[2017] JMCA Civ 23

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 28/2013

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MR JUSTICE F WILLIAMS JA
THE HON MISS JUSTICE STRAW JA (AG)

BETWEEN	**CHARMAINE BOWEN**	**APPELLANT**
AND	**ISLAND VICTORIA BANK LIMITED**	**1ST RESPONDENT**
AND	**UNION BANK LIMITED**	**2ND RESPONDENT**
AND	**RBTT BANK JAMAICA LIMITED**	**3RD RESPONDENT**
AND	**FINSAC LIMITED**	**4TH RESPONDENT**
AND	**JAMAICAN REDEVELOPMENT FOUNDATION INC**	**5TH RESPONDENT**
AND	**DENNIS JOSLIN JAMAICA INC**	**6TH RESPONDENT**

Michael Williams for the appellant

Miss Christine McNeil instructed by the Director of State Proceedings for the 1st and 4th respondents

William Panton instructed by DunnCox for the 2nd and 3rd respondents

Charles Piper QC and Miss Petal Brown instructed by Charles E Piper and Associates for the 5th and 6th respondents

28, 29 June and 31 July 2017

BROOKS JA

[1] We considered this appeal on 28 and 29 June 2017, and, having heard the submissions of counsel, and considered the material that had been placed before the court, we made the following orders:

1. The appeal is dismissed.
2. Costs to the respondents to be agreed or taxed.

We promised at that time to put our reasons in writing and we now fulfil that promise.

[2] Mr Michael Williams, who appeared for the appellant Ms Charmaine Bowen, had the challenging task of having to convince this court that a judge of the Supreme Court of Judicature erred in an exercise of his discretion. The learned judge had struck out Ms Bowen's claim due to her failure to comply with an order that the court had made over a year before. Learned counsel's task was made even more difficult by the fact that he had only been recently retained by Ms Bowen. The history of the litigation, which Ms Bowen commenced in 2004, was such that it was imperative that her appeal be heard without any further delay. Mr Williams was, however, granted two days adjournment to better prepare himself to argue the appeal.

[3] The respondents to the appeal are Island Victoria Bank Limited (IVB), Union Bank Limited (Union Bank), RBTT Bank Jamaica Limited (RBTT), Finsac Limited (Finsac) Jamaica Redevelopment Foundation Inc (JRF) and Dennis Joslyn Jamaica Inc (Dennis Joslin) (together referred to hereafter as "the respondents").

[4] The learned judge, on 21 March 2013, having heard submissions from Ms Bowen, then representing herself, and counsel for the respondents, made the following orders:

> "1. The Claimant's [Ms Bowen's] Statement of Case is struck out.
>
> 2. Judgment entered for all Defendants against the [Ms Bowen].
>
> 3. Judgment be entered for the Fifth Defendant [JRF] against the Claimant, Charmaine Bowen, and the Defendant to the Counterclaim, Aldith Ellis, in the following terms:-
>
> a. Judgment for [JRF] in the sum of US$431,125.65 with interest thereon as at September 4, 2012 at the rate of 15% per annum or US$50.50 per day before as well as after Judgment made up as follows:
>
> | | |
> |---|---|
> | Principal: | $122,887.94 |
> | Interest to September 4, 2012 | 270,147.29 |
> | Fees: | 38,090.42 |
> | Total | $431,125.65 |
>
> b. It is declared that [JRF] is the Mortgagee of [Ms Bowen's] property known as Apartment E 119 Chelsea Manor, Kingston 5, in the parish of Saint Andrew being all that parcel of land registered at Volume 1253 Folio 552 of the Register Book of Titles, [Finsac] having assigned [Ms Bowen's] Mortgage thereof, initially given to [IVB], to [JRF].
>
> c. It is declared that until all sums which are due and payable by [Ms Bowen] under the Third Letter of Commitment have been duly paid, [JRF] is entitled to exercise all of its rights, as Mortgagee by assignment, in respect of the said property registered at Volume 1253 Folio 552 aforesaid.
>
> d. It is declared that [JRF] is the Second Mortgagee of all that parcel of land known as 14 Penfield Avenue,

Forrest Hills Gardens, Kingston 19 in the parish of Saint Andrew being the land registered at Volume 1096 Folio 858 of the Register Book of Titles being land owned by [Ms Bowen] and one Aldith Quivador Ellis as Joint Tenants, [Finsac] having assigned [Ms Bowen's] and the said Aldith Quivador Ellis' Mortgage thereof, initially given to [IVB], to [JRF].

e. It is declared that until all sums which are due and payable by [Ms Bowen] under the Third Letter of Commitment have been duly paid, [JRF] is entitled to exercise all of its rights as Second Mortgagee by assignment, in respect of the said property registered at Volume 1096 Folio 858 aforesaid.

f. Costs of the proceedings to the 2nd, 3rd and 5th Defendants to be paid by the Claimant."

The factual background

[5] The brief background history of the matter is that Ms Bowen, a businesswoman, who was a customer of IVB in May 1994, borrowed money from IVB by way of a demand loan. The loan was to assist her in the operation of her business. In addition to the demand loan, Ms Bowen also secured an overdraft facility on her current account with IVB. The interest rate, which was not unusual in those days, was horrendous. The demand loan, for instance, attracted an initial interest rate of 68% per annum. Another feature of the loan was that IVB was entitled to compound the interest, payable on the loan, using monthly rests.

[6] Over the course of the next 12 months, both the loan account and the overdraft facility went into default. Ms Bowen sought to extricate herself from the impending disaster. She alleges that she secured some funds and instructed IVB to use it to settle

the loan account. On her account, IVB ignored her request and instead credited the sums toward the debt on the overdraft account. IVB contended that the payment only reduced but did not satisfy the debt due on the overdraft facility. Ms Bowen conducted a number of major transactions, including clearing and re-instituting the demand loan. By June 1995, she again had a demand loan as well as an overdraft facility.

[7] Ms Bowen's account is that she "renewed her overdraft facility with [IVB] and commenced operating it" (paragraph 19 of her particulars of claim). The debt on both the loan account and the overdraft facility continued to grow.

[8] Ms Bowen, obviously a proactive person, sought another solution. At her request, in November 1996, IVB converted her debts to a demand loan in United States Dollars. That loan carried an interest rate of 17% per annum.

[9] IVB alleged that she also failed to service that loan properly. It then moved to liquidate the debt by taking steps preparatory to the sale of the real estate that Ms Bowen had provided as security for the loan. Ms Bowen had provided IVB with mortgages over two parcels of real property.

[10] Ms Bowen strenuously contested the accuracy of IVB's accounts. At one stage, IVB admitted that it had made an error. It claimed that it corrected the error by crediting Ms Bowen's account with the sums involved. It insisted, however, that it was still owed and that it wanted to collect.

The litigation

[11] Ms Bowen sued IVB in 1999. She accused it of mishandling her accounts, of overcharging her, and of failing to obey her instructions which, had they been followed, would have, she asserted, significantly ameliorated her position.

[12] That suit became the victim of inactivity by Ms Bowen. When the change in the regime from the Civil Procedure Code to the Civil Procedure Rules (CPR) was effected in 2002, Ms Bowen's suit became a casualty and it was deemed struck out.

[13] By that time, IVB had encountered its own financial difficulties. In 1999, its assets and liabilities were vested in Citizen's Bank Limited. Within five months of the vesting, Ms Bowen's liability, along with those of other debtors, was sold to Finsac and, in 2002, again sold to Dennis Joslin. Dennis Joslin appointed JRF to service the debt and to manage the account (see paragraph 33 of the defence and counterclaim filed by JRF and Dennis Joslin). After the sale of the liabilities to Finsac, Citizen's Bank Limited was renamed Union Bank and later renamed RBTT.

[14] Ms Bowen sued again. The respondents were all named as defendants to the claim. The claim was based, in large measure, on a report by Mr Dalma James, a chartered accountant.

[15] Mr James opined that not only had Ms Bowen fully paid all her debts to IVB, but that IVB owed her money. He opined that using the same method that IVB had used to charge interest in respect of her accounts, it, in fact, owed her significant sums.

[16] All the defendants denied liability. In their statement of defence, Finsac and Dennis Joslin denied the accuracy of the premises on which Mr James had predicated his report. They stated at paragraph 37 of that document, that among the flaws contained in Mr James' report were that the report failed to take into account:

a. Ms Bowen's defaults in servicing the loan and the overdraft facility and the effect, presumably the imposition of penalty fees and penal interest rates, that those defaults would have had on the balances on her accounts, and

b. that IVB was entitled to apply compound interest to the account using monthly rests.

[17] The claim meandered through the court system. Ms Bowen changed legal representatives twice as it went along. Two trial dates were lost because of applications for adjournment by Ms Bowen. One was lost by virtue of an application by counsel representing Finsac and Dennis Joslin.

[18] Eventually, when the matter came before P Williams J (as she then was) on 31 October 2011, being the 4th trial date, Ms Bowen's counsel, supported by counsel representing one or more of the respondents, asked for an adjournment. The basis of the adjournment on this occasion was that Mr James' report was impractical for use at a trial.

[19] Learned counsel proposed, and Williams J accepted, that the trial of the claim should be again adjourned to allow the parties to secure fresh accounting reports. The trial date secured at that time was 24 September 2012. The parties, except Union Bank and RBTT, were each ordered to prepare, file and serve accounts on or before 30 May 2012. The order stated:

> "1. The trial of this matter is adjourned to the 24th - 28th September 2012.
>
> 2. [Ms Bowen, IVB, Finsac, JRF and Dennis Joslin] do an accounting of the relevant accounts of [Ms Bowen] on or before 30th March 2012.
>
> 3. [Ms Bowen, IVB, Finsac, JRF and Dennis Joslin] are at liberty to file further Witness Statements relevant to the accounting.
>
> 4. The evidence on behalf of [JRF and Dennis Joslin] be given by Jason Rudd in place of Janet Farrow.
>
> 5. [JRF and Dennis Joslin] file and serve the Witness Statement of Jason Rudd within seven (7) days from the date of this Order.
>
> 6. Cost [sic] of today to be cost [sic] in the claim.
>
> 7. [Ms Bowen's] Attorneys-at-Law to prepare, file and serve this Order."

[20] On 9 May 2012, a report not having been filed on Ms Bowen's behalf, K Anderson J, on an application made by counsel for Ms Bowen, granted her an extension to 30 June 2012 for the report to be filed. The report was still not filed within the allotted time and, in July 2012, Ms Bowen made yet another application for extension of time. In September 2012, JRF and Dennis Joslin made applications for the claim to be

struck out and for judgment to be awarded to JRF on its counterclaim. Each of the other respondents, in turn, later applied for Ms Bowen's claim to be struck out.

[21] Ms Bowen's counsel fell ill and she undertook the task of representing herself. She applied for an order that Mr James' original report be considered a fulfilment of the order made by Williams J.

[22] The trial, predictably, did not take place on 24 September 2012. Additionally, Ms Bowen was then still without the benefit of counsel. The trial was adjourned to October 2013 and the various applications for court orders were adjourned to 14 February 2013.

[23] It was on the latter date that the applications came on before Pusey J, at which time Ms Bowen was not represented by counsel. The learned judge having considered these matters made the orders that were set out above.

[24] JRF's counterclaim asserted that Ms Bowen was still indebted to it for the monies secured by the mortgages. Ms Bowen had still filed no defence to the counterclaim.

[25] In JRF's application for summary judgment, it asserted that Ms Bowen had no defence to the counterclaim. JRF relied on the affidavit evidence of Mr Jason Rudd, who exhibited the documentation on which JRF relied. He also exhibited a statement of Ms Bowen's account showing the amount JRF claimed from her. Ms Bowen did not file any response, by way of affidavit evidence or otherwise, to this application.

The appeal

[26] Ms Bowen's notice of appeal was based on the following grounds:

> "(a) the [sic] Learned Trial Judge erred in law in holding that the Claimant's delay amounts to an abuse of the process of the court;
>
> (b) The Learned trial Judge erred in law in striking out the Claimant's claim for damages;
>
> (c) The Learned Trial judge erred in law in failing to apply the principle laid down in rule 1.1(2)(d) of the Civil Procedure Rules which states that dealing justly with a case includes "ensuring that it is dealt with expeditiously and fairly".
>
> (e) The failure to file the said witness statement and accounting was not the fault of the Appellant but was due to the fault of the appellant's previous attorney … who was seriously ill and the attorney whom he instructed … who failed to file the said documents.
>
> (f) That new material/evidence has come to the attention of the Appellant which may further account for the failure to file the said documents."

[27] Mr Williams submitted, on Ms Bowen's behalf, that the learned judge wrongly exercised the discretion given to him. A major plank of Mr Williams' submissions was that the learned judge's error stemmed largely from his reliance on a premise that Ms Bowen's delay in providing the forensic financial report amounted to an abuse of the process of the court. He pointed to the learned judge's written reasons for judgment, in which, after referring to JRF's and Joslin's application to strike out for non-compliance, it was said, at paragraph 10:

> "...the authority of Bruce v Bruce [unreported CL No B 058/1976 (delivered 14 June 2001) was cited by counsel]

> wherein a 2001 judgment of Marsh J. in this court indicated that the disobedience of a peremptory order of the court was an abuse of the process. This case is significant as it prefigures the "new" rules of the Civil Procedure Code of 2002. It is my view that the scope of the C.P.R. including its overriding objective strengthens that dictum of this court."

[28] Learned counsel submitted that Pusey J's premise was faulty. Mr Williams also submitted that the striking out of a party's statement of case was such a draconian step that it should only be exercised in the most extreme of circumstances. He argued that the authorities have consistently demonstrated that there are other viable options available to a court that is faced with delay by a party. One of those options, Mr Williams submitted, is that of making an "unless order". Such an order, he submitted, ensured that the party affected by it focussed its attention on the issues at hand.

[29] In applying those principles to the instant case, Mr Williams submitted that the delay in having the matter ready for trial did not solely rest with Ms Bowen. He argued that the delay between 2004 and 2009 was the fault of the respondents. Learned counsel submitted that the reasons for Ms Bowen's failure to file the relevant financial report was due to the fact that she was not represented by counsel at the time, as counsel, who had been retained by her, was ill.

[30] Mr Williams further argued that the striking out was all the more egregious when one considered that Ms Bowen's claim was against a financial institution that had admitted that it had overcharged her. She was entitled, by the Constitution, to pursue her claim against that institution and the court was the avenue by which she was

allowed to do so. He submitted that Pusey J's order deprived her of that constitutional right.

[31] Mr Williams argued that the learned judge ought to have examined the reasons proffered by Ms Bowen for having failed to comply with the order of the court. Such an examination, learned counsel submitted, would have demonstrated that there was no abuse to the processes of the court, at least on the part of Ms Bowen.

[32] He relied on a number of decided cases, some of which were included in written submissions that had been filed by Ms Bowen personally, as well as by counsel who had previously appeared for her in this court. The cases included, **Alpha Rocks Solicitors v Alade** [2015] EWCA Civ 685; [2015] 1 WLR 4534, **Fairclough Homes Ltd v Summers** [2012] UKSC 26, **Barbados Rediffusion v Mirchandani** [2005] CCJ 1 (AJ), **Icebird Limited v Winegardner** [2009] UKPC 24 and **Capital Solutions Limited v Terryon Walsh** [2010] JMCA App 4.

[33] Based on those arguments and authorities, Mr Williams submitted that the learned judge erred in law and, consequently, his decision ought to be set aside.

The response

[34] Three counsel addressed this court on behalf of the respondents. Miss McNeil, who represented IVB and Finsac, helpfully took the court through the history of the claim leading up to the appeal. Learned counsel submitted that, save for one

application made by counsel for JRF and Dennis Joslin for an adjournment, the delay in having the matter tried lay at Ms Bowen's feet.

[35] Learned counsel submitted that a well-established principle of law applied to this case, namely, that appellate courts will not disturb the result of an exercise of discretion by a judge of first instance unless that decision is manifestly flawed. Miss McNeil submitted that the learned judge carefully considered the history of the litigation and Ms Bowen's failure to comply with the order of Williams J, as varied by Anderson J's order. Learned counsel submitted that the learned judge considered that Ms Bowen was without the benefit of counsel and allowed her to explain her position in respect of the various applications. His approach, Miss McNeil submitted, demonstrated a careful exercise of his discretion.

[36] An important factor in the learned judge's analysis, Miss McNeil argued, was the fact that despite the passage of eight months since the order of Anderson J, there was not even a draft financial report forthcoming from Ms Bowen. Learned counsel argued that an accounting was critical to the trial of the case. Accordingly, Miss McNeil submitted, Ms Bowen's failure to produce one amounted to abuse of the process of the court. Learned counsel submitted that there was no manifest flaw in the learned judge's exercise of his discretion and that the decision to strike out should not be disturbed.

[37] In support of her submissions, Miss McNeil relied on the cases of **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1, **Bruce v Bruce** CL B058/76 (delivered

14 June 2001) and **Willowood Lakes Limited v The Board of Trustees of the Kingston Port Workers Superannuation Fund** (unreported) Court of Appeal, Jamaica, Supreme Court Civil Appeal No 98/2007, judgment delivered 2 July 2009.

[38] Miss McNeil's submissions were complemented by those of Mr Panton, on behalf of Union Bank and RBTT, and Mr Piper QC, on behalf of JRF and Dennis Joslin.

[39] Mr Panton submitted that whereas Ms Bowen had, for over 16 months, failed to obey the order of Williams J, Union Bank and RBTT have always been ready to proceed. Learned counsel argued that where a timetable has been set by the court, the court will not ignore the fact that a party has disobeyed its orders. It was important, Mr Panton submitted, that the learned judge observed that despite the long lapse of time since Williams J made her order, Ms Bowen did not even have a draft of a financial report for production to the court. He submitted that the learned judge considered the situation, applied the relevant principles of law and made the appropriate orders in the circumstances. Mr Panton argued that Ms Bowen had failed to show that the learned judge had exercised his discretion on an improper basis.

[40] Learned counsel pointed out that the CPR specifically allowed the court to strike out a party's statement of case, where that party had disobeyed an order of the court. He also relied on the cases of **Habib Bank Ltd v Jaffer (Gulzar Haider)** [2000] CPLR 438, **Hayden and Another v Charlton** [2010] EWHC 3144 (QB); [2011] 1 All ER (D) 57 and **Biguzzi v Rank Leisure Tours** [1999] 1 WLR 1926, in support of his submissions.

[41] For his part, Mr Piper submitted that not only had Ms Bowen disobeyed the orders of Williams J, but that Ms Bowen's attempt to revert to reliance on Mr James' report was misplaced. Learned Queen's Counsel argued that it had been demonstrated that Mr James' report was flawed. It was, Mr Piper submitted, the inadequacies in the document that had prompted Ms Bowen's counsel to apply to Williams J for an adjournment and for the orders for a new accounting report to be done. Learned Queen's Counsel submitted that any attempt by Ms Bowen to rely, at a trial, on Mr James' report, was doomed to failure.

[42] Learned Queen's Counsel submitted that a careful review of the learned judge's written reasons for judgment revealed that he had correctly exercised the discretion given to him by rule 26.3(1) of the CPR.

Analysis

[43] Two main principles are relevant to the analysis of this case. The first is that courts exist for the resolution of disputes. It is preferable, therefore, for cases to be decided on their merits rather than to be terminated for technical blunders. It is in accordance with that principle that the overriding objective, which is the bedrock of the CPR, requires that every case that is filed in the Supreme Court must be dealt with justly.

[44] The other overarching principle that applies in this case is that this court will not lightly disturb a decision that results from the exercise of the discretion of a judge at

first instance. The principle was recognised by Morrison JA, as he then was, in **The Attorney General of Jamaica v John MacKay**. In his judgment, with which the other members of the court agreed, Morrison JA set out this court's approach. He said at paragraph [20]:

> "This court will therefore only set aside the exercise of a discretion by a judge on an interlocutory application on the ground that it was based on a misunderstanding by the judge of the law or of the evidence before him, or on an inference - that particular facts existed or did not exist - which can be shown to be demonstrably wrong, or where the judge's decision 'is so aberrant that it must be set aside on the ground that no judge regardful of his duty to act judicially could have reached it'."

Morrison JA accepted that the position taken by the House of Lords in **Hadmor Productions Ltd and others v Hamilton and others** [1982] 1 All ER 1042 was applicable to this jurisdiction. He said at paragraph [19] of his judgment:

> "...the proposed appeal will naturally attract Lord Diplock's well-known caution in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 (which, although originally given in the context of an appeal from the grant of an interlocutory injunction, has since been taken to be of general application):
>
> > '[The appellate court] must defer to the judge's exercise of his discretion and must not interfere with it merely on the ground that the members of the appellate court would have exercised the discretion differently.'"

It will be noted that the principle is regarded as being of general application and would be applicable in the present case.

[45] It is in cases such as this, where there is an application to strike out a party's statement of case, that the task of striking a balance between these two major principles, becomes most taxing. The aim is to secure a just result and the court should adopt the most appropriate of the alternatives available to it, in order to secure that result (see **Biguzzi v Rank Leisure Tours**).

[46] It must first be recognised that the learned judge had the authority to strike out Ms Bowen's claim. Rule 26.3 (1) (a), which specifically grants that power, states:

> "In addition to any other powers 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 –
>
> (a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;"

[47] The next task is to assess the method by which the learned judge went about the exercise of his authority. The learned judge did so by firstly setting out, in summary, the submissions by each party. He was at pains, at paragraph [14] of his written judgment, to point out Ms Bowen's position:

> "Miss Bowen is at this time without an attorney. She points out that this puts her at a serious disadvantage against the might of experienced counsel and the resources of the [respondents]. With that in mind the court attempted to ensure that she be given sufficient time to explain her situation. She indicated that she intended to rely on the report of Dalma James and that this report was to be put in a format that would allow it to be used in court. She points out that she had always intended to rely on Dalma James' report as she set out in the pleadings. She also stated that [her last counsel] had applied for a further extension of the order of Williams J. She has since the hearing, filed a copy

> of the Notice of Application filed by [that counsel] in July 2012 seeking a further extension because the accountant retained, failed to honour his retainer."

[48] The learned judge was aware that in February 2013, when he was hearing the matter, the court was in no better position in moving the matter toward trial. He said at paragraphs [16] through [18]:

> "[16] To this date, that report is not before the court and [Ms Bowen] now seeks additional time for another report from Mr. James. Despite my understanding of the difficulties that [Ms Bowen] faces in arguing her case when she has no current representation, it is my view that she has been granted more than ample time and opportunity to obtain the necessary legal representation….
>
> [17] It is also clear that she had sufficient opportunity to obtain the accounting evidence or report in compliance with the order of Williams J. Even when one considers the last Notice of Application filed by [her last counsel] that extension if granted would only have been to the end of July 2012. Today, some eight months later, there is not even a draft report for this court to peruse.
>
> [18] In all the circumstances of this case it is my view that [Ms Bowen's] Statement of case should be struck out and Judgment entered against her in favour of all the [respondents'] Judgment [sic] in terms of the order made today."

[49] The learned judge was alive to the delay in bringing the case to trial. Although Mr Williams submitted that the delay between 2004 and 2012 in having the case tried was the fault of the respondents, the record does not support that statement. The record in fact shows, as Miss McNeil demonstrated, that it is at Ms Bowen's feet that the

cause of the delay lies. The learned judge recognised, however, that Ms Bowen was not alone in disobeying the orders made by Williams J. IVB and Finsac were also in default at that time.

[50] Mr Williams' reliance on **Alpha Rocks (Solicitors) v Alade** [2015] 1 WLR 4534; [2015] EWCA Civ 685, is similarly misplaced. The court in that case was dealing with a striking-out at the early stages of a case. In **Alpha Rocks**, in setting out the finding of the court, the headnote states in part:

> "Held, (1) that where an application was made under CPR r 3.4(2) to strike out a statement of case in whole or in part at an early stage of proceedings, the court should only exercise the power to strike out in exceptional cases where it was just and proportionate to do so; that the court had power to strike out at an early stage of proceedings where the defendant contended that the claimant had exaggerated his claim, whether fraudulently or otherwise, but only where a claimant was guilty of misconduct in relation to those proceedings which was so serious that it would be an affront to the court to permit him to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant had forfeited the right to have determined…"

[51] In that case, Vos LJ, with whom the rest of the court agreed, cautioned against lightly striking out cases at the early stages. He said in part at paragraph 21 of his judgment:

> "…striking out is available in [cases where a party to litigation thinks that his opponent has exaggerated his claim, whether fraudulently or otherwise] at an early stage in the proceedings, but only where a claimant is guilty of misconduct in relation to those proceedings which is so serious that it would be an affront to the court to permit him

> to continue to prosecute the claim, and where the claim should be struck out in order to prevent the further waste of precious resources on proceedings which the claimant has forfeited the right to have determined. The other available remedies for such a default follow the proceedings once they have run their course, but are none the less important. They include costs and interest penalties and proceedings for contempt of court or criminal prosecution."

That principle does not apply to this case, which was in its ninth year at the time that Pusey J dealt with these applications. By no standard could these proceedings be said to be in their early stages.

[52] A strong case in Ms Bowen's favour is **Keith v CPM Field Marketing Ltd** [2000] TLR 29 August 2000. In that case, Brooke LJ, with whom the rest of the court agreed, decided that a judge, who was considering whether to strike out a party's statement of case, should consider the provisions of the CPR dealing with relief from sanctions. Such a consideration, the learned judge suggested, should systematically review the provisions of the rule dealing with that relief.

[53] The learned judge in the present case did not specifically address the provisions dealing with relief from sanctions. This case, was, however, so blatantly in breach of the spirit of expedition and fairness that a consideration of each of the provisions of rule 26.8, dealing with relief from sanctions, would have resulted in favour of the respondents.

[54] Fairness contemplates the interests of all the parties to a claim. A judge considering striking out a statement of case must also consider the interests of the

administration of justice. In this case, with four trial dates having been lost due to factors attributed to Ms Bowen, there was undoubtedly significant negative impact on the system of the administration of justice. Other cases would have been prevented from being heard on the dates for which this case was scheduled to be heard.

[55] It should also be said that this is not a case where the delay in complying with the order of Williams J stands alone. In **Icebird Ltd v Winegardner**, their Lordships ruled that delay, even inordinate and inexcusable delay by a party, will not by itself justify striking out a statement of case. The difference between the present case and **Icebird Ltd v Winegardner** is that whereas the order in that case gave a party liberty to file an amended statement of case, the order by Williams J mandated action by Ms Bowen. An additional factor to be considered is that, after having filed two separate applications to extend the time for compliance with the order, Ms Bowen in her last application sought an order that Mr James' report be allowed to stand as compliance with the order. This combination of factors amount to an abuse of the process of the court and justifies a striking out of the claim.

Conclusion

[56] The learned judge took a careful and considered position in arriving at the decision to strike out Ms Bowen's statement of case. Although he did not systematically apply the criteria for an application for relief from sanctions, there was no such application made, neither was there any indication that such relief was being sought. It is patent, however, that if such an analysis were done, the result would have been the

same. An analysis of the circumstances of the case demonstrates that Ms Bowen had not only refused to comply with the order of Williams J but the case had had four trial dates lost at her instance. The learned judge was correct in granting the application to strike out her claim. There is no basis for finding that the learned trial judge was plainly wrong in the exercise of his discretion.

[57] It is for those reasons that I agreed that the appeal against the order striking out the claim should be dismissed as indicated in paragraph [1] above.

F WILLIAMS JA

[58] I have read, in draft, the reasons for judgment of my learned brother Brooks JA. I agree with his reasoning and have nothing useful to add.

STRAW JA (AG)

[59] I too have read the draft reasons for judgment of Brooks JA and agree with his reasoning.