IN THE COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

Claim No. 2015/CLE/gen/01079

BETWEEN

MARIAM CALLENDER
d/b/a SILVERLINE TOURS

Claimant

AND

AMERICAN EAGLE AIRLINES

Defendant

Before:	The Hon. Madam Justice Simone Fitzcharles
Appearances:	Mr. Lessiah Rolle for the Claimant (Respondent)
	Mr. Keith O. Major for the Defendant (Appellant)
Hearing Date:	22 January 2024

RULING

FITZCHARLES, J.

Introduction

1. This is an appeal from the decision of the Deputy Registrar delivered on 16 August 2022 by which an application to dismiss the Claimant's Writ of Summons for want of prosecution and an abuse of process was refused and leave was granted to the Claimant to file a statement of claim out of time.

2. By its Notice of Appeal to Judge In Chambers filed on 18 August 2022, the Appellant/Defendant seeks that:

   (1) "the Ruling [of the Deputy Reigstrar] be set aside in its entirety;
   (2) "th[is] Action be dismissed for want of prosecution;
   (3) "the Defendant's appeal be allowed;

(4) "the costs of and occasioned by this Appeal and the application below be paid by the Claimant to the Defendant; and
(5) "such further and/or other relief which this Honourable Court may deem just and equitable."

3. In this decision, Mariam Callender (doing business as Silverline Tours) is the Respondent/Claimant ("**MC**" or "the Respondent") and American Eagle Airlines is the Appellant/Defendant ("**AEA**" or "the Appellant").

Background

4. MC took out a Writ of Summons on 21 July 2015 against AEA by which she claimed, amongst other relief, damages for breach of a written contract dated 18 September 2012 and/or specific performance of the contract or alternatively, an injunction which restricts AEA from entering into any agreement which covers the scope of work contained in the written contract until trial of the action or further order. At the time MC was represented by Mr Bernard Ferguson of Ferguson & Associates.

5. Following service of the Writ of Summons on behalf of MC, Messrs Higgs & Johnson, legal representatives of AEA, filed a Memorandum of Appearance on 12 August 2015 by which the Supreme Court was requested to "PLEASE ENTER an appearance on behalf of American Eagle Airlines, the Defendant in this action." A Notice of Appearance was filed on the same day.

6. On or before 26 August 2015 MC's Counsel should have filed the Statement of Claim of MC in accordance with RSC Order 18, Rule 1. This did not happen for reasons later shared by MC and her former Counsel. In fact, neither MC nor AEA took any further step to see that the action moved along until 2021. The actual delay on the part of MC from the expiry of the time she should have served her Statement of Claim (26 August 2015) to the filing of the Summons to Dismiss the action for want of prosecution was some 5 years and 10 months.

7. The next chronological step taken in this matter was the filing of a Summons by AEA on 18 June 2021 by which AEA sought:

(1) pursuant to Order 34, rule 2 or the Rules of the Supreme Court, 1978 ("RSC") and/or the inherent jurisdiction of the Court to have the action dismissed for want of prosecution with costs on the basis that MC had not proceeded with due expedition and was inordinately and inexcusably late in proceeding, which caused AEA to suffer "serious prejudice"; or alternatively,

(2) pursuant to RSC Order 18, rule 19(1)(d) and/or Order 31A, rule 20(b), and/or the inherent jurisdiction of the Court, that the action be dismissed as an abuse of the process of the Court, with costs to AEA.

8. The 18 June 2021 application of AEA to dismiss this action (the "**Dismissal Application**") was supported by the **Affidavit of Shayla Campbell** filed on even date. Materially, the deponent stated, in part:

> "7. I have been informed by the Defendant and verily believe that since the filing of the Writ, more than 5 years have elapsed and the Plaintiff has not taken any further steps (the "Delay"). The Delay is inordinate and the Plaintiff has not produced any credible excuse for the same.
>
> "8. …[T]he Delay is not by way of any agreement or consent by the Defendant. Nor have there been any steps on the part of the Defendant which has contributed to the Delay.
>
> "9. Further…the Delay has caused the Defendant to suffer serious prejudice as the Plaintiff is seeking, inter alia, to restrict the Defendant, a corporate entity from entering into any further contracts or agreements covering the scope of the work contained in the Contract until the trial or otherwise directed by the court. The Defendant is seriously prejudiced in this respect as they are precluded from entering into contracts as they see fit from a business perspective in relation to the scope of work set out in the Contract.
>
> "10. Alternatively, if the Writ is not dismissed or want of prosecution, the same should be struck out on the basis that it is an abuse of the court process. I have read the Contract referred to in the Writ specifically Article 15 titled "Governing Law" which indicates that the parties to the Contract that being the Plaintiff and Defendant voluntarily submitted to the jurisdiction of the federal and state courts located in the State of Texas for any dispute arising out of the Contract. Accordingly, commencing a claim in the courts of the Commonwealth of The Bahamas is contrary to the agreed terms of the Contract and the Bahamian courts do not have the jurisdiction to hear the same; for that reason, the Writ should be struck out in its entirety."

9. The matter was initially slated to be heard by Deputy Registrar Renaldo Toote on 8 February 2022, but was adjourned to 8 March 2022. One day before the hearing was to take place, L Rolle & Associates, new Counsel for MC, filed a Notice of Change of Attorneys.

10. The hearing before the Deputy Registrar, Mr Toote, took place on 8 March 2022 as scheduled and the Court gave leave to Mr Rolle, Counsel for MC, to proffer submissions in response to AEA's Dismissal Application. The Deputy Registrar indicated that the Dismissal Application would be heard on the papers.

11. This was followed by the filing on 22 March 2022 of a Notice of Intention to Proceed and a Summons by which MC sought an abridgement or enlargement of time within which to file her Statement of Claim, as well as the dismissal of AEA's Dismissal Application by reason that it was "irregularly obtained". The **Affidavit of Bernard**

Evans, former Counsel of MC was filed on 22 March 2022 in support of MC's application. That Affidavit, in part, sets out the following statements:

> "5.On 18th September 2012 the Plaintiff and Defendant executed a contract for the Plaintiff to transport the Defendants Crew Members from and to the Lynden Pindling International Airport. The said contract:
>
> "5.1 Was for the duration of Five (5) years from the 1st November 2012 to the 31st October 2017.
> "5.2 Provided for the payment of One Hundred-twenty Dollars ($120.00) per round trip
> "5.3 Provided for written termination with Thirty (30) days written Notice."
>
> "6. In breach of article VII the Defendant wrongfully and unlawfully terminated the said contract with Two (2) years remaining.
>
> "7. In respect of the delay in pursuing my matter, I humbly ask the Court to take into consideration of (sic) the onset and duration of the COVID 19 Pandemic. The reasons for the delay in pursuing the matter is (sic) that:
>
> "7.1 The Plaintiff has been impecunious due to the Defendant's cancellation of the said contract hence unable to properly instruct me.
>
> "7.2 Sometime in 2015 I was diagnosed with a heart condition and as such was unable to work at a pace that I previously did and was overwhelmed by my workload.
>
> "7.3 [I] Have been in oral communication with the other side with the hope of reaching a settlement between the period of 2015 and the date of the Defendant's application…
>
> "8. Notwithstanding the long delay in pursuing the instant matter, I am advised and verily believe that the delay is not intentional, and I ask the Court to accept the reasons given for the delay.
>
> "9. More than One (1) year has elapsed since the filing of the last pleadings and the Defendant filing the Summons and Affidavit seeking to dismiss the Writ of Summons in the matter herein.
>
> "10. I conducted a search at the Supreme Court Registry and found that the Defendant has not filed a Notice of Intention to Proceed in the matter herein. Consequently the Defendant's said Summons in the matter herein is irregular."

12. MC also filed the **Affidavit of Mariam Callender** to support her application for further time to file her Statement of Claim and to challenge the Dismissal Application of AEA. In that Affidavit, MC repeated much of the statements made in the Affidavit of Bernard Evans. She added that the two years of the contract which remained after the Defendant's termination of the same were valued in excess of Eighty Thousand Six Hundred and Forty Dollars ($80,640.00). She also stated that the determination of

the matter is based solely on documentary evidence namely the written contract between the parties. As such, MC stated that she did not believe that the Defendants would be prejudiced should the Court grant her the extension of time she sought to file her Statement of Claim. MC indicated that she was advised and verily believed that she has an arguable case with good chances of success. MC exhibited to her Affidavit a copy of the written contract between the parties and a draft of her Statement of Claim.

13. It was later (and for the purposes of this Appeal) recounted by Counsel for AEA in the **Affidavit of Toreo Taylor** filed on 13 March 2023, that Mr Rolle did not receive permission to file an application and supporting Affidavits during the period from 8 March 2022 to 22 March 2022. The Deputy Registrar had given permission to MC to file submissions and a draft Statement of Claim by 21 March 2022. Mr Rolle sought an extension of time to comply by 1 day. Counsel for AEA felt constrained to advance points in rebuttal to the draft submissions of MC and did so by **letter dated 21 March 2022 from Oscar Johnson QC** of Messrs Higgs & Johnson to the Deputy Registrar. The points in rebuttal made on behalf of AEA were:

    (1) AEA filed its Notice and Memorandum of Appearance on 12 August 2015 in time in accordance with the RSC (that is, within 14 days of service of the Writ).

    (2) In defending the Dismissal Application, MC is incorrect in relying upon purported communications between the parties and not steps taken in these proceedings.

    (3) The argument of MC that AEA should have filed a Notice of Intention to Proceed is erroneous at law: ***Supreme Court Practice 1985, Part 1, para 3/6/1)***.

    (4) There is no credible basis for MC to seek to have the Court exercise its discretion to grant her an extension of time to file her Statement of Claim due to the onset of the Covid-19 pandemic. This is no excuse for her dilatoriness and failure to take advantage of statutory extensions of time granted by the ***Supreme Court (Covid 19) Rules, 2020, Nos. 1, 2 and 3***, to take certain steps under the Rules of the Supreme Court. To allow MC to proceed hinders the Court's agenda of clearing case backlogs and preserving judicial time for litigants who act timely to advance their cases.

14. Having considered the Dismissal Application of AEA on the papers submitted to the Court, the Deputy Registrar produced a written Ruling on 16 August 2022 in which he pronounced, in part, the following:

    "[4] On 12 August 2015, the defendant entered an appearance and no other pleading was filed by the plaintiff. As a result, the defendant filed its summons to dismiss the writ for want of prosecution.

"[5] The initial hearing of the application was heard on 8 march 2022, where Mr Lessiah Rolle, counsel for the plaintiff, stated that he was recently instructed by Ms Callendar therefore required a further adjournment.

"[6] This court cautioned Mr Rolle on the fact that there was no statement of claim filed after seven (7) years. At the conclusion of the hearing, the plaintiff was given an opportunity to reply to the defendant's submission to dismiss the claim for want of prosecution.

"[7] Instead of only presenting submissions in response, the plaintiff sought to file (1) notice of intention to proceed (2) affidavit of Bernard Ferguson (3) affidavit of Miriam Callender and (4) statement of claim.

"[8] No leave was given to the plaintiff to file the aforementioned pleadings in the fact of the extant application. Notwithstanding, I reviewed the filings to determine what relevance if any should be applied to them.

"[13] The affidavit of Miriam Callender purports to ventilate the factual matrix of the breach of contract and premised the inordinate delay on the illness of her first attorney who paradoxically was Mr Bernard Ferguson.

"[14] I find it interesting that Mr Ferguson was able to quickly produce an affidavit in support of this application but unable to file a statement of claim after several years.

"[15] It is the duty of the plaintiff's counsel to get on with the case. See ***Reggentin v Beecholme Bakeries Ltd*** (1967) 111 Sol. Jo, 216. The right to a fair trial is bilateral and not unilaterally in favour of the plaintiff.

"[16] In any modern justice system it is unacceptable for any matter of this nature to be subject to delays of this magnitude. The public's confidence in the administration of justice is incumbent upon the ability to not only access the justice system but to have its matters adjudicated in a timely and expeditious manner. Anything less, can create severe prejudice for a defendant."

15. The Deputy Registrar from paragraphs 17 through 27 oriented his focus to the core principles by which he felt the Court ought to be guided. In so doing, he explored those principles set out in the leading cases of **Birkett v James** [1978] AC 297, **Allen v Sir Alfred McAlpine & Sons Ltd** [1968] 2 QB 229 as well as the approach taken in the Bahamian judgment of Winder J (as he then was) in **Major Consulting Ltd v CIBC Trust Company (Bahamas) Limited** [2014] 2 BHS J No. 19. On the basis of his consideration of the core principles concerning dismissal for want of prosecution, the Deputy Registrar found (in part):

"[17] Indeed, the ability to dismiss a case for an inordinate delay and want of prosecution is a discretionary power of a judge and should be exercised judiciously considering all of the circumstances at hand.

...

"[19] In short, the present case is not one of intentional or contumelious default (e.g. disobedience to an order). It is one in which it is necessary for the defendants to show (1) that there has been inordinate and inexcusable delay on the part of the plaintiff or her lawyers and (2) that such delay has given rise to a substantial risk that it is not possible to have a fair trial of the issues in the action, or is such as is likely to cause or have caused serious prejudice to the defendant.

...

"[26]...The power to dismiss an action for want of prosecution is discretionary to the court and should be cautiously exercised so long as the defendant can prove that the delay will give rise to a substantial risk in which it is difficult to have a fair trial.

...

"[28] I am of the opinion that the delay in the instant case was not only inordinate, but also inexcusable. Albeit reasonable for the plaintiff to hope for a settlement, she was duty bound to continue prosecuting her case after reasonable time had elapsed, particularly after acknowledgment of her original attorney's medical condition which made it difficult for him to diligently prosecute this action."

16. Having so determined, the Deputy Registrar addressed the issue on which his decision finally turned: whether AEA had demonstrated that the delay caused them serious prejudice, is an abuse or has affected the case such that it is no longer possible to have a fair trial of the issues involved. (See the ***Major Consulting*** case at para 16). In accordance with the Major Consulting case, it was found that the burden was on AEA to file evidence to establish the nature and extent of the prejudice occasioned by such delay.

17. Materially affecting the issue of prejudice, the Deputy Registrar then made 3 key findings:

    (1) that based upon his understanding of the case at that stage, it was likely to turn on an interpretation of the contract between the parties rather than on oral evidence;

    (2) that it was unclear how reference to a 'going concern' in the submissions of AEA assisted in the demonstration of prejudice; and

    (3) there was no evidence to demonstrate prejudice of the Defendant.

18. To support his conclusions, the Deputy Registrar made reference to the decision of the Judicial Committee of the Privy Council in ***Icebird Limited v Alicia Winegardner*** [2009] UKPC 24, in which the Court found that a case inordinately delayed had not

given rise to the inability to have a fair trial and that there were no circumstances by which the Court could find that there was an abuse of process.

19. The Deputy Registrar also referred to, as a final quote, the words of Sachs LJ in ***Sayle v Cooksey*** [1969] 2 Lloyd's Rep 618 (at page 625):

> "For while it is of course for the court to take account of the need to avoid its machinery being abused by inordinate delays, it should also take account of the detriment to the interests of justice should a plaintiff innocent of blame suffer disaster by being driven from the judgment seat unless the justice of the case as a whole imperatively demands that course. The court is entitled, as Diplock LJ stated (in ***Allen v McAlpine***) to temper justice with humanity."

20. In the circumstances, the Deputy Registrar made the following orders and comments:

> "[38] For the aforementioned reasons, I will exercise judicial temperament and make the following orders:
>
> 1. The plaintiff is granted leave to file and serve its statement of claim out of time by 26th August 2022.
> 2. UNLESS, the plaintiff files and serves its statement of claim by 26th August 2022, the writ of summons is dismissed for want of prosecution.
> 3. Cost of and occasioned by this application be fixed costs to the defendant in the sum of $1,000.00.
>
> "[39] I departed from the usual order that costs follow the event, which would have awarded costs to the plaintiff, plainly on the fact that the plaintiff's delay in prosecuting this case was inordinate. Further, I am firmly of the view that had it not been for the defendant's summons, this sleeping dog may have still been asleep."

Grounds of Appeal and Submissions

21. The appeal of AEA is brought pursuant to Order 58 of the Rules of the Supreme Court, CH. 53, Statute Laws of The Bahamas which provides in part:

> "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...".

22. Dismissal of the action for want of prosecution is prayed for pursuant to **Order 34, rule 2** which provides, in part, that a defendant may set an action down for trial, or apply to the Court to dismiss the action for want of prosecution, where the plaintiff fails to set the matter down in compliance with an order of the Court which fixes the time for doing so. The Court's file does not reflect that an order had been made which provides for trial before a judge or that a time period had as yet been fixed by any order for the plaintiff to set the action down for trial. Under the former procedure it would have been incumbent on the plaintiff to file a summons for directions at the close of pleadings (now replaced by the procedure for referral to case management) to obtain such an order as is contemplated by **Order 34, rule 2**. The Court's inherent jurisdiction is also invoked.

23. Dismissal of the action as an abuse of process is also sought by the Defendant under **Order 18, rule 19(1), Order 31A, rule 20(b)** and the inherent jurisdiction of the Court. According to **Order 18, rule 19(1)** the Court may strike out or amend pleadings in an action where, amongst other things, it is an abuse of the process of the court. The Court may also, in enumerated situations, dismiss, stay or enter judgment in, the action. AEA argues that filing the Writ of Summons by MC without further prosecuting the action is an abuse of the court's process. AEA contends that the result of such abuse should be the dismissal of this action.

24. Reliance is also placed on **Order 31A, Rule 20(b)** which deals with case management by the Court. It provides for the striking out of a pleading by the Court where such pleading or part thereof is an abuse of the process of the Court or is likely to obstruct the just disposal of the proceedings.

25. The grounds of appeal and arguments on behalf of AEA are enumerated below.

First Ground of Appeal

26. AEA's first ground of appeal is that "**the Deputy Registrar, by not determining the Dismissal Summons in favour of the Defendant, erred in law by failing to arrive at a conclusion which a reasonable Deputy Registrar properly applying the law and considering the facts before him would have arrived and by having regard to matters he ought not properly to have had regard to.**"

27. In relation to this ground, the opening volley of Counsel for AEA, Mr Keith Major, is that the Respondent's inaction for a period of 7 years, since the filing of the Writ of Summons, was a sufficient basis on which the Deputy Registrar could have exercised the discretion under the RSC to dismiss the action for want of prosecution or strike it out as an abuse of the Court's process. It is argued the Deputy Registrar admitted facts which tended towards the dismissal of the action, but he came to incongruent conclusions at paragraphs 4, 6 through 8, 12, 14 through 16, 28 and 39 of the Ruling. In particular, Counsel submitted that the Deputy Registrar noted in paragraph 28 of

his Ruling that MC's delay "was not only inordinate, but also inexcusable." However, despite that finding the Dismissal Application was dismissed.

28. Further, Mr Major contends for AEA that the Deputy Registrar's reliance on **Icebird Limited v Alicia Winegardner** [2009] UKPC 24 and **Major Consulting Ltd v CIBC Trust Company (Bahamas)** Limited [2014] BHS J No. 19 was erroneous by reason that both cases may be distinguished on the basis of the period of delay in each being 2 years only, and not "a troublesome 7 years".

29. Counsel also contends that the treatment, in paragraphs 31, 34 and 35 of the Ruling, of the "trite concept" of a going concern in relation to AEA suggests some confusion and/or misapprehension regarding the Appellant's sole reference in its submissions to 'American Eagle' as a going concern (i.e. an operating business). It is argued that these references led to determinations which a reasonable Deputy Registrar having regard to the facts and evidence before him would not have arrived at. Therefore the only appropriate conclusion in the circumstances was that the instant action be dismissed as applied for.

30. Mr Lessiah Rolle, Counsel for MC argues that the Notice of Appeal is irregular because the grounds of appeal for AEA, are not set out therein. Further, he argues that the grounds of appeal purported to be relied on by AEA are actually "consumed in the principles" governing dismissal or strike-out of an action contained in the Bahamian Privy Council case of Icebird Ltd v Winegardner [20009] UKPC 24 and followed in the Bahamas Supreme Court case of Major Consulting v CIBC Trust Company (Bahamas) Ltd, 2011/CLE/gen/00070. Mr Rolle argued that the Deputy Registrar rightfully referred to those principles. It is submitted that AEA produced no evidence to support a finding of an abuse of process as alleged, and in relation to dismissal for want of prosecution, there is no substantial risk that the Appellant will not have a fair trial as the case seems principally to concern documentary evidence.

31. Reliance was also placed on the Caymanian case of ***Kirkconnell et al v Cook-Bodden*** (1990-91) CILR 23 where in the face of a delay of 4 years Harre J of the Grand Court refused to strike the matter out for want of prosecution on the basis that the delay was inordinate but not inexcusable. Further, the court was not satisfied the defendant would be materially prejudiced because the case would turn on matters of record. The court stated that in the circumstances, it did not see a reason why the case could not be determined as satisfactorily in 1990 as in 1986.

32. I accepted the form of Notice of Appeal used by the Appellant which was based upon a precedent from the Queen's Bench Master's Practice Forms. There is no form prescribed in relation to RSC Oder 58, rule 1 in the Bahamian RSC, 1978. I accepted the grounds of appeal as set out on behalf of AEA in its Submissions.

Delay

33. In speaking of the "inaction" of MC, AEA has, in argument, pegged the same as having a 7-year duration. There was a 7-year duration between the filing of the generally indorsed Writ of Summons and the hearing of the Dismissal Application by the Deputy Registrar, but it is my view that the actual period of inaction of MC was over 5 years, as correctly stated in paragraph 7 of the Affidavit of Shayla Campbell also relied upon by AEA. Having filed her generally indorsed Writ of Summons within the limitation period of 6 years, and having served the Writ within the year of its validity for service, MC was obligated to await the timely service of the Memorandum and Notice of Appearance of AEA before taking another step. According to the RSC Order 18 rule 1, MC ought to have served her Statement of Claim before the expiry of 14 days after entry of the appearance. The appearance was entered and served on 12 August 2015. As such, MC had to serve her Statement of Claim by 26 August 2015. From 27 August 2015 she was in the territory of delay. Some 5 years and 10 months later at the filing of the Dismissal Summons of AEA, MC could not regularly enter her Statement of Claim unless she was ordered to do so by the Court. Therefore, the delay on the part of MC from the time she ought to have filed her Statement of Claim to the time she could no longer do so without an order of the Court was over 5 years. She eventually received a peremptory Order to that effect from the Deputy Registrar on 16 August 2022, with a deadline of 26 August 2022 to file her pleading.

Dismissal for Want of Prosecution

34. Now turning to the heart of the matter, I concur that the delay of over 5 years was inordinate and inexcusable. Having considered the evidence before the Court, I do not question or doubt the veracity of the Claimant's reasons for her and her former Counsel's delay in filing a statement of claim, amongst which were serious illness of Mr Evans (former Counsel for MC), ongoing communication with AEA in an attempt to settle the case and delays caused by the Covid-19 Pandemic lockdown periods and other incidences thereof. However, it is quite a different thing to accept those excuses as adequate for the over 5 years of delay on the part of MC and/or her former Counsel in moving the case along.

35. Before me is an appeal in which this Court is asked to consider afresh the application to dismiss this action for want of prosecution. The Court must also consider, on the facts of this case, AEA's application to strike out this action as an abuse of process. The key principles to consider in such applications were condensed in the judgment of Winder J (as he then was) in ***West v Survance and others***, [2014] BHS J. No. 56 at paragraph 4:

"4 I repeat my recent discussion on the law for dismissal for want of prosecution made in ***Major Consulting Ltd. v. CIBC Trust Company (Bahamas) Ltd. 2011/CLE/gen/00070*** at paragraph 8-12:

"8. There are three types of dismissal for want of prosecution:

(a) Where there has been intentional and contumelious (insolent) default of the court's order, e.g. disobedience of a peremptory order of the court, and

(b) Where:

(i) there has been inordinate and inexcusable delay in the prosecution of the action by the plaintiff or his lawyers, and

(ii) such delay will give rise to a substantial risk that it is not possible to have a fair trial, or that the delay has caused, or is likely to cause, serious prejudice to the defendants either as between themselves and the plaintiff, or between each other, or between them and a third party.

(c) Where the plaintiff's conduct amounts to an abuse of the process of the court."

...

"11. For an application for dismissal to succeed under the heading of inordinate and inexcusable delay, the defendant must show that the delay satisfies the requirements set down in ***Birkett v James*** [1978] AC 297 as confirmed by the Privy Council in the Bahamian case of ***Icebird Limited v. Alicia Winegardner***, Appeal No. 72 of 2007. According to Lord Scott of Foscote, who delivered the decision of the Board in ***Icebird***, at paragraph 8:

> 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 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" (per Lord Diplcok at 318)."

"The Privy Council also stated:

> "[t]he present case is not one where there has been any contumelious default. It is a case where there has certainly been inordinate and inexcusable delay on the part of the Appellant or its lawyers. But what else? There is no evidence of any serious prejudice to the Respondent caused by the delay. Is this a case where the delay has given rise to a substantial risk that a fair trial will not be possible?"

36. Having found that the delay of MC or her lawyer was inordinate and inexcusable, the Court must, in accordance with the law, additionally be satisfied 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 AEA. Reliance is placed by AEA upon the English Court of Appeal case of ***Re Manlon Trading Ltd*** [1995] 4 All ER 14. The Appellant submits that dimming of witnesses' memories occurs over time and that a judge can infer that any substantial delay leads to a further loss of recollection. Further witnesses may die or disappear over time. The Court is invited to infer that there is prejudice to a businessman, inherent in the prolongation of proceedings, which remain pending for a lengthy time, for a business, owing to uncertainty of its position which stood to be adjudged by proceedings, would be prevented from ordering his affairs with a view to the future.

37. Further, in the Affidavit of Shayla Campbell at paragraph 9 the affiant characterizes the specific prejudice suffered by AEA. She states that the application to restrain AEA from entering into any contract covering the scope of the work contained in the written agreement between the parties is preventing AEA from entering contracts as they see fit in relation to such scope of works. As such, it is submitted AEA is suffering serious prejudice.

38. The Court has reviewed the Writ of Summons and draft Statement of Claim. In my view, the central question appears to be whether the contract was terminated in accordance with its terms. The contract is for MC to provide transportation to the crew members of AEA from and to the Lynden Pindling International Airport. In the contract between the parties (as exhibited to the Affidavit of Mariam Callender), there is a specific notice period prescribed for ending the contract in Article VII. Whether 30 days' written notice had been tendered appears to be the issue on liability. If a breach is established, on quantum the main question is likely to be whether a sum equivalent to what would have been earned on performance of the contract during the 30-day notice period only, or alternatively, compensation for the unperformed remainder of the contract (allegedly 2 years) would be due to the Claimant. This action appears to be a simple one of alleged breach of contract. As framed in the pleadings and draft pleadings, the matter is likely to be determined on the basis of minimal oral testimony and primarily on the construction of the written contract between the parties. Having perused the Writ of Summons and draft Statement of Claim, the Deputy Registrar came to this conclusion, and opined that in light of the nature of the claim, the possible prejudice to AEA or potential risk of not having a fair trial is significantly reduced. I agree.

39. As far as I can discern, nothing turns on the Deputy Registrar's construction or apprehension of the phraseology "a going concern". The points made in paragraph 6.9 of the 'Defendant's Submissions' speak to alleged prejudice suffered by AEA as an operating business. There is no evidence produced by AEA which proves that they are hindered in conducting business or any part of their business or have suffered damage to their business interest as a result of a delay of MC in this action. Pending litigation

is accompanied by some anxiety, but this has been held as not capable of being regarded as prejudice justifying a strike out. (See ***Dept. of Transport v Chris Smaller Ltd.*** [1989] 1 AC 1197). No proof has been proffered to make out that witnesses or documents have been lost over time and such factors as would tend to support prejudice or an inability to have a fair trial. The Court has been asked to infer prejudice, and I agree, it can to a certain degree. However, it is not inferred to a sufficient degree to drive the Respondent from the judgment seat. It is the Court's view that in all the circumstances, a fair trial is still possible in this matter and that if the Appellant has suffered prejudice, it may only be inferred to a minimal degree in the absence of proof.

40. In the circumstances, there is no basis for dismissing this action for want of prosecution.

41. On the Appellant's argument of the incongruence of paragraphs 4, 6 through 8, 12, 14 through 16, 28 of the Ruling of the Deputy Registrar, apart from those which contain the statement of general principles of the law (such as paragraphs 12, 15 and 16), these statements support the finding of inordinate and inexcusable delay. On the law, however, more is required (as is shown above) before the Court will exercise its discretion to dismiss the action for want of prosecution.

42. The Deputy Registrar's reliance upon the Privy Council decision of ***Icebird Ltd v Winegardner*** was criticized by AEA as there is a disparity in the periods of delay between ***Icebird*** and the instant case. It is clear that there is such a disparity in the years of delay in each case, but this is no basis upon which to fail to attend and adhere to the principles stated in ***Icebird*** by the highest Court in the Commonwealth of The Bahamas, and the manner in which that Court treated with the issues of dismissal for want of prosecution and abuse of the process of the Court have broad application.

Abuse of Process

43. In relation to examining whether a party's delay in proceeding with its action amounts to an abuse of process for which the matter may be struck out, Winder J., in paragraph 4 of ***West v Survance and others***, reiterated from his earlier judgment in the ***Major Consulting*** case:

> "12. Dismissals for abuse of process are occasions where a party to proceedings may use the process of the court in a way significantly different from its ordinary or proper use. This may be held to be abuse of the court's process, and an aggrieved party may make an application to dismiss the matter for abuse of process. In ***Grovit v Doctor*** [1997] 1 WLR 640, the House of Lords held that the courts were entitled, under the inherent jurisdiction to prevent abuse of process, to strike out/stay proceedings if the inactivity of the claimant amounted to an abuse of process even if the facts of a case did not fall within the principles of ***Birkett v James***. It was held that the continuation

of proceedings when a claimant had no intention of bringing a case to trial could, in appropriate cases, amount to an abuse of process and as such an application could be made to strike out the claim and dismiss the action. The inactivity of a claimant could be the evidence relied upon to establish the abuse of process."

44. It is appropriate as well to revisit the remarks of the Privy Council in the ***Icebird*** case (relied upon by MC) as the Court discussed ***Grovit*** and the topic of delay as an abuse of process as follows:

"7. ...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 judgment. 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 Lordships."

45. In the case of MC, there is no evidence apart from a lengthy delay, which indicates that the Respondent had no interest in actively pursuing the litigation. In the absence of evidence to the contrary this Court cannot make a finding that MC had lost interest in pursuing her case. She or her attorneys communicated with the Appellants in an effort to resolve the matter during the period counted as delay. This is not disputed by the Appellant, but rather AEA says that MC ought to have resumed her activity in the proceedings after a reasonable time had elapsed without a resolution. It appears there was some lethargy on the part of the Respondent, which prompted the Deputy Registrar to believe (expressed at paragraph 39 of his Ruling) that the 'sleeping dog' of this case would have further lain in slumber had it not been for Dismissal Application. But in my view, apart from the inordinate delay there is nothing which transforms the delay into an abuse of process. Further, it has not been alleged that MC brought this action for some other purpose than to recover damages for breach of contract by litigious means. The Court cannot make such a finding unless there is clear evidence to support it. The evidence falls short of doing so. I therefore find that the case for abuse of process against MC has not been made out.

Second Ground of Appeal

46. The Appellant's second ground of appeal is that "**the Deputy Registrar erred in law and committed a fundamental error of law by clearly ignoring relevant legal issues and legal authority placed before him for consideration and/or in failing to**

clearly show how he frontally addressed all of the relevant issues and authorities in the context of the evidence."

47. Counsel for AEA contends that the Deputy Registrar erred in not citing ***RSC Order 34, rule 2***, not mentioning the Summons by which MC sought an extension of time to file her Statement of Claim, not considering ***RSC Order 3 rule 4*** to extend time. Further, it is argued that the Court ignored that the issue of prejudice was dealt with in paragraphs 5.15 and 6.9 of the written submissions of AEA. See ***Evangelistic Temple v Lauriette Lightfoot*** IndTribApp No 47 of 2021.

48. Further on the finding that the case would more depend upon documentary evidence than oral testimony, AEA submits that the Deputy Registrar failed to apply ***Re Manlon Trading Ltd*** [1995] 4 All ER 14, 24 relied upon by AEA.

49. It is the opinion of this Court that even if the Deputy Registrar did not cite in his decision the authorities mentioned herein, he did not err in his reasoning and conclusions. This Court, having considered those Rules and authorities, has arrived at the same or similar conclusions as the Deputy Registrar.

50. The Appellant's Counsel also submits that the action ought to have been dismissed as an abuse of process because the parties contractually submitted themselves to the jurisdiction of the federal and state courts of Texas to handle any dispute arising between them. This was addressed at paragraph 15 of the Affidavit of Shayla Campbell.

51. Mr Rolle representing MC has argued that while it is otherwise an abuse of process of the Court to defy the governing law and forum agreed by the parties, provided there are sufficient connecting factors with this jurisdiction, a Bahamian Court will uphold the bringing of the action in The Bahamas. He relied upon ***Rosalyn Brown v Cotswold Group Limited et al***, 2018/CLE/gen/01042.

52. I have considered the case proffered by Mr Rolle and see the force of his argument. I also consider that both AEA and MC are present in The Bahamas. Having received service of the Writ of Summons AEA entered a regular Memorandum of Appearance. The contract was written to be performed in The Bahamas, and it was actually so performed for some years, according to the pleadings. The connection with Texas is tenuous – and if it were not so, AEA should have produced evidence to show the same. Without more, this Court is not of the view that there are sufficient grounds to dismiss this action as an abuse of process on the basis of the governing law and forum clause in the contract between the parties.

53. It is somewhat ironic that AEA has sought to have this action dismissed on the basis of the failure of MC to timely prosecute the matter, when AEA has also delayed significantly in moving its application to seek to strike out the action on the basis of want of jurisdiction of the Court. By its admission the Writ of Summons was served on AEA on 12 August 2015, yet its Summons by which it challenges the Court's

jurisdiction by alleging an abuse of process on the part of MC was not filed until 18 June 2021.

Third Ground of Appeal

54. AEA additionally appeals on the ground that "**the Deputy Registrar erred in law and acted ultra vires by exceeding his jurisdiction and by purporting to grant relief which was not expressly, specifically and properly sought in the only application before him being the Dismissal Summons.**"

55. It is argued that the Dismissal Summons was the only one before the Deputy Registrar, but he granted relief not claimed therein in granting MC an extension of time. AEA submits the following authorities apply: ***Alistair-Prescott Ltd v Securities Commission of The Bahamas*** [2003] BHS J. No. 34; ***Nigeria Air Force v Shekete*** (2002) 18 NWLR 129; ***The Hon Frederick Mitchell Minister of Foreign Affairs and Immigration of The Commonwealth of The Bahamas and Others v Melidor and another*** [2017] 2 BHS J. No. 28. MC counters this argument by submitting that the Court has jurisdiction to entertain and grant her application for an enlargement of time to enter a Statement of Claim notwithstanding AEA filed the Dismissal Application. Reliance was placed on ***Wiedenhofer v The Commonwealth*** [1970] HCA 54.

56. The Court considers that, in accordance with Order 32, rule 11(1), "[t]he Registrar shall have power to transact all such business and exercise all such authority and jurisdiction as under the Act or these rules may be transacted and exercised by a judge in chambers…". (There are exceptions to the general wording of Order 32, rule 11(1) which are irrelevant to this analysis). This being the case, Order 31A, rule 18 provides in part:

"18. (1) The Court's powers in this rule are in addition to any powers given to the Court by any other rule, practice direction or enactment.

> "(2)Except where these Rules provide otherwise, the Court may –
> …
> "(b) extend or shorten the time for compliance with any rule, practice direction, order or direction of the Court even if the application for an extension is made after the time for compliance has passed…".

57. The Deputy Registrar, having ruled that the case was not fit for dismissal or a strike-out, then took the next logical step in the Court's management of the case. He put in place a peremptory order for the filing of the statement of claim. It is this Court's opinion that this was an appropriate order to make as a result of the outcome of the Dismissal Application. Based upon the argument of AEA that the Deputy Registrar exceeded his jurisdiction in ordering that the statement of claim be filed by MC within a specified period of time lest the action be struck out, the alternative would have been to await the setting down of the application of MC for an extension of time, which had been filed and of which the Court was then aware. Such a course would

have been wasteful of the Court's time. The Court quite efficiently dealt with the extension and moved the matter along well within the boundaries of its case management powers.

58. Further, the 3 authorities cited in support of this ground of appeal are, in my view, clearly distinguishable from this case and the manner in which the Deputy Registrar exercised the Court's powers of case management.

Fourth & Fifth Grounds of Appeal

59. The fourth and fifth grounds of appeal are similar in that they invite this Court, should it so decide, to propound any additional or different reasons for allowing the appeal and dismissing the action. These grounds are framed as follows: (i) that "**the Deputy Registrar's Ruling is susceptible to being set aside on bases separate and apart from the erroneous reasons upon which it was decided, namely on the basis that an appeal to a Judge in Chambers is a re-hearing in which this Honourable Court's discretion is not fettered**; and that (ii) the Court may make its decision on the basis of "**any other ground that the Court may deem just and equitable.**" Lord Atkin's speech at pages 648-649 in ***Evans v Bartlam*** [1937] 2 All ER 646 is referred to. There the court confirmed that in an appeal to a judge in chambers, the judge is not fettered by the decision of the master. The judge's own discretion is intended by the rules to determine the parties' rights. The judge may exercise his discretion as if the matter came before him for the first time, but he is to give due weight to the master's decision.

60. The Court accepts the guidance from ***Evans v Bartlam***. In relation to the fourth and fifth grounds of appeal, the Court gleans from the evidence and the law no further grounds for challenging the Ruling of the Deputy Registrar.

Conclusion and Disposition

61. In all the circumstances of this application and for the foregoing reasons, the Court dismisses the appeal and upholds the Order of the Deputy Registrar made on 16 August 2022 at paragraph [38] of his Ruling. I further order:

(1) that the Appellant file its Defence within 28 days of the delivery of this decision;

(2) that the costs of and occasioned by this appeal shall be paid by the Appellant to the Respondent. If the parties do not agree the quantum of such costs, I direct that both Counsel submit arguments as to costs within 30 days for the Court's consideration and decision.

Dated 17 April 2025

Simone I. Fitzcharles
Justice