January 2024



**STRIKING OUT PLEADINGS – DISMISSAL FOR WANT OF PROSECUTION- RSC
ORDER 25- EXTENSION OF TIME- DISCHARGE OF INJUNCTION-
CONTUMELIOUS DEFAULT – INORDINATE DELAY- INEXCUSABLE DELAY -
PREJUDICE**

CASES

Birkett v James[1978] A.C 297

Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co. Ltd [1968] 1 W.L.R per Justice Harman

Investments Ltd v Phillips Cutler Phillips Troy [1987] *the Times* September 16th

Roebuck v Mungovin [1994] 1 All ER 568 at 575, [1994] 2 AC 224

Biss v Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 at 132, [1978] 1 WLR 382

Dept of Transport v Chris Smaller (Transport) Ltd [1989] 1 All ER 897 at 905, [1989] AC 1197

Trill and another v Sacher and others [1993] 1 All ER 961

Allen's case [1968] 1 All ER 543 at 561, [1968] 2 QB 229 at 268.

Rath's case [1991] 3 All ER 679 at 688, [1991] 1 WLR 399 at 410

Shtun v Zalejska [1996] 3 All ER 411

Electricity Supply Nominees Ltd v Longstaff & Shaw Ltd (1986) 12 Con LR 1

Hornagold v Fairclough Building Ltd [1993] PIQR P400, (1993) *Times*, 3 June,

Rowe v Glenister (1995) *Times*, 7 August, [1995] CA Transcript 964

Slade v Adco Ltd (1995) *Times*, 7 December, [1995] CA Transcript 1779

INTRODUCTION

1. This is an application by the First and Third Defendants (hereinafter called “**the Applicants,**”) for orders that the Court strike out the Plaintiffs’ Writ of Summons and Statement of Claim for want of prosecution and discharge an interim injunction obtained by the Plaintiffs against the Applicants in 2020.
2. The application is made by summons dated October 30, 2023, and supported by the First Affidavit of Jean Hubert Midi dated December 23, 2022.

BACKGROUND

3. On January 3rd 2020, the Plaintiffs filed an application for an *ex parte* injunction against the First to Third Defendants and obtained an *ex parte* interlocutory injunction against the Defendants on January 13, 2020. A Writ of Summons was filed by the Plaintiffs on January 14th 2020 and the Statement of Claim filed on March 17th 2020. A Defence and Counterclaim was filed on 3rd June 2020.
4. On the facts, the Plaintiffs in this matter were both elected as President and Vice President respectively of the United Christian Baptist Church [“the Church”] and were also trustees of the said Church and a parcel of land described as 60504/251 & 252. The action was brought by both Plaintiffs in their capacity as members of the Executive Committee. The 1st Defendant was employed as Pastor of the Church in 2011 by the said Executive Committee and his said employment was terminated in November 2019. The 1st Defendant is also a trustee of the said parcel of land. The 2nd Defendant was hired as the assistant Pastor and also terminated in November 2019. The 3rd Defendant was appointed a non-voting member of the Executive Committee by the 1st Defendant as the Pastor representative. All three Defendants are Haitian nationals and migrated to the Turks and Caicos to take up the abovementioned positions.
5. At all material times the Plaintiffs and 1st Defendant were all signatories to the Church’s bank account. In or about late 2018 it is pleaded that the 1st Defendant unlawfully and unilaterally disbanded and dissolved the Executive Committee. In or about July 2019 the Church’s Financial Team raised concerns about rapid decreases in the Church’s bank account with the 1st Defendant, in response he dissolved the Financial Committee and took possession of all records pertaining to the finances of the Church. Subsequently the 1st Defendant closed the Church’s bank account and caused a cheque to be written with the balance of funds in the name of his Attorney Hugh O’ Neill. The Defendants then incorporated an entity with the Financial Services Commission as the Church. The Plaintiff claims all actions of the 1st Defendant are unlawful and invalid.
6. On 15th November 2019 the Executive Committee terminated the 1st and 2nd Defendants and obtained an injunction preventing them from entering the premises, It is pleaded however, that the Defendants retained possession of all records including the financial records of the Church’s finances. The Plaintiff’s claimed the following reliefs
 - a) A declaration that the first and second plaintiffs remain the July elected president and vice president of the executive committee for the United

Christian Baptist Church responsible for the administration of the church and its business activities

- b) A declaration that the notices of termination of employment dated 15th November 2019 issued by the plaintiffs and soothed upon the first and second defendants on or about 15th November 2019 are valid
 - c) A declaration that the first and two defendants are in breach of their fiduciary duties as trustees for the United Christian Baptist Church
 - d) An order for the removal of the first and third defendants as trustees for the United Christian Baptist Church
 - e) An order directing the defendants to provide to the plaintiffs a full accounting and respect of all funds collected by and or received from the United Christian Baptist Church and of the business operations dealings and assets of the United Christian Baptist Church
 - f) Damages to be assessed against the first and third defendants for breach of trust and unlawful interference
 - g) Damages to be assessed against a second defendant for dishonest assistance
 - h) Costs
7. A Directions Order by consent was prepared and signed by Attorneys for the Plaintiffs and Defendants dated Monday 7th September 2020. This Order gave directions for the furtherance of the matter. A trial date was inserted on the said Order.
8. As stated in the affidavit of Jean Hubert Midi filed 23rd December 2022, the March 2021 trial date was vacated and a new trial date of 28th September 2021 was agreed. On the 2nd of September 2021 the Defendants Attorney wrote to the Plaintiff's Attorney stating if the parties did not exchange list of documents within 7 days the Defendants intended to make an application to strike out the Plaintiff's Claim and to have the interim injunction discharged. Mr. Midi in his affidavit stated that from January 2022 there were no further correspondence in this matter and out of an abundance of caution a Notice of Intention to proceed was filed on the 17th of October 2022.
9. On the 5th of July 2023 the court wrote to both Counsel at the time indicating that the Defendants Summons to strike out the Plaintiff's Statement of Claim and discharge of the injunction was set down for hearing on the 14th day of July 2023 at 11.30am.
10. Ms. Douglas on behalf of the Defendants wrote to the Court on the 6th of July 2023 stating that a Notice of Change of Attorney was filed on the 12th of June 2023 and asked that the Summons be listed for a date in September 2023. The

matter was listed for hearing before Gruchot J on the 16th of October, then adjourned to the 30th of October and further adjourned to 15th November 2023.

11. On the 1st of November 2023 the Defendant filed a documents titled “Summons for Directions” seeking direction for *inter alia* the hearing of the Summons to strike out and also seeking further directions for the continuation of the matter.
12. On the 14th of November 2023 the Attorney for the Plaintiff filed a Summons seeking an extension of time to file and serve the Reply to Defence and Counterclaim.
13. This matter came up for hearing on the 15th of November 2023 before Gruchot J who directed as follows

“(1) Defendants Summons for Directions filed on 30th October 2023 is adjourned to a date to be fixed after the disposal of the Defendant’s Summons to Strike out the Writ filed on the 14th of January 2020 and Statement of Claim dated 17th March 2020.

(2) The Plaintiff’s Summons for an extension of time to defend the Counterclaim filed on the 14th November 2023 being short served is adjourned to a date to be fixed before the hearing of the Defendant’s Summons for Directions”.

14. These matters were scheduled and heard before me on the 30th of November 2023.

DEFENDANT SUMMONS

15. The Defendant Summons is a Summons to Strike out the Plaintiffs’ Statement of Claim. No reference was made to the RSC Order under which the Summons to strike out was made. In submissions Ms. Douglas seemed to be unclear as well which RSC Order the application was made under. At paragraph 5 of her submissions reference was made to **Birkett v James[1978] A.C 297 and to R.S.C Order 25 r.1.**
16. The court pointed out that striking out of pleadings fall under RSC Order 18 r.19 whereas RSC Order 25 r.1 (4) and (5) applies to dismissal of an action for want of prosecution. After seeking clarification, Ms. Douglas indicated that she intends to proceed with an application for dismissal pursuant to Order 25 r.1 and not striking out pursuant to RSC Order 18.

17. Ms. Douglas referred to *Birkett v. James* [1978] A.C. 297, 318F-G. In *Birkett* Lord Diplock relying on a note in the Supreme Court Practice (1976) to R.S.C., Ord. 25, r. 1, said:

"The power should be exercised only where the court is satisfied either **(1) that the default has been intentional and contumelious**, e.g., disobedience to a peremptory order of the court or conduct amounting to an abuse of the process of the court; **or (2)(a) that there has been inordinate and inexcusable delay** on the part of the plaintiff or his lawyers, **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 or between each other or between them and a third party."

[Emphasis mine]

18. In relation to Lord Diplock's first point above, intentional and contumelious default, Ms. Douglas submitted that the repeated applications for adjournments and the fact that the Plaintiffs' Reply appears to have been exchanged during the 'Covid period' but was never filed is evidence of *laxitu* of the Plaintiff's approach in prosecuting the case.

19. In relation to points 2(a) and (b) from Lord Diplock above Ms. Douglas submitted that there is inexcusable delay and that the Applicants have suffered damage to their reputations and are being continually prejudiced. Ms. Douglas ended her submissions by asking that the claim be struck out for want of prosecution and alternatively if the claim is not struck out, the ongoing injunction should be discharged.

20. Ms. Francis for the Plaintiffs submitted that on an application to strike out a statement of claim as set out in *Birkett v James* [1978] A.C. 297 at 318 the court must consider:

i. If there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers and;

ii. If 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.

21. Ms. Francis submitted that there was no inordinate and inexcusable delay. The reason for the delay was due to the illness of Counsel, who contracted Covid 19 at the end of December 2021 to January 2022, and upon Counsel's return to work other matters required urgent attention.

22. Ms. Francis submitted that notwithstanding the Plaintiffs' delay in respect of this matter, the Defendants filed their Defence and Counterclaim on 4 June 2020, arising out of the same facts and have also not taken any steps to progress their matter. The Defendants are equally guilty of the delay, and they now seek to utilize the Court's discretionary power to seek relief.
23. Ms. Francis also submitted that pursuant to RSC Order 15/2, the Defendants are also under a duty to prosecute its Counterclaim timeously and have failed to do so as stated in In *Zimmer Orthopaedic Ltd v Zimmer Manufacturing Co. Ltd [1968] 1 W.L.R per Justice Harman*
24. Ms. Francis submitted that the Defendants are guilty of the same conduct and is therefore equally to blame for the delay since the Defendants last correspondence prior to its application to strike out was 22 January 2022. Ms. Francis further submits that the appropriate remedy in light of the fact that the Defendant is also guilty of delay would be to dismiss the Defendants application to strike and proceed with directions for the progression of this matter. She further submits that the existing injunction does not provide any prejudice on the Defendants

PLAINTIFFS SUMMONS

25. The Plaintiffs on the 14th of November 2023 filed a summons for an extension of time to file their reply to the Defence and Counterclaim. At the hearing of this matter Ms. Francis admitted to two oversights. Firstly, she indicated that the Reply was available but never filed through an oversight. Secondly, she indicated that the reply was not exhibited to the affidavit in support of her application, which was also an oversight.
26. Ms. Francis referred to the Defendants Summons for Directions, where the Defendants agreed that the Reply should stand, given the understanding between counsel during the Covid period.
27. During this hearing, when questioned by the court Ms. Douglas stated that if the Summons to strike out was unsuccessful, she has no objections to the extension of time for the filing of a reply.

DISCUSSION

28. RSC 25 expressly empowers the Court to dismiss any action for want of prosecution. This can be done when either a party has been guilty of

contumelious default, or where there has been inordinate delay in the prosecution of the action.

CONTUMELIOUS DEFAULT

To establish contumelious default, it must be shown that there was a deliberate default in compliance with a peremptory order of the court or conduct amounting to an abuse of the process of the court. In this matter a directions Order was issued in September 2020 with a trial date listed for March 2021. This date was vacated due to non-compliance of directions by both sides. From the 2nd of September 2021 to 6th December 2021 there were several exchanges between the parties for exchange of documents. This was finally done on the 6th of December 2021. Thereafter no further action was taken. The Plaintiff in the affidavit of Zelma Hernandez alluded to the fact that emails were written but were never sent. On the facts there is no evidence to conclude that the Plaintiff deliberately refused to obey directions given in December 2020.

DELAY AND PREJUDICE

29. The second way an action may be dismissed is for delay. In a case where there has been no contumelious conduct by the plaintiff, the court, if it is to strike out an action for want of prosecution, must be satisfied (a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers 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, or between each other, or between them and a third party see **Birkett v James [1977] 2 All ER 801 at 805, [1978] AC 297 at 319** per Lord Diplock.

30. It must be shown that there has been 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 to cause serious prejudice to the defendants. Inordinate delay means materially longer than the time usually regarded by the profession and courts as an acceptable period. In establishing inexcusable delay, objectively. Further, prejudice to the defendants must be established as it must be shown that the lapse of time caused prejudice. As stated in James **Investments Ltd v Phillips Cutler Phillips Troy [1987] the Times September 16th** the prejudice to the defendant must be caused by delay since the issue of the writ, Evaluation of the degree of prejudice requires the context of such delay and the effect of the total lapse of time. The prejudice caused by the totality of the period of his delay

can be looked at, see Roebuck v Mungovin [1994] 1 All ER 568 at 575, [1994] 2 AC 224 at 234 per Lord Browne-Wilkinson.

31. The prejudice may take a variety of forms, but one recognized form is the impairment of the memory of witnesses (see Birkett supra). Another form consists of the prejudice to the defendant through having a serious claim hanging indefinitely over him (see Biss v Lambeth, Southwark and Lewisham Health Authority [1978] 2 All ER 125 at 132, [1978] 1 WLR 382 at 389 per Lord Denning MR). But the court should only in exceptional cases treat the anxiety which accompanies all litigation as alone being sufficient to justify dismissing an action (see Dept of Transport v Chris Smaller (Transport) Ltd [1989] 1 All ER 897 at 905, [1989] AC 1197 at 1209–1210 per Lord Griffiths).

32. In Trill and another v Sacher and others [1993] 1 All ER 961 Neill LJ formulated 14 principles and guidelines for use on an application to strike out for want of prosecution where it is not suggested that the plaintiff has been guilty of intentional and contumelious default. I have quoted below the principles relevant to this case
 - (1) *The basic rule is that an action may be struck out where the court is satisfied—*
 - '(a) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, 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 or between each other or between them and a third party.' Birkett v James supra
 - (2) *The general burden of proof on an application to strike out for want of prosecution is on the defendant.*
 - (3) *'Inordinate' delay cannot be precisely defined. 'What is or is not inordinate delay must depend on the facts of each particular case' Allen's case [1968] 1 All ER 543 at 561, [1968] 2 QB 229 at 268. It is clear, however, (a) that for delay to be inordinate it must exceed, and probably by a substantial margin, the times prescribed by the rules of court for the taking of steps in the action and (b) that delay in issuing the writ cannot be classified as 'inordinate' provided the writ is issued within the relevant period of limitation.*
 - (4) *Delay which is inordinate is prima facie inexcusable (Allen's case). It is for the plaintiff to make out a credible excuse. For example, difficulties with regard to obtaining legal aid may provide such an excuse.*

(11) *Prejudice to the defendant may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable.*

(12) *The prejudicial effect of delay may depend in large measure on the nature of the issues in the case. Thus the evidence of an eye witness or of a witness who will testify to the words used when an oral representation was made is likely to be much more seriously impaired by the lapse of time than the evidence of someone who can rely on contemporary documents. A defendant may also suffer some prejudice from prolonged delay in an action which involves imputations against his reputation, though this factor by itself is unlikely to provide a ground for striking out.*

(13) *When considering the question of prejudice and, if it is raised, the question whether there is a substantial risk that it will not be possible to have a fair trial of the issues in the action, the court will look at all the circumstances. It will look at the periods of inordinate and inexcusable delay for which the plaintiff or his advisers are responsible and will then seek to answer the questions: has this delay caused or is it likely to cause serious prejudice, or is there a substantial risk that because of this delay it is not possible to have a fair trial of the issues in the action? As Slade LJ stressed in Rath's case [1991] 3 All ER 679 at 688, [1991] 1 WLR 399 at 410: '... a causal link must be proved between the delay and the inability to have a fair trial or other prejudice, as the case may be.'*

(14) *An appellate court should regard its function as primarily a reviewing function and should recognise that the decision below involved a balancing of a variety of different considerations upon which the opinion of individual judges may reasonably differ as to their relative weight. Accordingly, unless intervention is necessary or desirable in order to achieve consistency where there appear to be conflicting schools of judicial opinion, the appellate court should only interfere where the judge has erred in principle.*

33. In Shtun v Zalejska [1996] 3 All ER 411 Peter Gibson LJ did an exposition of the law on dismissal using the following decisions:
- a. Electricity Supply Nominees Ltd v Longstaff & Shaw Ltd (1986) 12 Con LR 1 Mustill LJ said (at 6) *"The standard of what is inordinate is controlled by what has gone before. But this is only a partial solution, for if the effect of the long prior delay is to make it easier for the defendant to show that a short subsequent delay is culpable, it still leaves him with the task of showing that this short period of culpable delay has made an appreciable addition to the prejudice already caused by what is ex hypothesi a much longer antecedent lapse of time."*

- b. In Trill v Sacher [1993] 1 All ER 961, [1993] 1 WLR 1379 supra-Neill LJ summarized 14 principles and guidelines for use on an application to strike out for want of prosecution where no contumelious default was alleged.
- c. In Hornagold v Fairclough Building Ltd [1993] PIQR P400, (1993) Times, 3 June, In the court below Schiemann J (27 July 1992, unreported) had dismissed a personal injuries action for want of prosecution. The evidence before him included affidavits in which it had been stated that unspecified witnesses would have difficulties of recollection. Schiemann J expressed the view that it was not incumbent on the defendant always to identify the particular witnesses or the particular respects in which their evidence was impaired by the delay. In this court Roch LJ referred to Leniston and Benoit and the remarks of Mustill LJ in the Electricity Supply case and of Lord Griffiths in the Smaller case and said (at P409): *"The conclusion that I have reached, having regard to the authorities and especially to the judgment of Mustill L.J., and the opinion of Lord Griffiths, is that to succeed in an application to strike out a plaintiff's claim for want of prosecution a defendant must produce some evidence either that there has been a significant addition to the substantial risk that there cannot be a fair trial caused by the post-commencement of proceedings period, or periods of inordinate and inexcusable delay, or that there has been a significant addition to the prejudice to a defendant either as between the defendant and the plaintiff, or as between that defendant and another party to the action caused by such delay or delays. By saying that, I do not say that inference has no part to play in the process of resolving the issue of "more than minimal additional prejudice" or that the court cannot draw inferences from evidence contained in affidavits ..."*
- d. In Rowe v Glenister (1995) Times, 7 August, [1995] CA Transcript 964 Waite LJ identified four applicable principles:
(1) The onus of proving additional prejudice in the post-writ period lies on the defendant.
(2) The discharge of that onus will normally require evidence specifying the particular disadvantage suffered or anticipated by the defendant on which he relies as constituting additional post-writ prejudice, but in plain cases where such prejudice is self-evident the court may act on it without affirmative evidence. [I stress para (2) because it shows that Waite LJ accepted that in a clear case, even without affirmative evidence, prejudice may be inferred.]
(3) The prejudice relied on must be genuinely "additional" to prejudice existing at the date of the writ. If the defendant relies on prejudice of the

same kind as he has already suffered, he must show that the culpable delay has significantly increased his existing disadvantage.

(4) The consequence of (3) is that in cases where the head of additional prejudice relied on is the dimming of witnesses' memories through the passing of time, a generalised assertion that memories must have grown fainter during the period of post-writ delay will not do. The defendant must be able to demonstrate that in some specific respect particular witnesses have become disabled, by reason of the lapse of time during the period of culpable delay, from giving at the trial when in due course it takes place, evidence as cogent or as complete as the evidence which they would have been in a position to give if the trial had taken place at the date at which (had it not been for the culpable delay) it could in the ordinary course have been expected to be listed.'

- e. In **Slade v Adco Ltd (1995) Times, 7 December, [1995] CA Transcript 1779** this court heard an appeal from Judge J, who had struck out a personal injuries action for want of prosecution. Neill LJ said: *'The prejudicial effect of delay on a defendant and the effect of delay on the possibility of a fair trial will depend in large measure on the nature of the issues in the case. In some cases much of the evidence will be in documentary form or there will be in existence statements made soon after the relevant events which will enable witnesses to refresh their memories. In other cases, however, including many cases involving road accidents or industrial accidents where claims for damages for personal injuries are made, the crucial evidence may be largely oral and any statements made shortly after the event may be imprecise or incomplete. It follows therefore that each case is likely to depend on its own facts. The onus of proving prejudice or the impossibility of a fair trial rests on the person who asserts it ... An account must also be taken of the fact that delay may create difficulties for a defendant when he seeks to test by way of cross-examination the reliability of the plaintiff and his witnesses.'*

34. The 1st Defendant in a sworn affidavit filed on the 23rd of December 2022 in support of the application to discharge the injunction and the dismiss the Plaintiff's action for want of prosecution stated the following: -
- a. An ex parte injunction was granted against the Defendants on the 13th of January 2020
 - b. A Writ of Summons was filed on the 14th of January 2020 and served on the 17th of January 2020
 - c. The Statement of Claim was issued on 17th March 2020 and

- d. The matter came before the court on the 23rd of March 2020, wherein the Plaintiffs were ordered to apply to the court for leave to file and serve the Statement of Claim by the 14th of April 2020. This application was filed on the 4th of May but not served
 - e. The matter came before the court on the 6th of May 2020, the application could not proceed because the application was not filed in time and the affidavit was not sworn
 - f. On the 27th of May 2020 permission was granted to the Plaintiff and directions given for filing of a Defence and reply if necessary.
35. The 1st Defendant further stated that after several delays List of Documents were exchanged on the 6th of December 2021 with no further activities taking place. At paragraph 17 the 1st Defendant stated that he and the 3rd Defendant *“Are still bound by the terms of the injunction order and accordingly continue to be prejudiced by being unable to contact members of my congregation or to return to my church I continue to suffer financial losses arising from this prejudice”*. No evidence of the alleged prejudice was provided.
36. In order for the Defendant’s to succeed with this application, they must show that the delay, if inordinate or inexcusable will give rise to a substantial risk that it is no longer possible to have a fair trial of the issues or that such delay has caused serious prejudice to the defendants.
37. Neill LJ in Trill *supra* stated that inordinate delay depends on the facts of each case and for delay to be inordinate, it must exceed “and probably by a substantial margin” the time prescribed by the rules of court. RSC Order 25 provides that *“the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than 14 days.”*
38. In this matter a Defence and Counter Claim was filed on the 3rd of June 2020 following the directions order of 27th May 2020. No reply was ever filed. A directions Order by consent dated 7th September 2020 was entered giving directions for the progression of the matter and setting a trial date of 29th March 2021. The time table was not adhered to by both parties resulting in list of documents only being exchanged in December 2021 almost one year after it was supposed to be exchanged. Since that date no other directions were complied with. Effectively the consent order dated 7th September 2020 acted as a directions order, as a summons for directions was not filed.
39. In establishing inordinate delay, the Defendant must show that the Plaintiffs substantially exceeded the time for filing a Summons for Directions in this matter, further the Defendants actions must be inexcusable. However, after the

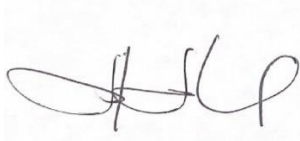
filing of the Defence and Counterclaim in June of 2020, both parties attempted to move the matter forward by agreeing to a directions order by consent to progress the matter, obviating the need for a Summons for Directions. Therefore, it cannot be said that the Plaintiff was guilty of inexcusable delay in filing a Summons for Directions as there was no need for one. The facts show that the only delay existing is that in following the directions order of 7th September 2021 to which both parties are culpable.

40. On the facts the Defendants have not shown that the Plaintiff was guilty of inexcusable delay. In the event, assuming that delay was established, Ms Francis submitted that as a credible excuse for delay, previous Counsel in this matter did contract the Covid-19 virus between December 2021 and January 2022 which caused a serious disruption to this and other matters. Continuing with the alternative assertion on the assumption that inexcusable delay had been established, the Defendants must show prejudice.
41. The only prejudice raised by the 1st Defendant in his affidavit was that being bound by the injunction continues to prejudice him, as he is not able to contact the congregation, to return to the church and that he continues to suffer financial losses. No other evidence was provided in support of these statements. It is to be noted here that it is alleged that the 1st Defendant is in control of all finances of the Church's account. Factually, this is a case based on law, which concerns the legality of the actions of the 1st Defendant and the defendant has failed to provide sufficient evidence showing that any delay (which has not been found to be inexcusable delay) did in fact prejudice the Defendants. Furthermore no additional evidence have been provided by the Defendants showing that any existing prejudice has created a substantial risk to the defendant having a fair trial. I again refer to the words of Roch LJ supra

“to succeed in an application to strike out a plaintiff's claim for want of prosecution a defendant must produce some evidence either that there has been a significant addition to the substantial risk that there cannot be a fair trial caused by the post-commencement of proceedings period, or periods of inordinate and inexcusable delay, or that there has been a significant addition to the prejudice to a defendant either as between the defendant and the plaintiff, or as between that defendant and another party to the action caused by such delay or delays. By saying that, I do not say that inference has no part to play in the process of resolving the issue of “more than minimal additional prejudice” or that the court cannot draw inferences from evidence contained in affidavits ...”

DECISION

42. The Defendant's Summons to dismiss the Writ and Statement of Claim is dismissed. This matter is to be urgently listed before the Registrar for a Directions hearing with strict timelines to be agreed.
43. In consideration of the non-objection of Counsel in relation to the Plaintiff's application for extension of time to file and serve its reply, leave is granted for the Plaintiff to file and serve its Reply in this matter.
44. On the issue of costs, the Plaintiff to pay the Defendants costs on the Defendants application. On the Plaintiff's application no order as to costs.



Narendra J. Lalbeharry
Registrar
Supreme Court Turks and Caicos Islands