IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2016/CLE/gen/01196

B E T W E E N

STELLAR ENERGY LIMITED

First Plaintiff

-AND-

STELLAR WASTE TO ENERGY (BAHAMAS) LIMITED

Second Plaintiff

-AND-

RENWARD WELLS

First Defendant

-AND-

MINISTRY OF WORKS & URBAN DEVELOPMENT

Second Defendant

-AND-

THE ATTORNEY GENERAL

Third Defendant

-AND-

ALLEN, ALLEN & COMPANY

Fourth Defendant

-AND-

FRANK FORBES (SIGMA HOLDINGS LIMITED)

Fifth Defendant

Before: The Honourable Mr Justice Neil Brathwaite

Appearances: Mr. Osman Johnson for the Plaintiffs

Mr. Gregory Moss for the First Defendant

Hearing date(s): 13 December 2022 and 20 January 2023

JUDGMENT

INTRODUCTION & BACKGROUND

[1.] By Summons filed 22 February 2021, the First Defendant made an application pursuant to Order 18 Rule 19(1)(a),(b) and (d) of the Rules of the Supreme Court and pursuant to the inherent jurisdiction of the Court to strike out a summons filed by the Plaintiffs on 16 October 2019 which sought to extend the time to appeal a decision of the former Deputy Registrar Carol Misiewicz made on 8 March 2019. The First Defendant made this application on the grounds that the Plaintiffs are contemnors, as they had not complied with an order made by the Court of Appeal dated 15 October 2019. Additionally, the First Defendant claims that the Plaintiffs are guilty of inordinate and inexcusable delay in making the application, which was in excess of seven months following the date of the Ruling without any reason or explanation for the delay. The First Defendant further claims that the Summons should be struck out as the Plaintiffs have delayed in having the said Summons listed for hearing since its filing and have attempted to frustrate the First Defendant in the enjoyment of the finality and certainty of the dismissal of the action against the First Defendant. Moreover, in the alternative, the First Defendant alleges that the Plaintiff's claims in the action do not disclose a reasonable cause of action against the First Defendant and/or are scandalous, frivolous or vexatious and/or are otherwise an abuse of process of the court.

[2.] The Deputy Registrar on 8 March 2019 struck out the Plaintiffs' claim against the First, Fourth and Fifth Defendants with costs to be paid on the basis that the court was "*satisfied that the Plaintiff does not have a good arguable case against any of the defendants*". The Plaintiffs filed a Notice of Appeal in the Court of Appeal on 22 March 2019 to appeal the Ruling of the Deputy Registrar. The Plaintiffs (Appellants) then filed a Notice of Withdrawal of Appeal on 15 October 2019. The appeal was dismissed by the Court of Appeal of even date and the Plaintiffs were ordered to pay to the First, Fourth and Fifth Defendant costs in the amount of $20,000.00. The costs remain unpaid. The Plaintiffs then filed a Summons on 16 October 2019 to Extend the Time to Appeal the Deputy Registrar's ruling.

THE FIRST DEFENDANT'S CASE

[3.] The First Defendant seeks to have the Plaintiffs' summons to extend the time to appeal struck out pursuant to Order 18 Rule 19 of the RSC and otherwise pursuant to the inherent jurisdiction of the

court as it does not disclose a reasonable cause of action, being scandalous, frivolous and vexatious and otherwise an abuse of the process. The First Defendant submits that the Court has an inherent jurisdiction to protect its integrity and to strike a summons that has been filed but has not been listed for hearing for an inordinate time, which is doomed to fail, or which has been filed for an ulterior motive, as it is an abuse of the court's process. The First Defendant relied on **Rose v Rose** [2003] All ER (D) 321 (Mar), **Foster v Foster** [2011] (2) CILR 89 and **Attorney General v Arnold and another** [2014] 2 BHS J. No. 8.

[4.] In any event, the First Defendant contends that the Court will not hear a contemnor unless and until he has first purged his contempt. (*see.* **Hadkinson v Hadkinson** [1952] 2 All ER 567). It is the First Defendant's position that the Plaintiffs are in contempt as they have failed to satisfy the costs order made by the Court of Appeal on 15 October 2019, as a result of which their application to extend the time to appeal should not be heard by the Court. If the Court was minded to accede to the Plaintiffs' application, then an Unless Order should be made to the effect that the application would be dismissed unless the Plaintiffs pay to the First, Fourth and Fifth Defendants the $20,000.000 costs.

[5.] The rule in **Hadkinson** contains an exception where the purpose of the application is to appeal against the order which the applicant has disobeyed. However, the First Defendant posits that the Plaintiffs do not fall within this exception as there exists an exception to the exception laid down by *Brandon LJ* in the case which the Plaintiffs do fall within. That is, the Court should not hear the application by the applicant where the appeal against the order can be shown to be an abuse of the process of the Court. The First Defendant contends that striking out a Summons as being an abuse of the process is materially distinct from striking out for want of prosecution, which they are not relying on, and cited *Lord Wolff* in **Grovit and others v Doctor and others** [1997] 2 All ER 417, HL.

[6.] The First Defendant posits that there is no automatic right to appeal from an interlocutory judgment as leave must be obtained by the Plaintiffs to appeal the ruling. Further, that the Plaintiffs have failed to make said application for leave within 5 days of the ruling as required by Order 58 rule 1 of the RSC and have not filed an Affidavit outlining the reasons for their delay in making the

application for an extension of time to file an appeal against the Ruling following **Turner and others v Turner and others** [2013] 2 BHS J. No 52. It is the First Defendant's position that the Plaintiffs' summons amounts to an abuse of the process as they filed the summons with no intention of bringing it to a conclusion which justifies a dismissal of the proceedings. They say that the Summons was used by the Plaintiffs as a tactic to pressure the First Defendant to exert pressure on the Bahamian Government to settle the unfounded claims of the Plaintiffs, to revive unfounded assertions against the First Defendant which were dismissed in the substantive action, to use the Summons as a means of disparaging the personal and political reputation of the First Defendant, and to frustrate the finality of the dismissal of the action.

[7.] In the alternative, the First Defendant posits that the Plaintiffs claims in the action are an abuse of process as they are statute barred pursuant to section 12 of the Limitation Act, and are prohibited against the First Defendant by section 12 of the Crown Proceedings Act and section 49 of the Interpretation and General Clauses Act. The First Defendant contends that the claims are not actionable in law by the First Plaintiff as the First Plaintiff was not a party to the said Letter of Intent, and neither is the Second Plaintiff as it did not execute the said Letter of Intent. The First Defendant claims that the Letter of Intent was subject to contract and numerous unfulfilled preconditions, and automatically terminated on 3 July 2015. The First Defendant seeks costs against the Plaintiffs for this application.

THE PLAINTIFFS' CASE

[8.] The Plaintiffs submit that the First Defendant's application to have the Plaintiffs' summons struck out pursuant to Order 18 Rule 19 RSC is procedurally incorrect as this rule does not create the statutory framework to do so. The Plaintiffs contend that Order 18 Rule 19 RSC empowers the court to strike pleadings from the record as opposed to a Summons and in any event, the application does not meet the threshold in law required to strike a Summons before the Court. The Plaintiffs rely on **Florida Marine and Carey Marine International T/A Carey Marine and New Hope Holding Co. Ltd** 2008/CLE/FP/00218 to assert that a Summons does not constitute "pleadings" as they are referred to in Order 18 Rule 19. They say that the First Defendant's application is a

collateral attack on the Plaintiffs' right to relief before the Supreme Court, which increases the loss, damage and expense to the Plaintiffs.

[9.] The Plaintiffs contend that they have not surpassed the limitation period for bringing the action pursuant to section 12 of the Limitation Act as they filed the Summons to extend time within the stipulated 12 months following the ceasing of injury or damage occasioned by the First Defendant. The Plaintiffs posit that Parliament's intention in section 12 of the Act was not to impose a one-year limitation in actions against the Crown, and if so, then section 4 of the Crown Proceedings Act would not exist. The Plaintiffs further contend that the action is actionable in law as causes of action in contract and tort were specifically pleaded against the First Defendant. They further submit that even if a limitation defence were to apply, that would not prevent the bringing of an action, as "Where it is thought to be clear that there is a defence under the Limitation Act, the defendant can either plead that defence and seek the trial of a preliminary issue or, in a very clear case, he can seek to strike out the claim on the grounds that it is frivolous, vexatious and an abuse of the process of the court and support his application with evidence. But in no circumstances can he seek to strike out on the grounds that no cause of action is disclosed. [**Ronex Properties Ltd. v John Laing Construction Ltd.** [1982] 3 All ER 961 at 966.]

[10.] The Plaintiffs assert that the First Defendant had actual and/or ostensible authority on behalf of the Bahamian Government as Parliamentary Secretary to enter into a contract with the Plaintiffs. Therefore, they say that the First Defendant is estopped from denying his corresponding liability for his acts and or omissions, and rely on **Freeman & Locker v Buckhurst Park Properties (Mangal) Ltd.** [1964] 2B 480 and **Pharmed Medicare Private Limited v Univar Ltd.** [2002] EWCA Civ 1569 in this regard.

[11.] In any event, it is the Plaintiffs' position that the Summons is sufficient to entitle the Plaintiffs to the relief prayed for and that it does not represent the plain and obvious case in which it should be struck out. They say that the First Defendant's application is an attempt to drive the Plaintiffs from the judgment seat by asking the Court to prematurely decide on differences of law without a trial. They submit that their respective causes of action are arguable and that there are no credible grounds upon which they should be refused a hearing in court by an order of the judge. The

Plaintiffs contend that the First Defendant's Summons to strike out is an abuse of process that has no statutory basis and was not prosecuted within a reasonable time and therefore should be dismissed.

LAW & ANALYSIS

[12.] I shall consider both the Plaintiffs application to extend the time to appeal and the First Defendant's application to strike out the Plaintiffs' summons. The questions for this Court to consider are whether the Plaintiffs have satisfied the court that time to appeal should be extended in this matter, and/or whether the application should be struck out or dismissed.

Appeal from a decision of a Registrar

[13.] Generally, Order 58 Rule 1 of the RSC provides that an appeal from a decision of a Registrar should be made by notice to the parties within 5 days after the judgment or decision was given. It provides:

> "1. (1) An appeal shall lie to a judge in chambers from any judgment, order or decision of the Registrar.
>
> (2) The appeal shall be brought by serving on every other party to the proceedings in which the judgment, order or decision was given or made a notice to attend before the judge on a day specified in the notice.
>
> (3) Unless the Court otherwise orders, the notice must be issued within 5 days after the judgment, order or decision appealed against was given or made and served not less than 2 clear days before the day fixed for hearing the appeal.
>
> (4) Except so far as the Court may otherwise direct, an appeal under this rule shall not operate as a stay of the proceedings in which the appeal is brought."

[14.] The Plaintiffs were obviously not in compliance with this rule, having filed an appeal in the Court of Appeal instead of the Supreme Court. I note also that that appeal was filed fourteen days after the decision of the learned Deputy Registrar. The Plaintiffs then made an application in the Supreme Court for an extension of time to appeal pursuant to Order 3 Rule 4 RSC, which provides that:

"4. (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 these Rules, or by any judgment, order or direction, to do any act in any proceedings.

(2) The Court may extend any such period as is referred to in paragraph (1) although the application for extension is not made until after the expiration of that period.

(3) The period within which a person is required by these Rules, or by any order or direction, to serve, file or amend any pleading or other document may be extended by consent (given in writing) without an order of the Court being made for that purpose."

Extension of time

[15.] There are four factors that the court must take into consideration when deciding whether to grant an extension of time for leave to appeal. *Allen P* outlined the said factors in **Turner and others v Turner and others** [2013] 2 BHS J. No. 52 stating that:

"17. Notably, the court has an absolute discretion whether to grant leave to appeal out of time or not, but there are numerous authorities that have firmly established the factors which are normally taken into account in exercising such discretion. We have adopted those factors and took them into consideration in exercising our discretion in this case.

18. The classic statement of the factors relevant to the exercise of the discretion to extend time within which to appeal are as stated by Griffiths LJ in CM Van Van Stillevoldt BV v El Carriers Inc [1983] 1 All ER 699, and are as McCowan LJ set them out in Norwich and Peterborough Building Society v Steed [1991] 2 All ER 800 as: (1) the length of the delay, (2) the reasons for the delay, (3) the chances of the appeal succeeding if the time for appealing is extended and (4) the degree of prejudice to the intended respondent if the application is granted.

[16.] The Learned President went further to consider the guidance given by the court on how the aforementioned factors are applied to a particular case, and the circumstances in which leave should be granted or refused. At paragraphs 19 – 22, Allen P stated:

> 19. Moreover, Lord Donaldson of Lymington MR in Norwich and Peterborough Building Society v Steed (above) [1991] 2 All ER 800, gives guidance on how the above considerations are applied to any particular case. He said at page 888 paragraph g:
>
> "Once the time for appealing has elapsed, the respondent who was successful in the court below is entitled to regard the judgment in his favour as being final. If he is to be deprived of this entitlement, it can only be on the basis of a discretionary balancing exercise, however blameless may be the delay on the part of the would-be appellant."
>
> 20. Lord Donaldson MR further demonstrated how the balance was to be achieved, by reference to two cases at different ends of the spectrum of delay. In the case of Palata Investments Ltd. v Burt & Sinfield Ltd [1985] 2 All ER 517, where the delay was only three days which was fully explained, he noted that in such circumstances the balancing exercise would be unlikely to come down on the side of refusing an extension of time, but that in an extreme case of lack of merit it could do so.
>
> 21. This was compared to the case of Rawashdeh v Lane (1988) 40 EG 109 where the delay was six weeks. He referred to a passage from the judgment of Glidewell LJ in that case, who after quoting a passage from Ackner LJ in Palata's case, said as follows:
>
> "There Ackner LJ was considering a case in which the time which had elapsed was very short; but suppose (as here), the reverse is the case. The time which has elapsed is lengthy and there is little valid explanation for it. Suppose, also that the prospective appellant (the tenant) wishes to argue that he has a good chance of success in his appeal. Should the court then go on to consider how great it thinks that chance is; or, should it simply say: 'You are very much out of time. You have

given so little explanation for the delay that we are not prepared to consider the chances of a successful appeal?' In my view in such circumstances it is a relevant matter for the court to consider the merits of the appeal. We are not bound to do otherwise by the decision in Palata Investments Ltd. We therefore went on to hear argument on the merits, as to which I now turn."

22. Finally, Lord Donaldson said of the two cases:

"So it will be seen that that case (Rawashdeh) was the other side of the coin to that shown in *Palata's* case. In *Palata's* case the delay was as short as could be and was wholly excusable. The merits therefore played little part. In *Rawashdeh's* case the delay was very much longer- it was six weeks in fact- and was not wholly excusable. Much more merit was required to overcome it.""

[17.] Further, in **Mosko United Construction Ltd. v Turnstar Ltd.** [2003] BHS J. No 161 *Mohammed J* (as he then was) stated that the Rules of the Supreme Court must be obeyed, and cited the authority of **Ratnam v Cumarasamy and another** (1964) 3 All ER 933 at 935 where *Lord Guest* stated:

"The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation."

[18.] At the hearing, the Plaintiffs conceded the First Defendant's point that there was a lack of action in the matter and that an Affidavit outlining the reasons for the delay was not filed. The Plaintiffs asked the court to take judicial notice of Hurricane Dorian which adversely affected Grand Bahama (the locality of Counsel for the Plaintiffs' office), in September 2019, and the COVID-19 Pandemic that triggered worldwide lockdowns and closure of the Courts beginning in 2020. The Plaintiffs submitted that these were independent reasons for delay notwithstanding the absence of an Affidavit stating the same.

[19.] The decision of the Deputy Registrar was made 8 March 2019. The Plaintiffs were required by the Rules to appeal the decision within five days of it being made. This timeframe, unfortunately, was not met. The Plaintiffs then nine days following the last day to appeal the ruling, filed a Notice of Appeal to the Court of Appeal. Counsel for the Plaintiffs noted that this was inadvertently done, and was therefore withdrawn. However, five months lapsed between the filing of the Notice of Appeal and Hurricane Dorian in September 2019, in which the matter lay dormant. I take judicial notice of this event. It was not until October 2019 that the Plaintiffs withdrew the Notice of Appeal and filed a Summons to extend the time to appeal to a Judge in chambers. Since the filing of this Summons, the Plaintiffs have not filed an Affidavit in support to furnish the court with the reasons for their delay.

[20.] There were some five months since the filing of the Notice of Appeal to the Court of Appeal and Hurricane Dorian. Counsel for the Plaintiffs claimed at the hearing that when the Notice of Appeal was filed, he was not yet retained as Counsel in the matter. However, there is no Affidavit stating this, of which the Court may take. Furthermore, following the application to extend the time to appeal, there was another five months lapse *before* the COVID-19 Pandemic, in which no action was taken on behalf of the Plaintiffs. The COVID-19 Pandemic began in March 2020 with a series of complete lockdowns for a brief period. However, the Court was able to resume hybrid operations with legal documents being filed and virtual hearings conducted. The Plaintiffs took no further action to have the application heard before a Judge until sixteen months later, or to even put their action properly before the court with a supporting affidavit at all. Whilst recognizing these unfortunate events in which the Plaintiff would have been unable for a period to file legal documents to continue the appeal of this matter, I find that the delay on behalf of the Plaintiffs to apply for leave to extend the time to appeal is excessive. I also find that there are timeframes in which the Plaintiff was able to make the application and failed, without providing any reasons for the same.

[21.] I turn now to consider the prospects of success of the Plaintiffs' appeal if time was to be extended and whether any prejudice would be caused to the First Defendant if the extension is granted. The decision of the Deputy Registrar was to strike out the Plaintiffs' claim against the First, Fourth and Fifth Defendants. This decision is based on the finding that the First Defendant was a public

authority for the purposes of the claim against him, and that these claims were statute-barred by virtue of the Limitation Act and the Crown Proceedings Act. The Deputy Registrar dismissed the case against the First Defendant as she found him to have immunity pursuant to Section 49 of the Interpretation and General Clauses Act and that there were no allegations that he acted in bad faith or negligence.

[22.] As it relates to the Letter of Intent (LOI), the Deputy Registrar found that the First Plaintiff was not a party to the LOI, yet signed the document, and that the Second Plaintiff is a party to the LOI but had not signed the document. The Deputy Registrar further found that the LOI automatically expired one year from the date of its execution on 3 July 2015 and was a discussion document, subject to contract, and was not binding in law. The Deputy Registrar did not find that the Fourth and Fifth Defendants were parties to the LOI or that the Plaintiff had a good arguable case against any of the Defendants, particularly the First, Fourth and Fifth Defendants.

[23.] The Plaintiffs assert that the Deputy Registrar erred in finding that the LOI had no contractual effect, and insist that it was a contract entered into by the parties and did not expire on its original expiration date as it continued. The Plaintiffs further assert that the Registrar should have considered that the Plaintiffs were parties to the LOI based upon a written list of terms without either party actually signing or executing the same. The Plaintiffs posited that the statutory defences of limitation and/or immunity did not apply to the First Defendant due to fraud, and that the Registrar failed to consider whether it could be said that the First Defendant was not acting in a ministerial capacity at all. It is the Plaintiffs' position that the Statement of Claim should have not been struck out as it was not a plain and obvious case and should have been advanced to trial.

[24.] According to Halsbury's Laws of England Building Contracts (Volume 6 (2023)) at 320,

> "A letter of intent is a communication expressing an intention to enter into a contract in the future. A letter of intent may be appropriate when the price is either agreed or there is a clear mechanism in place for it to be agreed, the contract terms are, or are very likely to be, agreed and there are good reasons to start work in advance of the finalisation of all the contract documents.

> The effect of such a communication depends upon the objective meaning of the words used. The various possibilities are: (1) it may have no binding effect; (2) it may take effect as an executory ancillary contract entitling the recipient to costs consequently incurred if the intended contract does not materialise; or (3) it may affect a contractual offer to the effect that if the recipient undertakes the proposed action, they will be remunerated either reasonably or by the terms they state. Finally, the recipient might be entitled to reasonable remuneration where they act to the benefit of the sender pursuant to the communication."

[25.] I have had a chance to review the LOI. The language used in the LOI is indicative that the LOI was an intention to enter into a contract in the future. For instance, the provisions contain language such as "The Project Developer "has prepared a full proposal..", "intends to sell..", "intends to bear.." and "is to submit". It is evident that the Project Developer's application for approval as a foreign investor in The Bahamas was contingent on the signing of the LOI. However, clause 8 of the LOI provides for its automatic termination after twelve months "unless extended by mutual consent of the parties releasing the other from their respective obligations, if for any reason the project does not proceed and the intended project is terminated as a result." I agree with the findings of the Deputy Registrar and also find that there is no basis to conclude that the LOI was a contract or has any contractual effect. Instead, I find that it was an agreement between the parties to contract in the future with. As the LOI stipulates the parties, there is no evidence, as the Plaintiffs suggest, that any other person was made a party to the agreement through their conduct. However, even if the First and Second Plaintiffs were found to be parties to the LOI, nothing turns on this point.

[26.] Moreover, the LOI is stated to be between the Parliamentary Secretary to The Minister of Works and the Second Plaintiff. The LOI's execution page also states:

> "In Witness Whereof the Honourable Parliamentary Secretary of the Ministry of Works with responsibility for Bahamas Electricity Corporation (and for an on behalf of the Government of The Bahamas has set his hand and seal hereto the day and the year first herein before written.

Signed Sealed and Delivered by the Hon. Renward Wells, Parliamentary Secretary to the Ministry of Works responsible for Bahamas Electricity Corporation in the presence of:"

[27.] There can be no dispute that the First Defendant in signing the LOI was acting in his official capacity as a public authority being the Permanent Secretary on behalf of the Minister of Works and not in a personal capacity. At this juncture, the court cannot find that fraud has occurred which bars the limitation or immunity defence on behalf of the First Defendant. At the time of the hearing before the Deputy Registrar, there were no allegations of bad faith or negligence posed against the First Defendant in the Statement of Claim. Had there been any claim of fraud, there is no doubt that the court would have addressed its mind to it. Therefore, the First Defendant should have the immunity provided in Section 49 of the Interpretation and General Clauses Act. The First Defendant's appointment as Parliamentary Secretary was revoked in October 2014. Therefore, it cannot be said that there was a continuance of injury or damage on his part in relation to the LOI beyond that point. In this instance, the Plaintiffs would have had to bring the action against the First Defendant within twelve months after this time according to Section 12 of the Limitation Act. Moreover, being an agent/officer of the Crown, the action should have been brought against the Crown itself in the name of the Attorney General pursuant to Sections 4 and 12 of the Crown Proceedings Act.

[28.] I find that the Plaintiffs have no prospect of success if time was extended to appeal, as their cause of action founded in contract and or tort law does not disclose a reasonable cause of action against the First Defendant. I also consider that should the Plaintiffs' application be granted, this would be prejudicial to the First Defendant. As the First Defendant submitted, this matter was initiated almost 10 years ago, with significant delays on behalf of the Plaintiff to appeal with little to no prospects of success. Allowing the appeal would extend the lifespan of the matter further against the First Defendant in his personal capacity. In this vein, I refuse the Plaintiffs' application to extend the time for leave to appeal this matter.

Striking out the summons for an extension of time

[29.] The First Defendant made an application to have the Plaintiffs' summons struck out pursuant to Order 18 Rule 19 RSC and under the inherent jurisdiction of the court. Order 18 Rule 19 RSC is specifically framed to give the court the jurisdiction to strike out pleadings that are incontestably bad. Order 18 Rule 19 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, and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.
>
> (2) No evidence shall be admissible on an application under paragraph (1) (a).
>
> (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."

[30.] This jurisdiction, unfortunately, does not extend to a summons, as it is not a pleading according to the definition of "pleading" in Order 1 Rule 4 RSC. It specifically provides in that section that ""pleading" does not include a petition, summons or preliminary act". I have had occasion to consider this point in **Gateway Ascendancy Ltd v Timothy Francis Clarke** [2023] 1 BHS J No 112 at paragraph 32 where I stated:

> "32 It is to be noted that striking out is a summary process that is to be used sparingly, and is reserved only for those cases which are irremediably bad on the face of the pleadings. According to Order 1 Rule 4 the word *"pleading does not include a petition, summons or preliminary act. "* The wording of the Act makes it clear that one cannot apply to have a Summons struck out under Order 18 Rule 19. This was confirmed in the case of *Farrington and another v Island Hotel Company Limited [2009] 2 BHS J No. 20.* In this case the Defendant appealed an

Order made by a Registrar dismissing a Summons for want of prosecution. It was stated by Isaacs J that:

"3. There does not appear in the Rules of the Supreme Court (R.S.C.) any express or discretionary power to strike out a Summons for want of prosecution.

4. The power to strike out for want of prosecution under the rules relate to actions or pleadings. Actions can be struck out under 0.19 r.1 for default in filing a statement of claim; under 0.25 r.1(4) for default in taking out a summons for directions; under 0.34 r.2(2) for default in setting down a trial for hearing. There is also an inherent jurisdiction in the Supreme Court to strike out an action for want of prosecution (see *Harvey Don Cooke v Sun International Bahamas Ltd.* Civil Appeal No. 95 of 1999.

5. With regard to pleadings 0.18 r.19(1) empowers the court to strike out statements of claim or defences on the following grounds.."

[31.] The First Defendant also sought to have the Summons dismissed under the inherent jurisdiction of the Court. Under the inherent jurisdiction, the court is endowed with the power to control its procedure to prevent oppression and ensure fairness to the parties before it. This jurisdiction is reserved for those cases where it is clear that the said jurisdiction should be exercised. In **Montreal Trust Co v Churchill Forest Industries (Manitoba) Ltd** (1971) 21 DLR (3d) 75, 1971 CanLII 960, the court stated at 81 that:

"Inherent jurisdiction is derived not from any statute or rule but from the very nature of the Court as a superior Court of law: "The jurisdiction which is inherent in a superior court of law is that which enables it to fulfill itself as a court of law." (p. 27). Inherent jurisdiction cannot, of course, be exercised so as to conflict with a statute or rule. Moreover, because it is a special and extraordinary power, it should be exercised only sparingly and in a clear case.

Master Jacob concludes his very helpful analysis with the following definition at p. 51:

> "In this light, the inherent jurisdiction of the court may be defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, and in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them." ' (Emphasis added)

[32.] The court may dismiss an action for want of prosecution, as an abuse of the court's process, and where there has been intentional and contumelious default of a court's order. The First Defendant made it clear that they are not proceeding against the Plaintiffs on the ground of want of prosecution but instead on the basis of an abuse of process for significant delay. In **Grovit and others v Doctor and others** [1997] 2 All ER 417, the court held that:

> "The court had power under its inherent jurisdiction to strike out or stay actions on the grounds of abuse of process irrespective of whether the test for dismissal for want of prosecution was satisfied. Accordingly, since the commencement and continuation of proceedings with no intention of bringing them to a conclusion was itself sufficient to amount to an abuse of process which entitled the court to dismiss the action, it was not strictly necessary in such a case to establish want of prosecution by showing that there had been inordinate and inexcusable delay on the part of the plaintiff which had prejudiced the defendant."

[33.] It is therefore clear in my view that the inherent jurisdiction of the court can also encompass the dismissal of a Summons to extend the time to appeal, which is in essence an attempt to extend the proceedings. The absence of any effort to advance that application shows a lack of any intention to bring the proceedings to a conclusion. In all the circumstances of this case, and bearing in mind that this power should be exercised sparingly, I would have been prepared to find it to be an abuse of the court's process to file an appeal in a matter, but to then take no steps to have the appeal heard within a reasonable time. To find otherwise would mean that a respondent to such an appeal could be left hanging in the wind, as they bear no responsibility for advancing the appeal, but would be unable to consider the matter concluded, and to enjoy the benefits of that finality, as the appeal

would still be outstanding. Given that I have, for other reasons, refused the Plaintiffs' application to extend time for leave to appeal, this application to dismiss the Summons is moot.

CONCLUSION

[34.] I hereby refuse the Plaintiffs' application to extend the time to appeal the decision of Deputy Registrar Misiewicz. Generally, costs follow the event. However, in my discretion, I grant the First Defendant 75% of their costs to be taxed if not agreed, as the First Defendant's Summons pursuant to Order 18 Rule 19 was in my view misconceived.

Dated this 2nd day of May, A.D. 2024

Neil Brathwaite

Justice