**IN THE GRAND COURT OF THE CAYMAN ISLANDS**

**CAUSE NO. 320 OF 2007**

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| **BETWEEN** | **MIGUEL ANGEL GOMEZ MARTINEZ** | **PLAINTIFF** |
| **AND** | **THE PROPRIETORS, STRATA PLAN NO. 46 (PLANTATION VILLAGE)** | **DEFENDANT** |

**IN CHAMBERS**
**BEFORE THE HON. ANTHONY SMELLIE, CHIEF JUSTICE**
**THE 16TH DAY OF JULY 2013 AND 29TH JULY 2013**

**APPEARANCES:** **Mr. Clyde Allen for the Plaintiff**
**Mr. Nicholas Dunne of Walkers for the Defendant**

## RULING

1. The Defendant brings this application for an order striking out the Plaintiff's claim on the ground of inordinate and inexcusable delay in the prosecution of the claim.

2. The claim is one by which the Plaintiff seeks compensation for ongoing medical costs and expenses incurred as the result of the Defendant's failure to secure health insurance for him while he was in its employment and, he also claims, as required by the Health Insurance Law ("the Law").

3. It appears from his pleadings that the Plaintiff started employment with the Defendant on 9th August 2002. He was engaged to carry out general janitorial tasks at Plantation Village with responsibility for maintenance and repair of the grounds and equipment.

4. He states that when he commenced employment with the Defendant he can recall having signed documentation for his employment but was not given copies.

5. A Mr. Jim Fraser was the manager of the Defendant at the time and, as far as he Plaintiff knew and recalls, had full authority to make representations to him on behalf of the Defendant.

6. The Plaintiff's understanding from Mr. Fraser was that, in keeping with the Law, the Defendant would obtain health insurance for him (as was provided for any other employee) and would pay its portion of the premium and the portion that he should contribute would be deducted from his salary.

7. He recalls filling out a health insurance application form with the assistance of Mr. Fraser (English not being his first language – as a native of Cuba). This application was in a small booklet format and was returned to the Defendant but again, he was not provided with a copy.

8. His understanding was that thereafter the Defendant made regular deductions from his salary by way of his contributions to his health insurance premium, as it did for contributions to the pension scheme also mandated by law for all workers in the Cayman Islands. Although he could not read English, he saw on his pay slip that there were two deductions from his salary each month and so assumed that these were the deductions required for pension and health insurance. He tenders six of his pay slips in evidence. He now appreciates that they show confusingly from his point of view, that both deductions are described as pension contributions (while there was only ever one pension plan) but no explicit reference to health insurance.

9. Repeated requests from his former attorneys to the Defendant's attorneys for disclosure or explanation of what became of his salary deductions have gone unanswered, as have requests for disclosure of the insurance policies the Defendant should be expected to have had in place at the relevant times.

10. These times include occasions in October 2003 when the Plaintiff attended at the George Town Hospital for treatment and when he informed the Hospital staff that he was covered (as he said he then believed) by the insurance provided by his employer the Defendant.

11. On 7th May 2004, the Plaintiff, then 46 years old, suffered a heart attack whilst at work. This was the first of a number of infarcts. He was told on that first occasion that he required urgent overseas treatment. Arrangements were being made for him to be airlifted to Houston, Texas, when it was discovered that he was not covered by any health insurance plan. It was, to his dismay, explained at the Hospital overseas referrals office that he would have to pay for the necessary surgery and for the treatment he had already received.

12. As he knew that he could not afford to pay for the treatment he then urgently needed in Houston, he at that stage feared for his life. He made desperate enquiries with the National Health Insurance Commission, the Labour Board, the Cayman Islands National Insurance Company ("CINICO"), the Government Social Services Department and with the Defendant, seeking funding. He hoped, at least, to have the necessary operation, if not in Houston, then in Cuba where it would be less expensive.

13. After the intervention of the Labour Board, the Defendant agreed to provide USD14,585 to cover the costs of treatment at the Institute of Cardiology and Cardiovascular Surgery in Cuba.

14. The Plaintiff says that he took this as an acknowledgement of responsibility for his coverage on the part of the Defendant but this assumption was falsified by its

subsequent refusal to provide further funding and ultimately, by the filing of its Defence in this action.

15. Subsequent provision of coverage for him by CINICO has become the subject of a promissory note for repayment, a liability that has grown significantly and continues to grow, as the Plaintiff continues to require and undergo surgery and other treatment. It is a liability for which he also claims indemnity from the Defendant.

16. It is also a part of the Plaintiff's case that had insurance coverage been in place from the outset as it should have been, he would have once and for all received the comprehensive treatment that his condition required and the need for subsequent surgical interventions would have been avoided. The permanent impact of his illness upon his health – said now to have rendered him unemployable and uninsurable – would have been avoided. This gives rise to his claim for general as well as special damages, the latter to include past as well as future costs of medical treatment.

17. In direct response to the Defendant's strike out application, Mr. Allen argues on his behalf that the debilitating impact of his illness – diagnosed as coronary heart disease and hypertension – and the several episodes of surgery and other treatment, have hampered and delayed the prosecution of his claim.

18. Apart from that excuse for the delay, Mr. Allen also argued that the Defendant has itself contributed to the delay by its refusal to disclose the insurance policy (and any other related documentation) that was in place at the time when the Plaintiff was in its employment. These documents, he submits, would likely put the lie to the Defence – which is that the Plaintiff, uniquely and peculiarly among its employees – failed to provide the necessary information to the Defendant and opted instead to obtain his

own insurance coverage. That, says the Defendant, explains the failure to disclose the insurance policy – one does not and never existed in respect of the Plaintiff.

19. On behalf of the Defendant, Mr. Dunne argues that the onus that has rested throughout upon the Plaintiff to advance his claim in a timely fashion has been entirely ignored by the Plaintiff. No alleged failure of disclosure on the part of the Defendant can excuse such inordinate delay. The Grand Court Rules provide a mechanism for compelling a party to meet its disclosure obligations and the Plaintiff could have invoked those rules if it was serious about prosecuting its claim. Alleged failure on the part of the Defendant to give disclosure can therefore provide no excuse for the inordinate delay.

20. There plainly has been inordinate delay in the prosecution of this claim, as revealed by the chronology set out in the table following:

| DATE | ACTION |
|---|---|
| 27 July 2007 | Writ Issued |
| 1 August 2007 | Writ served |
| 14 August 2007 | Defence filed |
| 23 August 2007 | Reply filed |
| October/November 2007 | Correspondence between parties re medical records |
| January 2008 | Written authority to obtain Medical Records from doctors given to Defendant by Plaintiff |
| 13 March 2008 | Notice of Intention to Proceed issued by Plaintiff |
| 12 October 2009 | Second Notice of Intention to proceed issued |
| December 2010 | Interim payment requested by Plaintiff but refused by Defendant |
| 21 December 2011 | Mr. Allen comes onto the record for the Plaintiff in place of Mourant Ozannes |
| January 2012 | Interim payment again requested and refused |
| 24 January 2012 | Third Notice of Intention to Proceed |
| 19 February 2013 | Defendant issues summons seeking dismissal for want of prosecution |

21. In short, says Mr. Dunne, this action was commenced almost six years ago (on 27th July 2007), during which time the Plaintiff has failed to progress the matters beyond the stage of pleadings. Worse, it has been nine years since the realization of his cause of action if, as the Plaintiff asserts, he became aware on 7th May 2004 that he was uninsured.

22. Such delay, says Mr. Dune, is both inordinate and inexcusable within the meaning of the case law and the Grand Court Rules ("GCR"). It will also result in serious prejudice to the Defendant if the case is allowed to proceed because it is to be inferred that the "memories of its witnesses" – their ability to recall crucial conversations engaged in when the Plaintiff was recruited in September 2002, would have faded. The case law does recognize that such an inference may be drawn. See for example ***Cranston v Mothersill and Mothersill*** *2004-05 CILR 417* and ***Benoit v Hackney LBC, unreported, Feb. 11, 1991 CA Transcript No. 91/0116*** the latter of which is noted in the **Hong Kong Civil Procedure Code 2012 Edition** (at 25/L/7) as having decided that:

> *"In a case of prolonged culpable delay following long delays in serving of proceedings, the court may readily infer that memories and reliability of witnesses has further deteriorated in the period of culpable delay."*

23. That period here, says Mr. Dunne, has been the six years since the issuance of the writ which came three years after the realization of the cause of action. He cites another risk of prejudice – that which he says has arisen from the claim having been swollen by the accumulation of interest on the sum of the medical bills in the meantime and which would have been avoided had the claim been timely prosecuted.

24. That such form of financial prejudice could form the basis for strike out is already recognized by this Court, says Mr. Dunne; citing ***Reinvest S.A. v Bank of Butterfield International (Cayman) Ltd. 1999 CILR 223.***

25. There it was decided (among other things), that although financial detriment to a defendant from the increased value of a plaintiff's claim caused by delay in promoting its action could be regarded as serious prejudice, no such detriment had in fact occurred in that case.

26. Here, the Plaintiff, through Mr. Allen foreswears any intention to press for an interest claim. He says that the Plaintiff is himself liable only to repay to CINICO the principal sum of expenses incurred or to be incurred, but not interest.

27. The Plaintiff will therefore not be pressing his interest claim and so there will be no risk of prejudice to the Defendant in that regard.

28. This is an explanation that commends itself but only if the claim is not to be struck out on the other bases contended for by Mr. Dunne.

29. The final such contention is that the Plaintiff's failure to persecute its claim in a timely manner, having so long ago engaged the process of the court by the issuance of its writ, amounts to an abuse of the process of the Court. This is only exacerbated, says Mr. Dunne, by the Plaintiff's failure to progress the action despite on three occasions having issued notices of intention to proceed and on at least one occasion (by letter of 12 October 2010 from Mourant Ozannes) proposing to issue a summons for directions in order to move the matter forward.

30. Thus, says Mr. Dunne, the action should be struck as an abuse of the process of the court, and/or for the inordinate and inexcusable delay which will result in a risk of prejudice to the Defendant if the case is allowed to go to trial.

31. Those bases upon which an action can be struck for want of prosecution are well recognized in this jurisdiction.

32. The principles from the case law are summarized in ***Williams v Bob Soto Diving Limited 1992-93 CILR 308,*** which adopted the authoritative dictum of Lord Diplock from ***Birkett v James [1998] A.C. 297*** (and see below).

33. The principles have again been recently restated by the Privy Council in an appeal from the Bahamas in ***Icebird Limited v Alicia Winegardener [2009] UKPC 24*** in these terms (per Lord Scott at para. 8):

> *"Birkett v James [1998] 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 is 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 Diplock at 318).""*

34. No contumelious default in the sense of disobedience of court orders or directions is alleged in this case. The ground for strike-out is said to be the failure to prosecute amounting to an abuse of process arising from the Plaintiff's neglect to advance the action and that this has or will cause prejudice to the Defendant.

35. Having regard to the gross and prolonged inactivity in the prosecution of the case, "prolonged delay" is fair criticism. It is not however fair to attribute the fault to the Plaintiff himself. He has been especially reliant on his lawyers due to the debilitating nature of his illness and the repeated surgeries (four so far) he has had to undergo; most recently on 17 May 2013 when a blocked artery was treated by coronary angiography and stenting.

36. His attorney Mr. Allen came on the record only some 18 months ago. His conduct in the matter so far may not be described as dilatory. He has had to sort out the Plaintiff's ongoing entitlement to legal aid, including for funds to obtain and adduce the expert opinion of a doctor on the extent of the Plaintiff's ongoing need for treatment and its likely costs in the future.

37. In the meantime, he has also pressed anew for a settlement of the claim. Having been unsuccessful so far in that, he has settled the Plaintiff's List of Documents (itself identifying an extensive bundle of discovery) and has taken out the cross-summons for directions for consideration by the Court now, in the event this strike-out application fails.

38. Nonetheless, Mr. Dunne raises the further concern as an aspect of his abuse argument, that the Plaintiff's status as a legally aided party allows him to flout the rules of

procedure with impunity being aware that he will have no liability for the Defendant's costs.

39. This is not, in my view, a concern that could justify strike-out for want of prosecution or abuse of process.

40. The Court having been recently satisfied that the Plaintiff's legal aid certificate should be continued, the Defendant cannot be allowed to suggest now that the system is being abused to its detriment without tangible evidence of abuse rather than merely on the basis of a concern that the Defendant will be unable to recover its costs from the Plaintiff as a legally aided party.

41. I accept that detriment in costs is another form of financial detriment that could amount to unfair prejudice resulting from inordinate and inexcusable delay and so the kind of prejudice required by the case law for striking out. Moreover, as Lord Woolf observed in ***Grovit v Doctor*** ***[1997] 2 All ER 417 at 420 para (2)*** – the fact that a successful defendant would usually recover his costs does not mean that he is sufficiently protected against this kind of prejudice resulting from delay. As he noted, an award of costs rarely if ever acts as a full indemnity. That reasoning Mr. Dunne submits, applies a fortiori in a case like this one where the Plaintiff, being publicly funded, is insulated from any adverse order for costs whatsoever, by reason of GCR O.62.4.4(8).

42. Were the circumstances here such as to indicate that the Plaintiff has been abusing the public purse by delay while being indifferent to the consequences in costs for the Defendant, I would have felt obliged to accede to the strike-out application. But as I have explained, no such basis for concern is shown.

43. Nor is this a case which, in my view, justifies being struck out on the further public policy basis recognized in ***Grovit v Doctor*** and ***Soto v Williams*** (both above). This is the power of the court to strike out for abuse of process whether or not the abuse has resulted in unfair prejudice to the Defendant. It is explained in ***Grovit v Doctor*** (per Lord Woolf) in the sense that:

> *"The effectiveness of the court's power to strike out proceedings as a sanction against delay is undermined by the need to show prejudice to the Defendants. This requirement prevents the Court taking into account the adverse effect which delay can have on the reputation of the civil justice system as a whole...*
>
> *...(2) What is regarded as capable of amounting to prejudice is too restricted. Normally little regard is paid to the anxiety caused to litigants as a result of litigation....*
>
> *In order to establish prejudice a defendant is required usually to show that the delay has prejudiced him in the conduct of his defence. This will involve him in having to demonstrate, for example, that his witnesses' recollection has been adversely affected. Relying on this sort of ground is alright from the defendant's point of view if the action is struck out but can be unfortunate if the action is not struck out since he has undermined his own case by his comments about his witnesses."*

44. Mr. Dunne does not rest his application here squarely upon those wider public policy concerns in alleging an abuse of the court's process by the Plaintiff. His reliance is rather more tangential, suggesting instead that the court should not be itself hampered

by the adversarial strictures of the strike out rules in protecting its own procedure from abuse.

45. The real substance of Mr. Dunne's complaint remains the alleged actual or potential prejudicial impact the dilatoriness of the Plaintiff's conduct will have upon his client the Defendant's case.

46. While abuse of process even in the absence of a showing of prejudice can exceptionally be a basis for striking out; imposing that sanction upon a Plaintiff in the absence of prejudice to a Defendant could itself be an abuse.

*47.* Where the proper balance is to be struck has for some been the subject of debate. The question has been whether the principles laid down in ***Birkett v James*** are too lenient for allowing the courts to deal effectively with excessive delays; that they breed excessive further delays and costs in their application. However, as Lord Griffith opined in his contribution to the debate:

> *"To extend the principle purely to punish the plaintiff in the illusory hope of transforming the habits of other plaintiffs' solicitors would, in my view, be an unjustified way of attacking a very intractable problem. I believe that a far more radical approach is required to tackle problems of delay in the litigation process than driving an individual plaintiff away from the courts when his culpable delay has caused no injustice to his opponent. I, for my part, recommend a radical overhaul of the whole civil procedural process and the introduction of court controlled case management techniques designed to ensure that once a litigant has entered the litigation process his case proceeds in accordance with a timetable as prescribed by rules of court as*

*modified by a judge: see the Civil Justice Review, Report of the Review Body in Civil Justice (Cas 394 (1988):"* ***Dept. of Transport v Chris Smaller (Transport) Ltd.*** *[1989] 1 All E.R. 897 at 903.*

48. Those and other calls for reforms resulted in what are now famously called the Woolf Reforms in England and Wales.

49. Reports are that the judge driven processes they have introduced have resulted in significant reduction to the kind of abuse of process that troubled the judges in the cases cited above and the many other cases that dealt with the subject. But to the extent such concerns about the inefficacy of the strike-out powers continue to arise in this jurisdiction, the response must likewise be the introduction of further reforms. Such reforms perhaps going over and above the mere adoption in the Preamble to the GCR of the overriding objectives of the Woolf Reforms and more in keeping with judicial case management interventions allowed by the modern Civil Procedure Code in England.

50. But that is a debate for another forum. Here the applicable principles remain – as the Privy Council has affirmed in ***Icebird v Winegardener***, (above) – those declared in ***Birkett v James.*** The Defendant may not therefore in a general way, merely assert an abuse of process. While (as ***Grovit v Doctor*** explains) the Court can strike out on grounds of abuse of process irrespective of whether or not the strict tests for dismissal for want of prosecution (including the showing of prejudice to the Defendant) are satisfied; some fault must be ascribable to a plaintiff. In that case, the commencement and continuation of proceedings with no intention of bringing them to conclusion, was itself found to be sufficient to amount to an abuse of process entitling the court to dismiss the action.

51. No such abusive intention on the part of the Plaintiff in this case has been shown.

52. Inordinate delay there certainly has been. Viewed objectively, as it should be, rather than merely subjectively from the point of view of this particular Plaintiff; the delay is fairly to be described as inexcusable as well. Even if he was not himself in a position consistently to be able to press his former lawyers for progress of his claim, that by itself does not excuse the inordinate delay. In the context of adversarial litigation, a plaintiff must take the responsibility even for failings on the part of his lawyers if they amount to an abuse of the process. Indeed, if the action were properly to be struck-out for delay, his recourse would perhaps only be against them.

53. But it is clear on the present state of the law that in the absence of some blame-worthy conduct or failing on the part of the Plaintiff, prejudice to the Defendant must be shown before a claim can be struck out on the basis of inordinate and inexcusable delay. Yet it is about that concern that the Defendant has failed to satisfy me.

54. In this important regard, Mr. Dunne relies merely on the ready inference of prejudice which he says should be drawn as explained in the ***Benoit*** case (above). But the same text in which that case is cited and on which he relies (the Hong Kong Civil Procedure) also cites the following equally plain proposition (op cit. ibid):

> *"Bald assertion of prejudice or of a substantial risk that a fair trial was not possible are insufficient. There has to be some indication of prejudice, e.g. that no witness statement was taken at the time so that a particular witness who would have been called on a particular issue had no means of refreshing his memory or that a particular witness was of advanced age and no longer wished to give evidence or had become infirm or unavailable in the period of inordinate and*

*become infirm or unavailable in the period of inordinate and inexcusable delay (Hornagold v Fairclough Building Ltd. [1993] P.I. Q.R. 400; The Times, June 3 1993 C.A."*

See also in this regard ***Williams v Soto*** (above).

55. No such explicit allegation of prejudice has been presented here. This is a case in which the Plaintiff's primary assertion is that there was a breach by the Defendant of a mandatory statutory duty owed to him by the Defendant failing to obtain health insurance coverage for him as one of its employees. It has been admitted that there was no such coverage obtained, although the Defendant asserts that this was because of the failure of the Plaintiff to provide the information it required to obtain coverage. This is what has, in essence, been pleaded by way of the Defence in this case.

56. Such an assertion must surely be susceptible of documentary proof, or at the very least, proof by the recollection of a witness or witnesses currently available to testify. Otherwise, it is difficult to imagine how such a defence could have been pleaded in the first place.

57. It follows, and I infer, that the availability of evidence for the Defence has not been diminished by the passage of time. Mr. Dunne says that important aspects of the Defence will depend on a witness' (or witnesses') recollection of things said by the Plaintiff himself at the time when he was recruited (circa September 2002). But that recollection must have been in place to provide the instructions for the Defence when it was filed in August 2007. No explanation has been given why it would not now be in place or shortly from now at trial. The Plaintiff's evidence indicates that only Mr. Fraser would have been involved in the process of his recruitment but no concern has been raised by Mr. Dunne about that witness' availability or ability to recollect.

58. Prejudice to the Defendant not having been shown, I refuse the application to strike out. I will proceed to consider the Plaintiff's application for directions and give directions with a view to the avoidance of further delay and for the expedited trial of the action. In this regard, I invite both attorneys to agree upon a draft form of directions order that I might approve administratively by their consent on behalf of their respective clients and without the need for a directions hearing and the further costs of such a hearing.

59. There will be no order for costs.


Hon. Anthony Smellie
Chief Justice

July 29, 2013