COMMONWEALTH OF THE BAHAMAS
IN THE SUPREME COURT

COMMONLAW AND EQUITY DIVISION

2012/CLE/gen/01592

BETWEEN

PEACE HOLDINGS LIMITED

Plaintiff

AND

FIRSTCARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Defendant

(by Original Action)

AND BETWEEN:-

FIRST CARIBBEAN INTERNATIONAL BANK (BAHAMAS) LIMITED

Plaintiff

AND

PEACE HOLDINGS LIMITED

First Defendant

ALBERT BALLARD

Second Defendant

LAKE PROPERTY HOLDINGS LIMITED

Third Defendant

(by Counterclaim)

Before:	**Her Ladyship The Honourable Madam Justice Deborah Fraser**
Appearances:	**Mr. Philip Lundy for Peace Holdings Limited and Albert Ballard**
	Mr. Christopher Jenkins KC and Mr. Ramonne Gardiner for First Caribbean International Bank (Bahamas) Limited
	No Appearance for Lake Property Holdings Limited
Judgment Date:	**27 April 2023**

Breach of Contract - Striking Out – Want of Prosecution – Abuse of the Court's Process – Hearing an application in the absence of a party

JUDGMENT

Background

1. By a series of loan transactions between 2006 and 2012, First Caribbean International Bank (Bahamas) Limited ("**Bank**") provided financing in excess of $30,000,000.00 ("**Loan Amount**") to Peace Holdings Limited ("**Peace**") in respect of the development of a 79-unit condominium complex on Paradise Island, The Bahamas known as Ocean Place on the Harbour ("**Ocean Place**").

2. The Loan Amount was secured, *inter alia,* by a debenture dated 28 April 2006 ("**Debenture**") executed by Peace and an equitable deposit of deeds by Lake Property Holdings Limited ("**Lake**") recorded by a Collateral and Supplemental Memorandum of Deposit of Deeds also dated 28 April 2006 ("**Lake Property Deposit of Deeds**"). There was also a personal guarantee executed by Mr. Albert Ballard ("**Mr.Bullard**"), the Vice President, Secretary and Managing Director of Peace.

3. The Debenture included a fixed charge over Ocean Place and an undeveloped tract of land known as Parcel 1A in Prospect Ridge, The Bahamas ("**Parcel 1A**"). The Debenture included the right of the Bank to appoint receivers to realize the charged property, or any part thereof.

4. Pursuant to the Lake Property Deposit of Deeds, Lake granted an equitable mortgage to the Bank against an undeveloped tract of land adjoining Parcel 1A ("**Parcel 1C**"). The Lake Property Deposit of Deeds also expressly included the right of the Bank to appoint receivers to realize the assets charged thereby to satisfy the indebtedness of Peace to the Bank.

5. Parcels 1A and 1C are adjoining parcels of approximately 15 acres each together forming a roughly 30-acre plot between Prospect Ridge Road and Baha Mar Boulevard. These parcels are referred to together as "the Prospect Ridge Properties".

6. By letter dated 18 October 2012, the Bank demanded from Peace, Lake and Mr. Ballard the repayment of US$37,079,441.39, representing the total indebtedness of Peace to the Bank as at that date, including interest. This demand was unanswered.

7. Consequently, the Bank exercised its right to appoint a receiver and receiver managers over the assets of Peace and Lake.

8. Subsequent to this, Peace filed a Generally endorsed Writ of Summons on 26 November 2012 and a Statement of Claim on 03 January 2013. Peace pleaded that the Bank was in breach of contract by failing to provide the requisite funding for the construction and completion of Ocean Place and further claimed that the Bank was micromanaging the project and being obstructive, which caused a delay in completion of Ocean Place. Peace claimed: (1) Specific Performance of the requisite loan agreements, (2) damages for delayed performance; (3) damages for breach of contract; (4) Interest; (5) Costs; and (6) Such other and further relief the Court deems just.

9. The Bank, in turn, filed a Defence and Counterclaim on 26 February 2013 and an Amended Defence and Counterclaim on 05 February 2014 denying the allegations of the Writ of Summons and Statement of Claim. It claimed, as against Peace: (1) judgment in the amount of $38,115,557.33, (2) an Order for the sale of Ocean Place, the property upon which Ocean Place was constructed on, the Prospect Ridge Properties, and/or any part or parts thereof by the Receivers and/or the Bank; (3) Damages (including enforcement fees and any further liabilities of Peace) due under the loan documents and facilities as at the date of judgment; (4) Interest; (5) Costs and (6) such further relief the Court deems just. As against Mr. Ballard: (1) judgment in the amount of $38,003,856.99; (2) damages; (3) interest; and (4) such further the relief the Court deems just.

10. Mr. Ballard filed a Defence and Counterclaim on 11 July 2013 claiming that he is not validly committed to pay the debts as alleged by the Bank in its Defence and Counterclaim and as such Mr. Ballard holds the Bank to strict proof. He further claims that he is not validly committed to pay the debts and that, even if he is validly committed, the Bank has misrepresented to Mr. Ballard and Peace, by virtue of things said and done, that the Bank would provide funding for the completion of Ocean Place. He requested the Court grant: (1) a declaration that the Debenture inclusive of the Supplemental and Collateral Memorandum of Deposit Deeds are invalid and unenforceable; (2) a declaration that the purported guarantees in favor of the Bank are invalid and unenforceable; (3) further or alternatively, damages; (4) interest; (5) costs; and (6) such further or other relief as the Court deems just.

11. Even though Lake was enjoined as a party to this action, no appearance or any court filings have taken place.

12. There were a multitude of subsequent filings of Court applications by all relevant parties, however, the substantive court action never gained any traction.

13. On 27 February 2019, a Notice of Intention to Proceed was filed on behalf of Peace. To date, the matter remains extant. On 10 May 2022 the Bank then filed a Summons and the Affidavit of Simon Townend requesting the Court to: (1) Strike Out the Writ of Summons and Statement of Claim of Peace and the Counterclaim of Mr. Bullard for Want of Prosecution and because such pleadings are an abuse of the Court's process and (2) order Peace and Mr. Bullard to pay the Bank's costs, to be taxed, if not agreed.

14. Peace, Mr. Bullard nor Lake made any subsequent filings in response to the Bank's Summons and Affidavit nor have any submissions been laid over to the Court.

15. On 10 November 2022, Charles Sr. J. made an order in the following terms:

> **"1. Leave is granted to Miriam Curling & Co to withdraw as Counsel for Peace should such leave be necessary;**
>
> **2. The Bank shall serve this Order, the documents comprising the Strike Out Application and all supporting documentation, via email on Mr. Phillip Lundy of Priderock Law Chambers and at the last known email address for the Second Defendant [by Counterclaim] on behalf of Peace;**

3. The Bank shall serve any additional documents requiring service on Peace at the last known email address for the Second Defendant with a copy to Mr. Phillip Lundy of Priderock Law Chambers;

4. Peace and Mr. Ballard shall lodge any submissions opposing the Strike Out Application on or before 24th November 2022; and

5. The hearing of the Strike Out Application filed on 10th May 2022 shall occur on 17th January 2023 at 10:00am in the forenoon (emphasis added)"

ISSUES

16. The issues that this Court must decide are: (i) Whether the Writ of Summons, Statement of Claim of Peace and Counterclaim of Mr. Ballard should be Struck Out for Want of Prosecution? (ii) Whether the Writ of Summons, Statement of Claim of Peace and Counterclaim of Mr. Ballard should be Struck Out as an Abuse of the Process of the Court?

DISCUSSION

(I) Whether the Writ of Summons, Statement of Claim of Peace and Counterclaim of Mr. Ballard should be Struck Out for Want of Prosecution?

17. The Bank brought this application under (i) Order 18 rule 19; (ii) Order 34 Rule 2(2) of the Rules of the Supreme Court ("**RSC**"); and (iii) the inherent jurisdiction of the Court. Order 18 rule 19 of the RSC provides:

> **"19. (1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that —**
>
> **(a) it discloses no reasonable cause of action or defence, as the case may be; or**
>
> **(b) it is scandalous, frivolous or vexatious; or**
>
> **(c) it may prejudice, embarrass or delay the fair trial of the action; or**
>
> **(d) it is otherwise an abuse of the process of the court"**

18. Order 34 Rule 2(2) of the RSC states:

> **"2. (1) Every order made in an action which provides for trial before a judge shall, whether the trial is to be with or without a jury and wherever the trial is to take place, fix a period within which the plaintiff is to set down the action for trial.**

(2) Where the plaintiff does not, within the period fixed under paragraph (1), set the action down for trial, the defendant may set the action down for trial or may apply to the Court to dismiss the action for want of prosecution and, on the hearing of any such application, the Court may order the action to be dismissed accordingly or may make such order as it thinks just"

19. The significance of pursuing a claim in a timely manner was highlighted in the case of **Vadale v Major of Port of Spain [1968] 13 WIR 299** ("**Valdale**"). At page 305 of ***Vadale***, Fraser JA stated:

> **"Dismissal is no doubt a stern measure, but it is the duty of a plaintiff and his advisers to get on with the action. Cases should proceed expeditiously and if necessary the courts should enforce expedition and in a proper case strike out an action for want of prosecution."**

20. In **Icebird Limited v Winegardner [2009] UKPC 24**, ("**Icebird**") the Privy Council discussed the law in The Bahamas relating to applications for Striking Out for Want of Prosecution. Lord Scott at paragraph 8 noted:

> **"8. Birkett v James [1978] AC 297 remains, in their Lordships' opinion, the leading authority for the approach to be taken to an application to strike-out an action for want of prosecution. The House of Lords endorsed the principles set out in the then current Supreme Court Practice, namely, that the power to strike-out should be exercised only where the court was satisfied-**
>
> > **'….either (1) that the default has been intentional and contumelious eg disobedience <u>to a peremptory order of the court or conduct amounting to an abuse of the court</u>, 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 them and a third party.(emphasis added)'"**

21. The Bahamian Supreme Court decision of **Re Harris [1998] BHS J. No. 182** also discusses principles in relation to Striking Out for Want of Prosecution. There, Dunkley J (acting) stated as follows at paragraphs 38-42:

> **"38. There are two distinct, though related, circumstances in which an action may be dismissed for want of prosecution, namely, (a) when a party has been guilty of intentional and contumelious default, and (b) where there has been inordinate and inexcusable delay in the prosecution of the action (Allen v Sir Alfred McAlpine**

& Sons Ltd. [1968] 2 Q.B. 229; [1968] 1 All E.R. 543, C.A., approved in Birkett v James [1978] A.C. 297, [1977] 2 All E.R., 801, H.L.).

39. Under (b) above, an action may be dismissed for want of prosecution where: (a) there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (b) 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 ior is such as is likely to cause or to have caused serious prejudice to the defendants either ras between themselves and the plaintiff or between each other or between them and a thir party: Birkett v James [1978] A.C. 297 at 318; [1977] 3 W.L.R. 38; [1977] 2 All E.R. 801, H.L.

40. "Inordinate" means "materially longer than the time usually regarded by the profession and Courts as an acceptable period" (Birkett v James, above)

41. "Prejudice" to the Applicants is a matter of fact and degree…Prejudice the actual conduct of the trial, but includes, inter alia, prejudice to the defendant's business interests (Department of Transport v. Chris Smaller (Transport) Ltd [1989] 1 All E.R. 897, H.L.)."

22. Furthermore, in the Bahamian Supreme Court case of **Bussoz v Thiery [2001] BHS J. No. 28**, Osadebay Sr. J (as he then was) noted the following in his judgement at paragraphs 20-21:

> **"20. In considering this matter I bear in mind the statement of Lord Griffiths in Ketteman vs. Hansel Properties Ltd (1987) A.C. 189 when he said:**
>
> > **"Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interest of the whole community, legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.""**

23. Osadebay Sr. J. (as he then was) at paragraphs 24 and 25 also stated:

> **"24. Thus the Plaintiffs' inactivity for a period of two (2) years was sufficient basis for the Court to dismiss the action, "notwithstanding that there was no risk that fair trial would not be possible and notwithstanding that the Defendant had not suffered any identifiable prejudice. This principle has been adopted and followed in a number of cases…**
>
> **25. <u>In these cases the Court acted mainly on the inactivity of the Plaintiff lasting over periods of upwards of two (2) years. In doing</u>**

so the Court emphasized that "a series of separate inordinate and inexcusable delays in complete disregard of the rules of court and with full awareness of the consequences" may constitute good ground for such dismissal." (emphasis added)"

24. In the Bank's submissions, it asserts that there has been an inordinate delay by Peace to prosecute its claim and on the part of Mr. Ballard to prosecute his Counterclaim. This Court agrees. The initial pleadings were filed herein back in 2013. Peace had a myriad of filings subsequent, but no Notice of Intention to Proceed was filed until 2019. After this filing, no other progress of this matter has taken place, save and except this application being made by the Bank. It is now some four (4) years later since the filing of the Notice of Intention to Proceed. The Court finds this inordinate and, in line with the aforementioned authorities, rules that Peace's Writ of Summons and Statement of Claim along with Mr. Ballard's Defence and Counterclaim should be struck out for Want of Prosecution.

(II) Whether the Writ of Summons, Statement of Claim of Peace and Counterclaim of Mr. Ballard should be Struck Out as an Abuse of the Process of the Court?

25. In **Grovit v Doctor [1997] 2 All ER 417** Lord Woolf outlined when an action could be struck out on the basis of an abuse of process. The learned judge stated:

> **"To commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action. The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution. However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock in Birkett v James. In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.(emphasis added)"**

26. In ***Icebird***, Lord Scott at paragraph 7 stated:

> **"As Lord Woolf noted, delay in prosecuting an action and abuse of process are separate and distinct grounds on which an application to strike-out the action may be made but may sometimes overlap. Want of prosecution for an inordinate and inexcusable period may justify a striking-out order but "if there is an abuse of process, it is not strictly necessary to establish want of prosecution" (647H). Where, however, there is nothing to justify a strike-out order other than a long delay for which the plaintiff can be held responsible,**

> **the requisite extent or quality of the delay necessary to justify the order ought not, in their Lordships' respectful opinion, to be reduced by categorizing the delay as an abuse of process without clarity as to what it is that has transformed the delay into an abuse and, where necessary, evidential support. In Grovit v Doctor the added factor was the judge's finding made on the evidence, that the plaintiff had lost interest in the libel proceedings he had commenced and had no intention of prosecuting them to judgement. No comparable finding had been made by Lyons J in the present case and the evidential basis for any comparable finding is not apparent to their Lordhips. (emphasis added)"**

27. It too was observed in **Edwards v Johnson [2010] 3 BHS J No. 15** at paragraph 27 that:

> **"27. It is clear therefore that to maintain an abuse of process claim on the Grovit v Doctor basis there must not simply be evidence of delay, but evidence from which a court can find that the plaintiff has no intention of prosecuting the claim."**

28. By several affidavits (namely, the Affidavit of Vernon Clarke along with the Second, Third and Fourth Affidavits of Vernon Clarke), the Bank evidenced all means of service in accordance with orders of the Court. Accordingly, all parties had notice of the Bank's Striking Out Application in advance of the hearing.

29. To date, Peace nor Mr. Ballard made any filings, submissions or provided the Court with any explanation as to why no further movement of their respective claims has occurred – despite an order of the Court directing them to lodge any submissions opposing the Striking Out Application being in place. It is to be noted that there has been no subsequent responses or filings by Peace or Mr. Ballard in relation to progressing their respective claims since 2019. Furthermore, there has been no response by Peace nor Mr. Ballard to the Bank's several affidavits nor to the Bank's Striking Out application.

30. The Court notes the pronouncements of Charles J in **Arnett v Farrington and another [2017] 2 BHS J. No. 110**. There, the court had to consider granting summary judgement against a defendant who did not appear on the day of the hearing. At paragraph 30, Charles J stated:

> **"30….The Defendants have failed and/or refused to file any affidavit evidence in this application……."**

31. The Court granted final judgement, despite the non-appearance of the defendant.

32. The hearing of an application in the absence of a party was also discussed in **The Queen v The Rt. Hon. Perry G. Christie, Prime Minister of the Commonwealth of The Bahamas (in his capacity as Minister responsible for Crown Lands); Ex Parte Coalition to Protect Clifton Bay [2017] 2 BHS. J. No. 57**. There, Bain J had to consider whether Her Ladyship should hear a recusal application in the absence of the Fifth Respondent, the party who brought the application before the court. At paragraphs 46-47 and 52-53, Bain J stated:

"46 <u>The court shall consider the non-attendance of the Fifth Respondent pursuant to the order of the court as a separate issue and shall not delay these proceedings any further because of the non-attendance of the Fifth Respondent</u>.

47 <u>The court shall not allow the court to be used by the Fifth Respondent. The court is not at the beck and call of the Fifth Respondent…..The court shall hear the application in the absence of the Fifth Respondent</u>….

52 <u>The court shall not allow the non-attendance of Peter Nygard to further delay the hearing of these proceedings</u>.

53 <u>The court shall hear the Amended Notice of Motion…in the absence of the Fifth Respondent.</u> (emphasis added)"

33. All parties had ample notice of this application. Peace and Mr. Bullard elected not to resist or respond to the application – despite having nearly a year's time to respond. They have also chosen not to comply with the 10 November 2022 Order

34. Additionally, the inactivity and silence of Peace and Mr. Ballard, despite a Striking Out application being filed by the Bank nearly a year ago with subsequent service of same on them, makes this Court believe that their respective actions have been wholly abandoned.

35. In the circumstances and by virtue of the mentioned authorities along with Order 34 rule 2(2) of the RSC, this Court rules that there has been an abuse of the Court's process and thus, the Writ of Summons and Statement of Claim of Peace as well as the Defence and Counterclaim of Mr. Bullard are struck out and thereby dismissed.

<u>CONCLUSION</u>

36. In the circumstances and in accordance with Order 18 rule 19 and Order 34 rule (2)(2) of the RSC, the Writ of Summons, and Statement of Claim of Peace along with the Defence and Counterclaim of Mr. Ballard are all struck out and dismissed for Want of Prosecution and because such pleadings are an abuse of the process of the Court.

37. Peace and Mr. Ballard shall pay the Bank's costs for this application and for the substantive trial, to be assessed if not agreed.

Justice Deborah Fraser

Dated this 26th day of April 2023