

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No. CV 2008 – 03176

BETWEEN

URTIS MENDOZA

Claimant

AND

DAILY NEWS LIMITED

First Defendant

AND

JOHN BABB

Second Defendant

AND

NALINI SEELAL

Third Defendant

Before the Honourable Madame Justice Rajnauth-Lee

Appearances:

Mr. Anthony Manwah for the Claimant.

Mr. Ian Benjamin instructed by Miss Nalini Jagarine for the Defendants.

Dated the 19th November, 2009

REASONS

THE PROCEEDINGS

1. By Claim Form filed on the 20th August, 2008, the Claimant claimed against the Defendants inter alia damages for libel in respect of the publishing of an article at page 4 of the “Newsday” newspaper on the 23rd August, 2004. The Claimant’s Statement of Case was filed on the said 20th August, 2008.

NOTICE OF APPLICATION

2. By Notice of Application filed on the 19th September, 2008, the Defendants applied for an Order pursuant to Part 26.2(1)(b) of the Civil Proceedings Rules, 1998, that the Claimant’s Claim Form and Statement of Case filed on the 20th August, 2008 be struck out as an abuse of process of the court and for costs.
3. On the 6th March, 2009, the Court ordered that the Claimant file and serve an affidavit in opposition, if necessary, on or before the 15th April, 2009 and that the Defendants file and serve an affidavit in reply, if necessary, on or before the 6th May, 2009. The Notice of Application was adjourned to the 8th June, 2009.
4. On the adjourned date the Claimant had filed no affidavits in opposition. The Court therefore ordered inter alia that the parties file and exchange full written submissions on or before the 31st July, 2009.
5. On the 31st July, 2009, the Defendants filed their written submission. However, on the said 31st July, 2009, Attorney for the Claimant filed a notice of application to extend time for the filing of the Claimant’s Written Submissions. The Court granted the application and extended time to the 14th August, 2009. Up

to the date of the hearing of the Defendants' application to strike out, that is, on the 23rd October, 2009, however, no written submissions were filed on behalf of the Claimant.

6. The grounds of the Defendants' application to strike out were as follows:

“(a) The libel action complained of is a repeat of an earlier libel matter that the Claimant commenced by way of Writ of Summons and Statement of Claimant filed on 9th November 2004 and served on 10th November 2004, but due to want of prosecution of the matter by the Claimant and/or his failure to comply with the directions to provide discovery and for inspection to be completed, to settle the issues in the matter and to set down the matter for trial, made by Assistant Registrar Madame Marissa Robertson on 14th November 2005, the action stood dismissed as of 19th November 2007 pursuant to Order 3 Rule 6A of the Rules of the Supreme Court 1975 further to the request of the Defendant by Notice dated 19th November 2007;

(b) The Defendant will also rely upon the Claimant's failure to comply with the Pre-Action Protocol – Appendix C and his failure to give any reason for not so complying.”

LAW AND CONCLUSIONS

7. The Defendants placed reliance inter alia on the case of **Securum Finance Ltd v Ashton and another** 2000 3 W.L.R. 1400. In that case, in 1989 a bank commenced proceedings against a debtor for the repayment of a loan, and against the two guarantors of the loan, a husband and wife who had granted the bank a legal charge over their property. In 1997 those proceedings were struck out for delay. In 1998 the plaintiff, as the bank's assignee, brought a second action

against the defendant guarantors, claiming to enforce the bank's rights to payment under the legal charge and to enforce its security by orders for possession and sale of the mortgaged property. The defendants contended that the second action involved relitigating issues raised in the first, and applied to strike it out on grounds of delay and abuse of process. The judge declined to strike it out, considering himself bound by previous authority to the effect that, in the absence of intentional and contumelious default, a litigant's action should not be struck out for delay or abuse of process where the relevant limitation period remained unexpired.

8. The defendants appealed and the Court of Appeal held:

That it was no longer open to a litigant whose action was struck out for delay to rely on the principle that a second action commenced within the limitation period would not be struck out save in exceptional circumstances; that in actively managing litigation, and in deciding whether to strike out a claim under C.P.R., r. 3.4, the court had to consider the overriding objective in rule 1.1(1) of doing justice and decide whether the claimant's wish to pursue a second case against the same opponent outweighed the need to allot the court's limited resources to other cases; and that in failing to give any weight to that objective the judge erred in his approach to the exercise of his discretion.

(2) Dismissing the appeal, that the claim to payment involved relitigating an issue already raised in the earlier proceedings and as such was an abuse of process; but that the claims to enforce the security under the legal charge, which were not (and did not need to be) raised in the earlier proceedings, could not be so categorised; that, if the issue whether there was a debt secured by the legal charge would have to be litigated in any event, the need to consider the allocation of the court's resources had

little weight; and that, in the circumstances, to strike out the claim for payment as a mark of the court's disapproval of the delay in the first action would be a wrong exercise of discretion.

9. Indeed at paragraph 34 of the judgment of the Court of Appeal, Chadwick L J said:

For my part, I think that the time has come for this court to hold that the “change of culture” which has taken place in the last three years and, in particular, the advent of the Civil Procedure Rules – has led to a position in which it is no longer open to a litigant whose action has been struck out on the grounds of inordinate and inexcusable delay to rely on the principle that a second action commenced within the limitation period will not be struck out save in exceptional cases. The position, now, is that the court must address the application to strike out the second action with the overriding objective of the Civil Procedure Rules in mind – and must consider whether the claimant’s wish to have “a second bite at the cherry” outweighs the need to allot its own limited resources to other cases. The courts should now follow the guidance given by this court in the Arbuthnot Latham case [1998] 1 W.L.R.1426, 1436-1437:

“The question whether a fresh action can be commenced will than be a matter for the discretion of the court when considering any application to strike out that action and any excuse given for the misconduct of the previous action see Janov v Morris [1981] 1 W.L.R. 1389. The position is the same as it is under the first limb of Birkett v. James. In exercising its discretion as to whether to strike out the second action, that court should start with the assumption that if a party has had one action struck out for abuse of process some special reason has to be identified to justify a second action being allowed to proceed.”

10. In this matter, the Court was of the view that the Claimant had no answer to the **Securum** case. In fact, the Court's orders that the Defendants file affidavits and written submissions were inexplicably ignored. In actively managing litigation and in deciding whether to strike out a claim commenced under the Civil Proceedings Rules, 1998, the Court had to consider the overriding objective set out in Part 1.1(1) of doing justice and to decide whether the Claimant's wish to pursue a second case against the same defendants outweighed the need to allot the court's limited resources to other cases.

11. In all the circumstances and in the exercise of the Court's discretion, the Court considered that the Claimant's wish to pursue a second case against the same defendant did not outweigh the need to allot the Court's limited resources to other cases. The Claimant has given no excuse for his inaction in the first action and has not justified a second action being allowed to be proceeded with. In considering the overriding objective in Part 1.1(1), therefore, the Court granted the application and ordered that the Claimant's Claim Form and Statement of Case filed on the 20th August, 2008 be struck out as an abuse of process. The Court also ordered that the Claimant pay to the Defendants costs of the action and of the Notice of Application assessed in the sum of \$8,900.00.

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Maureen Rajnauth-Lee
Judge