COMMONWEALTH OF THE BAHAMS

IN THE SUPREME COURT

Commercial Division

2012/CLE/GEN 0932

B E T W E E N

WISLEY LUBIN

Claimant

AND

TRENCHMASTERS LIMITED

First Defendant

AND

BRANFORD HENFIELD, JR.

Second Defendant

AND

BRANFORD HENFIELD, SR.

Third Defendant

Before:	The Honourable Madam Justice Camille Darville Gomez
Appearances:	Miss Darell M. Taylor for the Claimant Mrs Genell K. Sands and Ms. Alicia Gibson for the Defendant
Hearing Date:	2nd July, 2024

Strike out application – Civil Procedure Rules, 2022-Part 26.3 –

RULING

Darville Gomez, J

The Application

[1.] By a Notice of Application and an Affidavit in support of Demi Pindling ("the Pindling Affidavit") filed on 17 June, 2024, the Defendant sought the following relief:

(i) The stay of the whole of these proceedings granted by Order dated 23 October, 2023 (the "Stay Order") be lifted pursuant to the inherent jurisdiction of the Court;

(ii) the Amended Writ of Summons filed on October 13, 2021 (the "Writ") be struck out for want of prosecution and as an abuse of the process of the Court pursuant to Rule 26.3 of the Supreme Court (Civil Procedure) Rules, 2022 (the "CPR") and the inherent jurisdiction of the Court;

(iii) the costs of and occasioned by this Application and of this action be paid by the Plaintiff to the Defendants.

2. The grounds of the application for lifting the stay are that:

(i) There has been no material change in circumstances since the Stay Order was granted namely the Plaintiff has not submitted to an independent medical examination by a medical expert chosen by the Defendants;

(ii) The delay on the part of the Plaintiff has been inexcusable and inordinate; and

(iii) It is necessary in the interests of justice that the stay be lifted to allow the Defendants to strike out the Writ.

3. The grounds of the application for striking out the Writ are that:

(i) The delay on the part of the Plaintiff has been inexcusable and inordinate;

(ii) The delay has prejudiced the Defendants in that the matter has been prolonged and witnesses are aging and putting the quality of the case at risk. The Defendants have also had to expend significant time and expense in defending this matter which the Plaintiff clearly has no intention of bringing to trial. The Defendants have borne the costs of engaging Dr. David Barnett and the Plaintiff has unreasonably refused to attend the independent medical examination.

(iii) The Plaintiff has failed to comply with the Stay Order.

(iv) By virtue of the Plaintiff's conduct the Writ is currently an abuse of the process of the Court.

[2.] In response, the Claimant applied by Notice of Application filed on 26 June, 2024 supported by an Affidavit filed on 27 June, 2024 for the following relief:

(i) An extension of time to comply with the December Order pursuant to Rule 26.1(k);

(ii) An Order pursuant to Rule 26.8 for relief from sanctions as a result of the failure to comply with the December Order;

(iii) That the Defendant's Notice of Application that the stay of proceedings be lifted and the Claimant's Writ of Summons be struck out be dismissed.

(iv) There shall be no order as to costs.

The grounds of the application for an extension of time are:

(a) The failure on the part of the Claimant to fully comply with the terms of the Court's Order was not intentional but was due to the Claimant's dire financial circumstances and a failure on his part to appraise and instruct his Attorney-at-Law in a timely

manner of his challenges in complying with the Court's Order. The failures of the Claimant's part were based on his lack of understanding of the necessity for full and prompt compliance with a Court Order and the consequences of a breaches of such Order.

(b) The application for extension of time to comply with the Court's Order was prepared immediately upon receiving relevant information and instructions from the Claimant.

(c) The prejudice to be suffered by refusing the applications outweighs any prejudice to be occasioned by granting the application.

(d) It is in the interests of justice to allow the extension of time for the Claimant to comply with the Order.

(e) The Claimant has otherwise complied with all other relevant rules, practice directions, orders given by the court in this matter.

The grounds for the application for relief against sanctions are:

(a) The Claimant has a good (although not perfect) explanation for his regrettable breach of the Court's Order;

(b) Granting relief to the Claimant at this stage would not result in any significant further delay of proceedings with the Court's case management powers;

(c) Granting the reliefs prayed for by the Claimant would not take up any further time. Impact upon other Court users,

(d) The Claimant's breach of the Court's Order was not intentional, and there is no general history of non-compliance with the Court Orders, directions, or the Rules by the Claimant.

(e) From inception, litigation has been conducted appropriately by the Claimant up until the time of this breach;

(f) Upon the Claimant's appraising his Attorney-at-law of his dire situation and his unintentional non-compliance with the Court's Order, an application for relief from sanctions have been made relatively promptly;

(g) Although the upcoming trial duties would be delayed yet again, once the Court grants the reliefs prayed for herein, the Claimant's failure to comply with the Court's Order can be remedied within a reasonable time to meet any revised trial dates;

(h) It is in the interest of justice that the Claimant be granted the reliefs sought.

History and Background

[3.] By an Order dated 23 October, 2023 (the "Stay Order") the Court ordered that the whole of these proceedings be stayed until the Plaintiff submits to an independent medical examination by a medical expert chosen by the Defendants.

[4.] By Order dated 13 December, 2023 ("Costs Order") the Court ordered by consent costs of $10,000 to be paid by the Plaintiff to the Defendants before the Plaintiff can take any further step in the action. To date, the Plaintiff has made two payments totaling $2,000.

[5.] I set out below a chronology of the action which I reduced into a table which was prepared from the submissions by the Defendant:

	Type of document/Event	Date of filing/event	Other
1.	Alleged accident occurred	5 October, 2009	
2.	Generally endorsed Writ of Summons ("Writ") – defendants Geoffrey Brown and Trenchmasters Limited (the "original defendants")	13 July, 2012	Filed 3 months prior to limitation period
3.	Memorandum and Notice of Appearance	2 August, 2012	
4.	1st Notice of Change of Attorney – plaintiff/claimant	22 August, 2013	
5.	Notice of Discontinuance to discontinue against the original defendants	9 July, 2014	
6.	2nd Notice of Change of Attorney	1 July, 2019	Last step taken 5 years ago Accident occurred almost 10 years
7.	Notice of Intention to Proceed	1 July, 2019	
8.	Statement of Claim	12 November, 2019	Filed over 7 years after Writ
9.	Summons to set aside Notice of Discontinuance filed on 9 July, 2014	22 December, 2020	
10.	Order setting aside Notice of Discontinuance	2 March, 2021	
11.	Defence by Trenchmasters Limited – 2nd Defendant	22 June, 2021	
12.	Summons that the Writ be struck out as against Geoffrey Brown	22 June, 2021	
13.	Reply and Defence to Counterclaim – in relation to 2nd Defendant	14 July, 2021	
14.	Summons to add Branford Henfield Jr. and Branford Henfield Sr. as 3rd and 4th Defendants and leave to amend the Writ filed 13 July, 2012	3 September, 2021	
15.	Order striking out as against Geoffrey Brown and adding Branford Henfield Jr. and Sr. as 2nd and 3rd Defendants	6 October, 2021	2nd and 3rd defendants added 9 years after action commenced
16.	Amended Writ	13 October, 2021	9 years after action commenced
17.	Appearances – 2nd and 3rd Defendants	29 October, 2021	

18.	Defence – 2nd and 3rd Defendants	5 November, 2021	
19.	Summons for leave to re-amend Writ filed on 13 October, 2021	9 November, 2021	
20.	Consent Order – leave to re-amend the Writ filed on 13 October, 2021	17 November, 2021	
21.	Amended Statement of Claim without leave	6 December, 2021	
22.	Notice of Referral to CMC	18 January, 2022	10 years after action commenced
23.	CMC Order dated 7 July, 2022 the following ordered inter alia, i)PTR 3 March, 2023 ii) Trial date 27 – 31 March, 2023 (5 days)	5 January. 2023	
24.	1st PTR – 3 March, 2023		Issues being experienced by both sides in complying with the CMC Order
25.	2nd PTR – 12 June, 2023 i. March trial dates vacated ii. New trial dates 13 – 17 November, 2023		
26.	Witness statements of Defendants filed June 9 and 12 2023		
27.	Witness Statement of plaintiff/claimant	28 August, 2023	
28.	Application to stay proceedings pending submission to an independent medical expert – defendants	17 October, 2023	
29.	PTR held 23 October, 2023 – defendants stay application heard and court granted stay of proceedings until the plaintiff/claimant submits to an independent medical examination chosen by the defendants and costs paid by the plaintiff/claimant		
30.	Order dated 13 December, 2023: (i)Costs were fixed by consent for $10,000 to be paid by the plaintiff/claimant before he can take any further step in the action	7 March, 2024	

	(ii) PTR date to be fixed upon notification by the parties to the Court that action ready for 1st PTR (iii) 2nd PTR 18 June, 2023 at 9:30am. (iv) skeleton arguments and submission are dispensed with (v) Trial fixed for three (3) days 2, 3 and 4 July, 2024 at 10:00 am		
31.	Notice of Application by defendants that; (i) the Stay Order be lifted pursuant to the inherent jurisdiction of the Court (ii) the Amended Writ filed on 13 October, 2023 be struck out for want of prosecution and as an abuse of the process of the Court pursuant to Rule 26.3 of the CPR and the inherent jurisdiction of the Court;		
32.	PTR held on 18 June. 2024 and hearing of the defendant's application adjourned to 2 July, 2024. Court ordered: (i) All documents required are to be filed and served by 25 June, 2024 and submissions filed and served by 28 June, 2024		
33.	Notice of Application by plaintiff/claimant for: (i)an order pursuant to rule 26.1(k) of the CPR for an extension of time to comply with an Order dated 13 December, 2023; (ii)an order pursuant to rule 26.8 of the CPR for relief from sanctions for failure to comply with the Order dated 13 December, 2023; (iii) dismissal of the defendant's Notice of Application to stay the proceedings and strike out the Writ	26 June, 2024	
34.	Affidavit of plaintiff/claimant	27 June, 2024	

HELD:

[6.] For the reasons that follow, I have granted the relief sought by the Defendants in their said Notice of Application and have refused the relief sought by the Claimant in his Notice of Application.

Submissions - Defendants

Strike Out the Writ

[7.] The statutory jurisdiction of the Court to strike out the Writ is found in Part 26.3 of the Supreme Court (Civil Procedure) Rules, 2022 (the "CPR") which provides:

> *(1) In addition to any other power under these Rules, the Court may strike out a statement of case or part of a statement of case if it appears to the Court that -*
>
> *(a)* ***there has been a failure to comply with a rule, practice direction, order or direction given by the Court in the proceedings;***
>
> ... ...
>
> *(c) the statement of case or the part to be struck out is frivolous, vexatious, scandalous,* ***an abuse of the process of the Court*** *or is likely to obstruct the just disposal of the proceedings. [Defendants' emphasis added]*

[8.] The Court when exercising the power to strike out conferred by the CPR will have regard to the overriding objective under rule 1.1 and its general powers of case management under Part 26 of the CPR. Under the former RSC Order 18 Rule 19 the Court was also empowered to strike out a Writ as an abuse of the process of the Court.

[9.] Additionally, the Court has a residual inherent jurisdiction as a superior court of law and a court of unlimited jurisdiction to strike out statements of case and to dismiss actions that are an abuse of its process.

(i) Failure to comply with Court order

[10.] The Defendants complained that since August 2023 the Claimant had agreed to be examined by Dr. Barnett and that they had made numerous appointments for the Claimant's medical examination and he has not attended any of the examinations, despite agreeing to do so each time. Additionally, the Claimant made and then failed to keep two appointments made by him. They submitted that (i) the Claimant was always represented by Counsel; (ii) was present at the hearings during which both the Stay Order and the Costs Order were made; (iii) the Claimant fully understood the need to comply with the Court's Orders and the consequences on the prosecution of his action of not complying; (iv) the Claimant fully appreciated that the trial dates set for the week of November 13 to 17, 2023 had to be vacated and that his compliance was necessary in order for the trial to proceed on the new dates scheduled for trial on July 2 to 4, 2024; (v) the Defendants were paying the costs of the examination; (vi) the Claimant simply had to attend on one occasion and had 10 months to do so. Therefore, his failure to comply with the Stay Order is intentional.

Inordinate and inexcusable delay on behalf of the Claimant

[11.] The Defendant attached a chronology of the steps taken in the action which they submitted clearly showed that the Claimant has been guilty of a series of delays throughout the past 15 years culminating with the Claimant's delay and failure to attend the independent medical examination. Due to the length of the chronology, the Court extrapolated the information and created a table.

[12.] The Defendant submitted that from the chronology it was apparent that the Claimant had failed to comply with the Rules of the Supreme Court, Case Management Orders made, the Stay Order and the Costs Order. The Defendants deny the assertion made by the Claimant that they have caused the delay in bringing this matter to trial over the past 15 years as evidenced by the chronology.

[13.] They identified the following: (i) they filed their factual Witness Statement in June 2023 instead of December 2022 (6 months late); (ii) they obtained an extension of time to file their Witness Statements on the basis that the Claimant had failed to file required documents in compliance with the Case Management Order which meant that they did not have the benefit of having certain required documents to enable them to adequately prepare their case; (iii) the Claimant's Witness Statement was not filed in June 2023; (iv) the Claimant's Witness Statement was filed on August 28, 2023 at which time the Defendants requested that the Claimant attend the examination by Dr. David Barnett; (v) the Claimant commenced this action 13 years ago, discontinued the action, resurrected the action, changed the parties and did not have a first Case Management Conference with the current parties to the action until July 7, 2022, viz., 10 years after the action was commenced and 13 years after the date of the Claimant's accident. ; (vi) the Claimant failed to comply with every timeline under all of the Case Management Orders made and has failed to comply with the Stay Order and the Costs Order.

[14.] The Defendants asserted that the issue of expert witnesses or reports are raised at the Case Management Conference, not prior to and the delay in arriving at the Case Management Conference was the fault of the Claimant. The action did not reach the Case Management Conference until 10 years after the action had been commenced. While the Claimant alleged that the delay was due to poor or inadequate representation by his former attorneys, the Defendants say that this is irrelevant and does not amount to a good excuse in considering a strike out application. They referred to **Rowe v Tregaskes [1968] 3 All ER 447** at page 448, Court of Appeal per Lord Denning, M.R. and the **Maqsood case** at paragraph 44.

Prejudice caused to the Defendants

[15.] The Defendants submitted that this is a personal injury claim arising out of an alleged accident at work and it occurred on October 5, 2009, almost 15 years ago. Further, they submitted that prior to the imposition of the stay, there had already been a 14 year delay on the part of the Claimant in reaching the trial stage and, it has been an additional 8 months since the stay was granted on October 23, 2023. The trial dates which had been set for July 2 to 4, 2024 have been vacated and the Defendants do not know if a trial would ever take place in this matter.

[16.] The Defendants say that this delay has prejudiced the Defendants because the witnesses are aging and this puts the quality of their case at risk. The Third Defendant who is also a witness is currently 75 years old.

[17.] The Defendants submitted that they have been prejudiced by the significant time and expense they have incurred in defending a matter where the Claimant has no intention of bringing to trial. They have borne the costs of $1,500 of engaging Dr. David Barnett and the Claimant has unreasonably and intentionally refused to attend the independent medical examination.

[18.] Finally, they submitted that based on the Claimant's own evidence, he is unable to pay the balance owing under the Costs Order therefore, the matter would remain in limbo indefinitely.

[19.] Their position is that the Claimant's conduct amounts to want of prosecution and an abuse of the process of the Court.

Plaintiff's Notice of Application filed on June 26, 2024

[20.] The Defendants have advanced that the Claimant's applications for an extension of time and relief from sanctions are neither applicable nor appropriate at this time. However, they assert that if necessary, they rely on the Pindling Affidavit and all of the arguments and principles set out above in opposition to the Claimant's applications.

Submissions – Claimant

[21.] The Claimant did not tender any written submissions, however, he responded to the Pindling affidavit and made the following observations in addition to his affidavit filed in support of his application to extend the time for compliance:

(i) He admitted that the action has been in the *"Court system"* for ten years. He explained that the reason for the ten year delay from the filing of the Writ of Summons dated July 11, 2012 until July 1, 2019 was due to *"poor and or inadequate representation by my attorneys at that time"*.

(ii) He stated as follows: *"As a consequence of the ten-year delay through no fault of mine, I respectfully ask the Court that in computing any delay on his part in pursuing this matter that the focus of attention should be on his conduct from July 1, 2019 to the present date. The Courts will see that I have generally complied promptly with its orders.*

(iii) He has placed partial blame for the vacating of the March 2023 trial dates on the Defendants non-compliance with the Court Order dated July 7, 2022. He referred to the Defendant's inability to find any doctors willing to carry out the medical examination on their behalf which was the reason for their delay in filing their expert reports by the deadline. He averred that the Defendants did not seek to request that he see their medical expert until eight (8) months after they were required to file and serve the medical expert reports and one (1) month before the pre-trial review.

He averred in his affidavit as follows regarding this:

"10. I am informed and verily believe that at the Case Management Hearing dated the 6th July, 2022 the Defendants through their attorney Ms Vanessa Smith,

requested that I be medically examined by a Medical Expert of their choosing. Through my Attorney-at-Law I acquiesced to the Defendants' request and the Court granted permission for four (4) expert witnesses to be called, and the matter was then adjourned for 3rd March, 2023. The Court via the Case Management Order said that each party is at liberty to call four (4) expert witnesses, with any expert reports to be filed and served by 13 January 2023. The Defendants did not comply with that Order.

11. During the Case Management Hearing on 3rd March, 2023 the records would show that the Defendants through their Attorney, informed the Court that they were unable up to that date to find any doctors willing to carry out the medical examination on their behalf, and as such they were unable to prepare expert witness reports. A further, Case Management Conference was then set for the 12th June, 2023 at 9:30 am.

12. At the Case Management Conference (hereinafter the "CMC") held on the 12th June, 2023, the Defendants' position was that they still had not secured any expert witnesses, and instead Ms. Smith, Attorney-at-Law for the Defendants told the Court that they would be obtaining two (2) medical experts (please note that present at that CMC were Vanessa Smith, Genell Sands and Ms. Alicia Gibson their current attorneys). However, the Defendants did not seek to have this request for me to see their Medical Expert until some three (3) months after the CMC of 12th June, 2023. By way of letter dated 29th August, 2023, the Defendants requested that I see Dr. David Barnett, in September of 2023. This request was made eight (8) months after they were required to file and serve the Medical Expert Reports and one (1) month before the Pre Trial Review."

(iv) He referred to other delays caused by the Defendant's conduct including the filing of their Defence for a period of one year after the Statement of Claim was filed and served. The Statement of Claim was filed on 12 December 2019 and no Defence was filed until 22 November, 2022.

(iv) He had this to say in relation to the next appointment:

"15. On the 17th June, 2024 I informed my Attorney-at-Law about my reason for not being able to attend the appointment at Dr. David Barnett, the medical expert chosen by the Defendants. I am informed and verily believe that my Attorneys, acting on my behalf, have made a new appointment with Dr. Barnett, who has given the 11th July, 2024 as the next available date that I can attend his office for him to examine me. Subject to the Dr. Barnett giving assurances that I do not have to undergo any major procedures for this examination, I am committed to attending this appointment and doing all that is required on my part for my case to progress to a conclusion."

Analysis and Disposition

[22.] There are two pending applications, one by the Defendants for the lifting of the Stay Order and the striking out of the Writ for want of prosecution and as an abuse of the process of the Court pursuant to Rule 26.3 of the CPR, the other by the Claimant for an extension of time to comply with the Court's Order of 13 December, 2023 and for relief from sanctions for non-compliance.

[23.] I will consider the Defendants' application first because it was filed first in time and thereafter consider the Claimant's application.

[24.] It is undisputed that the Court has the inherent power to set aside in the interest of justice a stay which has been imposed in an action. **Henderson et al v Sulgrave Management Ltd BS 1989 SC 50.**

[25.] Similarly, it is undisputed that a stay may be removed if good cause or proper grounds are shown or where the continuance of the stay would cause or produce injustice. **Cooper v Williams [1963] 2 QB 567.**

[26.] The Defendants have submitted that it is necessary and in the interest of justice that the stay be lifted to allow the Defendants to strike out the Writ.

[27.] The Court's jurisdiction to strike out the Writ is found in rule 26.3 of the CPR, the Defendants have sought to have the Writ struck out on the basis of rule 26.3(1)(a) and 26.3(1)(c).

[28.] The Defendants submitted that the Court when exercising the power to strike out conferred by the CPR will have regard to the overriding objective under rule 1.1 and to its general powers of case management under Part 26 of the CPR. I concur with this.

Failure to comply with Court order/Abuse of process

[29.] It is obvious from the chronology that there has been an inordinate delay since the commencement of this action by a generally endorsed Writ of Summons ("Writ") in 2012 to reaching the Case Management Conference ("CMC") stage ten years later. Further, the action was commenced just three (3) months short of the limitation period for bringing the claim. The original Defendants were Geoffrey Brown and Trenchmasters Limited (the "original Defendants").

[30.] The Claimant has sought to distance himself from this failure blaming it on a "*poor or inadequate representation of my attorneys at the time*". Instead he stated: "*as a consequence of the ten-year delay through no fault of mine, I respectfully ask the Court that in computing any delay on my part in pursuing this matter that the focus of attention should be on my conduct from the 1st July 2019 to the present date. The Courts will see that I have generally complied promptly with its Order.*" The issue of poor representation was considered in **Rowe v Tregaskes [1968] 3 All ER 447.**

[31.] The Statement of Claim had been filed in November, 2019, over 7 years after the Writ had been filed and in fact had been irregularly filed because a Notice of Discontinuance had been filed to discontinue the action as against the original Defendants.

[32.] After the Notice of Discontinuance had been set aside, in March 2021, the Defence in relation to the Second Defendant was filed in June, 2021. Later, the Claimant would amend his Writ in October 2021 to add the Second and Third Defendants which enabled them to file their Defence in November, 2021. Therefore, despite the Claimant's complaint that the Defendants filed their Defence one year after the Statement of Claim had been filed and served on them, this is disingenuous given that this was the earliest opportunity that they could have filed their

Defence. There would be other applications culminating in the removal of the original First Defendant, Geoffrey Brown and the addition of the now Second and Third Defendants.

[33.] Finally, the Writ would be re-amended in November 2021 and the action finally proceeded to the Case Management in January 2022, some 10 years after the action had commenced. I refer to the dicta in the **Rowe** case on this issue of delay as follows:

> *"The plain fact is that although the accident happened as long as Nov.23. 1962, nevertheless by March, 1968, 51/2 years afterwards, no statement of claim had been delivered; and yet it was a case which should be tried promptly before recollections had failed.*
>
> ***What is to be done? We have said on many occasions that we consider all delay, not only the delay after writ, but also the delay before it. The delay in the first two or three years is often the most prejudicial of all. At any rate if a plaintiff does delay until the period of limitation is nearly expired, he should keep the timetable thereafter.***
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> [My emphasis added]

[34.] In the instant action, the Claimant commenced the action a mere three (3) months prior to the limitation period and thereafter, metaphorically "*sat on his hands*" for the next seven (7) years after filing the Writ. The action would not proceed to the Case Management Conference until almost ten (10) years after the Writ had been filed and almost thirteen (13) years after the alleged accident had occurred.

[35.] Therefore, it was incumbent upon the Claimant to "*keep the timetable thereafter*" as Lord Denning, M.R. said in **Rowe,** this was not done in the instant action.

[36.] The Claimant by his own evidence admitted to an awareness of the need to be medically examined by a Medical Expert of the Defendants choosing from as early as 6th July, 2022 and that he had through his attorney, acquiesced to the request. He alleged that the Defendants had difficulties in procuring an expert to medically examine him which resulted in their inability to file their report within the timelines set at the CMC. However, he admitted that by way of a letter dated 29th August, 2023 the Defendants requested that he see Dr. David Barnett in September, 2023 which was one (1) month before the Pre Trial review.

[37.] The Defendants had unsuccessfully attempted to agree convenient dates with the Claimant for 12th September, 2023 which the Claimant was unable to attend due to being off the island on a fishing boat. The Claimant's attorney agreed on his behalf to an appointment on September 26, 2023 and again the Claimant was unable to attend. Another appointment was sought to be made with Dr. Barnett on 3rd October, 2023 and again the Claimant's attorney advised that he was unable to attend because he was still off the island and she was unable to provide any definitive response on the date that he would return. Finally, the Defendants' Counsel sought to agree with the Claimant's Counsel whether 19 October, 2023 would be convenient and she advised that if the Claimant was back on island that he would be more than willing to submit to the examination by Dr. Barnett. The Claimant did not attend that appointment.

[38.] Consequently, the Defendants applied for a stay until the Claimant submitted to a medical examination by Dr. David Barnett. This was granted on 23 October, 2023 and the trial date for November, 2023 was vacated. The trial dates were subsequently set for 2 July to 4 July, 2024.

[39.] Prior to the Stay Order, he explained that he was unable to attend scheduled appointments with Dr. Barnett due to his employment on a fishing boat which went out to sea at weekly intervals and sometimes resulted him being off the island for two weeks at a time. He blamed an uncertain schedule for his inability to make the appointment times for the medical examination and regretted that despite his genuine best efforts that he was unable to meet any of the scheduled appointment dates.

[40.] He had this to say relative to the request to be examined prior to 29 August, 2023:

> "27. The Defendants would have the Court believe that this matter began as at the 29th August, 2023 when they made the request, for me to see Dr. Barnett. However, at the time of their request I was struggling to make a living to desperately provide food and shelter for myself and my family.
>
> 28. I think it would be unjust for the Court to dismiss my matter based on the Defendant's request for me to attend for an examination by their physician months prior to the trial date of the 13th November 2023. That appears to be quite unfair and unjust.
>
> 29. This matter is 15 years old. However, the 15 year delay is not entirely my fault. At this juncture the delay in prosecuting this matter is the fault of the Defendants who have asked the Court for an independent medical examination. This request has come at such a late time in the matter. I have provided them with my Medical Reports even before this matter was filed. I am asking the Court to look at the fact that they have had years to make this request but only made this last minute demand months before the scheduled trial date of the 13 November 2023.
>
> 32. The request by the Defendants is made for their sole benefit which according to them, is to assess the damage they have to respond to. However, the incident occurred more than fifteen years ago, as such any Medical Report they obtain could at best only show how my injuries have healed. My Attorneys-at-Law have informed me that this request might be beneficial to the Court when determining the assessment of damages rather than to prove liability. In the circumstances the Court could proceed to hear my case and determine whether the Defendants are liable, and the results of the Medical Report could be had at a later date. The absence of the medical Report at this stage should not be a barrier or hindrance to me continuing with this matter." [My emphasis added]

[41.] After the grant of the Stay Order and at the hearing on 13 December, 2023, the Claimant informed the Court that he had personally secured an appointment with Dr. Barnett's office to be examined on 30th December, 2023.

[42.] The evidence of Ms Pindling regarding the medical examination appointment continues as follows:

> "11. By email dated January 11, 2024, Counsel for the Plaintiff advised that the Plaintiff's appointment with Dr. Barnett had been for December 19th but that he was unable to attend and her office had rescheduled the Plaintiff's appointment to be examined by Dr. Barnett for February 20, 2024.

[43.] The Claimant would not attend that scheduled appointment. Dr. Barnett by letter dated 20th February, 2024 wrote as follows to the attorney for the Defendants:

"Good afternoon Mrs Sands,

Mr. Lubin did not attend his scheduled appointment for the third occasion today, the 20th February, 2024 after also not attending scheduled appointments on 26th September, 2023 and the 19th December, 2023.

On the first date, I spent 3 hours reviewing Mr. Lubin's documents in preparation for the consultation & 1 hour on each subsequent occasions, in expectation. It would appear that Mr. Lubin has no interest in having this matter settled, hence, fees for the preparatory work done to date total $1,500."

[44.] Ms Pindling's evidence concluded at paragraph 13 that the Claimant has not made himself available to be examined by the medical expert chosen by the Defendants despite the Defendants' attorneys having requested convenient dates approximately ten (10) months ago, since August, 2023.

[45.] The Claimant has alleged that after the Stay Order was made that his focus was keeping steady employment and applying his small income to ensure that his family's basic necessities were met. He had this to say in response to the evidence of Ms Pindling at paragraph 13:

"……..The Defendants contend that I am not willing to attend the doctor's office for an assessment. However, I have been ready, willing and more than ready to attend and be examined by a doctor of their choosing for more than 15 years. In fact, I was amenable to an independent examination even prior to the filing of the Writ of Summons".

[46.] The Claimant has stressed that a fair trial can be had based on the evidence that has been filed for more than two years and suggested that:

> The request by the Defendants is made for their sole benefit which according to them, is to assess the damage they have to respond to. However, the incident occurred more than fifteen years ago, as such any Medical Report they obtain could at best only show how my injuries have healed. My Attorneys-at-Law have informed me that this request might be beneficial to the Court when determining the assessment of damages rather than to prove liability. In the circumstances the Court could proceed to hear my case and determine whether the Defendants are liable, and the results of the Medical Report could be had at a later date. The absence of the medical Report at this stage should not be a barrier or hindrance to me continuing with this matter." [My emphasis added]

[47.] It is obvious to the Court that the Claimant has intentionally flouted the Stay Order. After the Stay Order had been granted in October, 2023, the Court issued new directions in December, 2023 and gave a new trial date in July, 2024 approximately eight (8) months after the Stay Order and approximately six (6) months after the Costs Order. Therefore, the Claimant already had an extension of time to be medically examined and failed or refused to do so.

[48.] This issue of being examined by the Defendant's medical doctor had already been agreed with the Claimant by his own evidence, from as early as July 2022 and he had acquiesced to the same.

[49.] It is apparent to this Court that the Claimant had no intention of attending to be medically examined. It is difficult to reconcile the Claimant's failure to be examined by the Defendants' medical expert after the grant of the Stay Order and even prior to the order. On the one hand,

his uncertain work schedule made it difficult to attend the appointments despite his "genuine best efforts" and on the other hand, once he became unemployed, he was still unable to keep any of the appointments. Even now, he had this to say about making an appointment:

> "15. On the 17th June, 2024 I informed my Attorney-at-Law about my reason for not being able to attend the appointment at Dr. David Barnett, the medical expert chosen by the Defendants. I am informed and verily believe that my Attorneys, acting on my behalf, have made a new appointment with Dr. Barnett, who has given the 11th July, 2024 as the next available date that I can attend his office for him to examine me. ***Subject to the Dr. Barnett giving assurances that I do not have to undergo any major procedures for this examination, I am committed to attending this appointment and doing all that is required on my part for my case to progress to a conclusion***."
>
> [My emphasis added]

[50.] The Claimant is under a duty to prosecute his claim with diligence and "*keep the timetable*". The blatant disregard of the Claimant relative to attending to be examined was pungent:

> In the circumstances the Court could proceed to hear my case and determine whether the Defendants are liable, and the results of the Medical Report could be had at a later date. The absence of the medical Report at this stage should not be a barrier or hindrance to me continuing with this matter." [My emphasis added]

[51.] It appears to the Court that the Claimant is "*by any means necessary*" attempting to avoid being medically examined. Given the fourteen (14) year delay in reaching the trial stage it is incredible that the Claimant still places blame for the delay in the trial on the Defendants when two trial dates have been vacated due to his refusal or failure to be medically examined. Even if the Court were to accept that there was justification for him not attending to be medically examined prior to the grant of the Stay Order (due to him being off the island) which necessitated the first trial date to be vacated, his subsequent action evinces an attempt not to comply with the Order. There were two dates to attend to be medically examined post the Stay Order, viz., on 19 December, 2023 and 20 February, 2024 both dates made directly by him or his attorney. Neither date was kept by the Claimant, nor any reasonable or justifiable explanation proffered. Thereafter, he alleged at the eleventh hour, that his attorney made an appointment for him to be medically examined on 11 July, 2024; thereby causing the second trial date to be vacated.

[52.] The Claimant even recommended that the Court at this stage bifurcate the trial thereby permitting the action to continue on the hearing of liability alone. This issue was not raised at the CMC stage and had it been raised earlier, the Court may have been willing to indulge this request.

[53.] The Defendants have also submitted that the Claimant failed to comply with the Costs Order and had in fact made only two payments totaling $2,000 and that they had attempted to agree payment terms.

[54.] As it relates to the costs award of $10,000 the Claimant stated as follows:

"18. I recall at previous Case Management hearing when the Court said it would not have made such a large cost award against me. However, I had agreed to paying the ten thousand dollar ($10,000) costs because I was of the view that the cost would be awarded at the end of the trial and I would have had a longer opportunity to pay if any cost was awarded. My present financial circumstances are unfortunate and bleak, and I am therefore respectfully asking and pleading with the Court to reconsider and revise the amount I have to pay in cost and reduce it to a smaller sum. A reduction in the amount I would have to pay in costs to the Defendants would allow me to continue with my matter in which I believe I have a good case and a chance of success.

19. I am informed and verily believe that the Court has the power to reduce the amount of the costs amount awarded against me, and to permit me a reasonable time to pay it off."

20. I am not abusing the Court's process neither am I wasting the Court's time. I have generally been consistent in my conduct to have this matter progress since I filed the Notice of Intention to Proceed on the 1st July 2019. The Court record will reflect a history that I have generally complied with the Court Orders and directions in this matter. It is only at this time where I find myself in the most embarrassing and unfortunate position of not having proper employment and a steady source of income, which has led to the non-compliance of this last Court Order on my part.

[55.] Since the Stay Order was made in December 2023 he was only able to make two payments despite his limited means and the survival of his family is always his immediate concern. However, towards the end of May, 2024 he was let go from his helper job on the fishing boat and is on the *"breadline"* unable to make any further payments in compliance with the Court Order.

[56.] The Claimant's reason for agreeing to a costs order of $10,000 in circumstances where he was unaware that he would be compelled to pay them now, rather than later is unacceptable. He is represented by Counsel who not only agreed to these costs, but is aware that the possibility of an order such as this was most likely in the circumstances given the CPR. The Claimant has had the benefit of the Rules of the Supreme Court, 1978 where cost orders were not expected to be addressed until the conclusion of the trial, however, the CPR has introduced an overriding objective which could possibly subject litigants to orders for costs much sooner and prior to the trial date.

[57.] The Claimant only has himself to blame for the Costs Order which was a direct result of his inaction in attending to be medically examined or his failure to communicate with his attorney any possible dates that he would be able to attend even though he was not on the island. His attorney was able to advise the Defendants' attorney of his unavailability to attend the appointments prior to the Stay Order being granted, however, he was unable to provide alternative dates. The Costs Order was a direct consequence of his conduct.

[58.] However, the focus of the Court is on the refusal or failure of the Claimant to comply with an order of the court requiring him to make himself available to be medically examined by Dr. Barnett and not on his failure to satisfy the Costs Order.

[59.] I have considered the evidence of the Claimant regarding the Stay Order and found that his default or non-compliance was intentional and contumelious. I have also considered the history

of the action and the inordinate and inexcusable delays in prosecuting this claim. As a result, I find that his conduct amounts to an abuse of the court.

[60.] I have considered the authorities on this issue of striking out commencing with the leading case of **Birkett v James** ***[1978] A.C. 297*** **[TAB 4]** remains 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 e.g. disobedience to a peremptory order of the court or conduct amounting to an abuse 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 them and a third party."

[61.] The **Birkett** case was discussed in **Grovit v Doctor and others** ***[1997] UKHL 13*** **[TAB 5]**, Lord Woolf however, it was not concerned with striking out due to want of prosecution, rather, on the basis of intentional and contumelious default or non-compliance with a Court Order or conduct amounting to an abuse of the process of the Court.

[62.] I adopt the quote from Lord Justice Ward in **Gohar Maqsood v Mr. Mufazar Mahmood et al:** *"From the outset of this litigation the claimant was in default"*. There had been inexcusable and inordinate delay in the prosecution of this action by the Claimant. However, when he finally arrived at the trial stage and the Court was forced to grant the Stay Order, I found the Claimant's non-compliance with the Stay Order both intentional and contumelious. His last serious attempt of attending to be examined was ***after*** the trial date of July, 2024. He has no intention of *"keeping the timetable"*.

[63.] In ***Maqsood v Mahmood and Ahmad [2012] EWCA Civ 251*** **[TAB 10]** the English Court of Appeal upheld the trial judge's decision to refuse the Claimant's request for an adjournment of the trial and to strike out the Claimant's action. In this case there was a failure on the part of both the Plaintiff and the Defendant to precisely comply with the Case Management Order. The Claimant's solicitors were aware of the trial date but still failed to take the necessary steps to be fully prepared. The Court of Appeal held that the trial judge acted reasonably in refusing the Claimant's request for an adjournment of the trial and that the Claimant's failures were egregious enough to justify the exercise of the Court's power to strikeout.

[64.] Even after the action had been set down for trial on the first occasion in November, 2023 and relisted again eight months later, in July 2024, it was incumbent upon him to proceed with the utmost diligence in prosecuting his claim against the Defendants.

[65.] The Claimant has by his application sought relief from sanctions.

[66.] **Denton and others v TH White Ltd. and another; Decadent Vapours Ltd. v Bevans and others; Utilise TDS Ltd. v Davies and others** [2015] 1 All ER 880 set out a three stage test when considering an application for relief from sanctions. I refer to it as follows:

> *"A judge should address an application for relief from sanctions in three stages. The first stage is to identify and assess the seriousness and significance of the 'failure to comply with any rule, practice direction or court order' which engages r 3.9(1). If the breach is neither serious nor significant, the court is unlikely to need to spend much time on the second and third stages. The second stage is to consider why the default occurred. The third stage is to evaluate 'all the circumstance of the case so as to enable [the court] to deal justly with the application, including [factors (a) and (b)]'."* Per Lord Dyson MR and Vos LJ at paragraph 35

[67.] I address briefly the Claimant's application for relief from sanctions and note the three stage test enunciated in the **Denton** case.

[68.] I found the Claimant's failure or refusal to be examined medically by the Defendant's doctor to be serious and significant. Two trial dates were vacated and the Claimant's conduct was unjustifiable or unreasonable. Even when the Claimant was off the island he was still unable to definitively provide alternative dates to be medically examined in his absence. The Court would have had sympathy for his circumstances if upon his return to the island, he promptly made himself available. This he did not do. He continued to keep the Defendants waiting with impunity.

[69.] There was no evidence tendered of his actual attendance to be examined, just promises to attend, appointments made, none of which were kept. I found his conduct and behaviour intentional, evasive and suspicious. It is the Claimant's case and he was at the trial stage after having commenced the action over ten (10) years ago with the accident having occurred over fifteen (15) years ago. He needed to *"keep the timetable"*.

[70.] I found no justifiable reasons for his conduct, just excuses upon excuses. The Claimant already has a Costs Order against him in relation to the Stay Order and even if I were minded to grant him relief from sanctions, it would have cost implications against him.

[71.] Accordingly, I refuse to grant him relief from sanctions.

[72.] Accordingly, for all of the above reasons, I find that there is good cause or proper grounds per **Cooper v Williams** supra to lift the stay and strike out the Writ in accordance with the CPR, Rule 26.3(1)(a) and 26.1(c).

[73.] I make the following orders sought in the Defendants' Notice of Application filed on 17 June, 2024 and the Claimant's Notice of Application filed on 23 June, 2024:

(i) The stay of the whole of these proceedings granted by Order dated 23 October, 2023 (the "Stay Order") be lifted pursuant to the inherent jurisdiction of the Court;

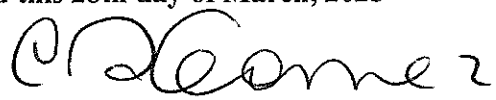
(ii) the Amended Writ of Summons filed on October 13, 2021 (the "Writ") be struck out for want of prosecution and as an abuse of the process of the Court pursuant

to Rule 26.3 of the Supreme Court (Civil Procedure) Rules, 2022 (the "CPR") and the inherent jurisdiction of the Court;

(iii) I refuse the reliefs sought by the Claimant;

(iii) the costs of and occasioned by these Applications and of this action be paid by the Claimant to the Defendants which I will summarily assess in accordance with the CPR, 2022.

Dated this 28th day of March, 2025



Camille Darville Gomez
Justice