



In The Supreme Court of Bermuda

CIVIL JURISDICTION

2018 No: 245

BETWEEN:

WANDRA ANN PEDRO

Plaintiff

and

DEPARTMENT OF CHILD AND FAMILY SERVICES

Defendant

CHAMBERS RULING

Strike Out Application (RSC Order 18/19); Limitation Act

Date of Hearing: 24 September 2019

Date of Ruling: 28 November 2019

Representation:

Applicant (Defendant) Mr Brian Moodie (Attorney General's Chambers)

Respondent (Plaintiff) Ms Pedro In Person (Via Teleconference)

RULING OF Alexandra Wheatley, AJ

Introductory

1. The Plaintiff filed a Writ of Summons dated 10 July 2018 ("the Writ of Summons"). The underlying facts of this case relate to the Plaintiff's son (who under the supervision and ultimate the care) of the Department of Child and Family Services ("DCFS") by way of applications made by DCFS to the Magistrates' Family Courts. The Plaintiff's allegations are, *inter alia*, that DCFS was negligent in making their applications for the supervision

orders and ultimately a care order in relation to her son. These are applications which were made over a few years between 2008 and 2010. The Plaintiff is seeking damages in the sum of \$250,000. The Plaintiff was very descriptive in her statement of claim as to why she is seeking damages, but ultimately it can be summarized as pain and suffering.

2. The Plaintiff alleges her pain and suffering was caused by actions of DCFS which amount to criminal charges such as, child abduction, unlawful removal of her son, falsification of reports/records, suppression/omission of evidence, fraud. She also alleges DCFS have caused damage to her reputation and inflicted trauma on her. Moreover, the statement of claim averred to make claims on behalf of her son, who is now twenty years old, for pain and suffering.
3. At the first appearance for directions in the matter on 22 August 2019, Mr Moodie indicated he would be filing an application to strike out the Plaintiff's Writ of Summons. Directions were given, *inter alia*, for the timeframe of filing of the formal strike out application and the filing of skeleton arguments. The matter was set down for a one-half day hearing for this application.
4. The Defendant's application seeks to strike out the Plaintiff's Writ of Summons on the following grounds:
 - a) The pleadings disclose no reasonable cause of action;
 - b) The claim is vexatious and frivolous; and otherwise
 - c) The claim constitutes an abuse of process.
5. In order to preserve transparency, and to give a general understanding of Ms Pedro's conduct in this matter, Ms Pedro e-mailed the courts and myself on many occasions both following the directions hearing, but prior to the hearing as well as following the hearing itself attempting to make further submissions. Consequently, the administrative staff as well as the Acting Registrar (who is the Assistant Registrar) directed Ms Pedro (which she has also been advised on several occasions by myself in my substantive capacity as Registrar, as well as by other administrative staff, in relation to other cases she is involved in before the courts) it was inappropriate to e-mail me directly particularly when she was attempting to make submissions in terms of the decisions I had made.
6. Ms Pedro also attempted to make submissions to the Governor that I should not have conduct of this matter and also attempted to make further submissions in relation to this application following the hearing despite being given several opportunities to ensure that she had fully put forward all of her submissions during the hearing.

7. I must address these inappropriate attempts to interfere with the proper and fair adjudication of this application. I have not considered any of Ms Pedro's e-mail correspondence outside of her skeleton argument she relied on at the day of the hearing sent to myself or to the courts in relation to making a determination of this application.

Preliminary Issue

8. For the purpose of completeness, it should be noted these proceedings initially included the Senior Magistrate, Juan Philip Wolffe, Magistrate Tyrone Chin and Miss Ashley Smith as her position of Court Associate in the Magistrates' Family Court. At the first directions hearing, I brought it to the Plaintiff's attention that Magistrates could not be held personally liable for decisions made in their judicial capacity. This was accepted by the Plaintiff.
9. As it related to Miss Smith acting in her course of employment with the Judicial Department as a Court Associate in the Magistrates' Family Court, the Plaintiff also accepted that it was not Miss Smith who played any decision-making role as it relates to the case and was merely carrying out her employment function as a result of the decisions made by the Courts. As such, the parties' consented to these parties being removed as Defendants to this matter.

The Law

10. Order 18, Rule 19 of the Rules of the Supreme Court 1985 ("the RSC") provides the Court with the jurisdiction to determine this application as well as sets out the grounds for which such an application would be successful. Order 18, Rule 19 states as follows:

"18/19 Striking out pleading and indorsements

19 (1)The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that—

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action; or*
- (d) it is otherwise an abuse of the process of the court;*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

- (2) No evidence shall be admissible on an application under paragraph (1)(a).*
- (3) This rule shall, so far as applicable, apply to an originating summons and a petition as if the summons or petition, as the case may be, were a pleading."*

11. *The White Book (1999 edition)* provides at 18/19/10:

“A reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered (per Lord Pearson in Drummond-Jackson v British Medical Association [1970] 1 WLR 688; [1970] 1 All ER 1096, CA). So long as the statement of claim or the particulars (Davey v Bentinck [1893] 1 QB 185) disclose some cause of action, or raise some question fit to be decided by a Judge or a jury, the mere fact that the case is weak and not likely to succeed is no ground for striking it out (Moore v Lawson (1915) 31 TLR 418, CA; Wenlock v Maloney [1965] 1 WLR 1238; [1965] 2 All E.R. 871, CA): ...”
[Emphasis added]

12. In the Supreme Court Ruling of the Learned Justice Shade Subair Williams (then Registrar of the Courts of Bermuda) in *David Tucker and Hamilton Properties Limited [2017] SC (Bda) 110 Civ (11 December 2017)*, she addressed the test for what is deemed to be scandalous, frivolous or vexatious as well as what amounted to an abuse of process. Paragraphs 21 through 24 state as follows:

“‘Scandalous, Frivolous or Vexatious’

Scandalous

21. A complaint that a pleading is ‘scandalous’ necessarily imports an allegation that the pleading is grossly disgraceful, false and malicious or defamatory. Scandalous claims are irrelevant to the proceedings and are invariably liable to be struck out on the basis that they are improper.

Frivolous and Vexatious

22. Justice Meerabux in *The Performing Rights Society v Bermuda Cablevision Limited* 1992 No. 573 at page 31 considered the meaning of ‘frivolous’ and ‘vexatious’: “...It is pertinent to mention that the words “frivolous or vexatious” mean cases which are obviously frivolous or vexatious or obviously unsustainable. Per Lindley L.J. in *AttorneyGeneral of Duchy of Lancaster v L. & N. W. Railway* [1892] 3 Ch. 274 at 277. Also when “one is considering whether an action is frivolous and vexatious one can, and must, look at the pleadings and nothing else... One must look at the pleadings as they stand.” Buckhill L.J. in *Day v William Hill (Park Lane) Ltd.* [1949] 1 K.B. 632 at 642.” However, Day pre-dates the 1985 Supreme Court Rules and the new CPR regime which introduced the Overriding Objective. RSC O.18/19(2) only excludes the admissibility of evidence on the grounds that no reasonable cause of action or defence is disclosed. Evidence may now be filed in support of grounds that the pleadings are ‘scandalous, frivolous or vexatious’.

‘Abuse of Process’

Misuse of procedure

23. In *Michael Jones v Stewart Technology Services Ltd* [2017] SC (Bda), Hellman J considered the meaning of ‘abuse of process’ by reference to Lord Diplock’s passage in *Hunter v Chief Constable* [1982] AC 529 at 536 C: “It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied...”

Delay in Prosecution of Claim

24. Kawaley CJ considered the legal principles relevant to a strike out application on grounds of abuse of process in *Jim Bailey v Wm E Meyer & Co Ltd* [2017] Bda LR 5 at paras 12-25. The issue underlying the abuse of process in “Bailey v Meyer” was pinned to delay in the prosecution of the claim. Kawaley CJ summarily rejected the submission that civil want of prosecution was governed by the same law applicable to an accused’s constitutional right to be tried within a reasonable time. The Court cited “Biguzzi v Rank Leisure plc” [1999] 4 All ER 934 (CA) where the High Court reversed a deputy district judge’s decision to strike out the claim. The reversal on appeal in that case hinged on the Defendant’s contribution to the delay in advancing the proceedings exceeded passive assent. See also *Re Burrows* [2005] Bda LR 77 (at paragraphs 13-14) and *Russell v Stephenson* [2000] Bda LR 63.”

13. Additionally, the *White Book (1999 Edition)* provides the following guidance in respect of making a finding that a claim is an abuse of process at 18/19/18:

“Abuse of the process of the Court – Para. (1) (d) confers upon the Court in express terms powers which the Court has hitherto exercised under its inherent jurisdiction where there appeared to be “an abuse of the process of the Court”. This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see *Castro v Murray* (1875) 10 Ex. 213; *Dawkins v Prince Edward of Saxe Weimar*; *Willis v Earl Beauchamp* (1886) 11 P. 59, per Bowen L.J. at 63)...

The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances and for this purpose considerations of public policy and the interests of justice may be very material... [Emphasis added]

14. The time period for which the Plaintiff has brought this claim is also relevant to this application. The Limitation Act 1984 (“the Act”) sets out the timeframe for which parties may bring actions before the Courts. In relation for claims founded in tort, section 4 of the Act is relevant:

“Time limit; actions founded on tort

4 An action founded on tort shall not be brought after the expiration of 6 years from the date on which the cause of action accrued.”

15. Section 12 of the Act provides a timeframe in cases where damages are sought base on allegations of negligence:

“Time limit; personal injuries or death

12 (1) This section applies to any action for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or under a statute or independently of any contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to the plaintiff or any other person.

(2) None of the time limits given in the preceding provisions of this Act shall apply to an action to which this section applies.

(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5).

(4) Except where subsection (5) applies, the period applicable is 6 years from—

(a) the date on which the cause of action accrued; or

(b) the date of knowledge (if later) of the person injured, whichever is the later.

...”[Emphasis added]

16. In addition to Section 4, Sections 33 and 34 of the Act states as follows:

“Fraud; concealment; mistake

33 (1) Subject to subsection (3), where in the case of any action for which a period of limitation is prescribed by this Act, either—

- (a) *the action is based upon the fraud of the defendant; or*
- (b) *any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or*
- (c) *the action is for relief from the consequences of a mistake,*

the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

Reference in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

(2) *For the purposes of subsection (1), deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty.*

...

Discretion of court to exclude time limit in case of personal injury or death

34 (1) *If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which—*

- (a) *section 12 or 13 prejudice the plaintiff or any person whom he represents; and*
- (b) *any decision of the court under this subsection would prejudice the defendant or any person whom he represents,*

the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.

(2) *The court shall not under this section disapply section 13(1) except where the reason why the person injured could no longer maintain an action was because of the time limit in section 12.*

(3) *In acting under this section the court shall have regard to all the circumstances of the case and in particular to—*

- (a) *the length of, and the reasons for, the delay on the part of the plaintiff;*
- (b) *the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time allowed by section 12 or (as the case may be) by section 13;*

- (c) the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;
- (d) the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;
- (e) the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;
- (f) the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received.

...
 (7) In this section “the court” means the court in which the action has been brought.

(8) References in this section to section 12 include references to that section as extended by any of the preceding provisions of this Part or by any provision of Part III.” [Emphasis added]

17. Mr Moodie relied on the UK Supreme Court case of *Barton v Wright Hassall LLP* [2018] UKSC 12. This case was an appeal to determine whether the Court should grant retroactive service of a claim form where a litigant in person served the claim form via email. The three courts below all refused this relief. Consequently, the Appellant would have been forced to institute a new claim which would have the effect of him being time-barred from bringing such an action. Whilst the Supreme Court allowed the appeal, there were findings made in relation to the applicability of the rules and procedures of the courts to litigants in person compared to parties who are represented by counsel. Lord Sumption at paragraph 18 addressed this issue:

“18. Turning to the reason for Mr Barton’s failure to serve in accordance with the rules, I start with Mr Barton’s status as a litigant in person. In current circumstances any court will appreciate that litigants in person is not always a matter of choice...Their lack of representation will often justify making allowances in making case management decisions and in conducting hearings. But it will not usually justify applying to litigants in person a lower standard of compliance with rules or orders of the court. The overriding objective requires the courts so far as practicable to enforce compliance with the rules...The rules do not in any relevant respect distinguish between represented and unrepresented parties...The rules

provide a framework within which to balance the interest of both sides. That balance is inevitably disturbed if an unrepresented litigant is entitled to greater indulgence in complying with them than his represented opponent. Any advantage enjoyed by a litigant in person imposes a corresponding disadvantage to the other side, which may be significant if it affects the latter's legal rights, under the Limitation Acts for example. Unless the rules and practice directions are particularly inaccessible or obscure, it is reasonable to expect a litigant in person to familiarise himself with the rules which apply to any step which he is about to take." [Emphasis added]

18. The *White Book (1999 Edition)* provides guidance at 18/19/6 as it relates to how a claim made outside of the statutory time limit should be treated in applications to strike out that claim:

"(2) Limitation – where is appeared from the statement of claim that the cause of action arose outside the statutory period of limitation, it was held that the statement of claim would not be struck out unless the case was one which the Real Property Limitation Act applied (see *Price v Phillips* [1894] W. N. 213). However, if the defendant does plead a defence under the Limitation Act, he can seek the trial of a preliminary issue, or in a very clear case, he can seek to strike out the claim upon the ground that it is frivolous, vexatious and an abuse of process of the Court (see, per Donaldson L.J. in *Ronex Properties Ltd v John Laing Construction Ltd* [1983] Q.B. 398). Thus, where there statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of process of the Court (*Riches v Director of Public Prosecutions* [1973] 1 W.L.R. 1019; [1973] 2 All E.R. 935, CA, as explained in *Ronex Properties Ltd v John Laing Construction Ltd*, above)." [Emphasis added]

The Defendant/Applicant's Position

19. Mr Moodie's submissions on behalf of the Defendant were quite straightforward. The Defence Statement filed on 23 August 2018 which clearly sets out the timeframe in which the Defendant made an application to the Magistrates' Family Court for supervision orders for the Plaintiff's son. On the three occasions the parties appeared before the Court in 2008 and the one occasion in 2009; it was admitted by the Plaintiff that she consented to the supervision orders being sought by the Defendant at these appearances.

20. Counsel further submitted the Plaintiff, at no time, filed appeals against the decisions made by the Learned Magistrates; indeed, it would not have been expected given Ms Pedro's consent to the applications. Mr Moodie submitted the Plaintiff's lack of action in this regard, makes her application before the Court now scandalous, frivolous, and vexatious and/or an abuse of the court's process.
21. Furthermore, Mr Moodie asserted even if one were to put aside the Plaintiff's failure to appeal the decisions made by the Learned Magistrates, this action is being brought ten years following the last application which was heard by the Magistrates' Family Court in 2009. As such, her claim is statute barred in accordance with Sections 4 and 12 of the Act.
22. An additional argument in the alternative made by Mr Moodie is that several particulars of Ms Pedro's claim amounted to what are actually criminal offences, such as child abduction, unlawful removal of her son, falsification of reports/records, suppression/omission of evidence and fraud. As such, these claims disclose no reasonable cause of action as this claim is being brought before the Civil Court.

The Plaintiff/Respondent's Position

23. The Plaintiff fully accepted the proceedings in the Magistrates' Family Court occurred in the years 2008 through 2010. She did, however, state that she made attempts to bring new applications to the court in 2012, 2013 and 2014, but her efforts were ignored. My understanding of Ms Pedro's statement of her efforts being "ignored" were not a representation that the Courts had actually "ignored" her applications. I found this assertion to be quite troublesome as Ms Pedro did confirm she was represented by attorneys throughout the proceedings and the years following. Ms Pedro went further to state her "*attorneys did not represent her properly*".
24. Notably, Ms Pedro confirmed she did not appeal any of the decisions made in the Magistrates' Family Court and that she believed she had been "*defeated and had no further recourse*". Furthermore, Ms Pedro throughout the hearing confirmed she consented to the supervision orders made by DCFS in 2008 through 2009.
25. Ms Pedro confirmed she left Bermuda to reside in the UK in 2011 and at no time prior to then did she make any requests to search the court files in relation to her son's case before the Magistrates' Family Court. She stated she did not search the file until 2016, which I observe is even two years prior to filing her claim which is now before the Courts.
26. The Plaintiff submitted the Act is not applicable to this case and relied on Section 33 (1) (a) and (b) of the Act. She avers her application is based on the fraud of the Defendant and purports the facts relevant to her action had been deliberately concealed from her by the Defendant. This assertion is based on her allegations that reports were not disclosed by the

Court Social Workers and evidence was withheld by the Defendant in the proceedings and this was only revealed to her upon her review of the court file in 2016. Ms Pedro also relied on Section 34 (3) of the Act in asserting the limitation period set by Section 12 of the Act prejudices her personal injury claim. She further submitted the Court has the discretion to waive the limitation period in such instances. Alternatively, she argued she did not become aware of the “injury” until she viewed the court files and as such the six year statutory timeframe would not commence until 2016 which is when she viewed the files.

27. Mr Moodie rebutted these submissions by referring to Section 34 (3) (e) where it is explicit in putting the onus on the Plaintiff to “*act promptly and reasonably once [she] knew the act or omission*” could give “*rise to an action for damages*”. The assertion being that Ms Pedro and/or her attorneys had every opportunity to view the files if they wished to do so once the proceedings commenced in 2008. Putting aside, Ms Pedro’s consent to the applications, she chose not to do so until 2016. Thereafter, she did not bring these proceedings until some two years later. It was not accepted the timeframe would commence when Ms Pedro viewed the files in 2016.
28. The case of *Barton v Wright Hassall LLP* relied on by Mr Moodie was used to challenge Ms Pedro’s assertions that as she is acting in person she was unaware of time limitations and her right to appeal. He submitted Ms Pedro’s alleged lack of knowledge being a litigant in person is moot regarding her right of appeal of the 2008 and 2009 decisions as she was represented by counsel at that time. He further submitted, the period within which she can bring an action should not be extended or waived as it would prejudice the Defendant in this matter. The Rules of the Court and the Limitation Act apply equally to those parties represented by Counsel as to litigants in person.

Findings and Application of the Law

29. As it relates to the Plaintiff’s claim being time barred in accordance with the Act, I find the claim has been made out of time in accordance with Sections 4 and 12 of the Act. I do not accept Ms Pedro’s reliance on Sections 33 and 34 of the Act as they do not apply to the facts of this case; particularly I do not accept she made any attempt to act promptly or reasonably in bringing forward this claim. Indeed, her statement of claim relies on the alleged damages being done over the last ten years which means any “injury” and/or “pain and suffering” she is seeking damages for did not commence or only become known to her when she reviewed the court files in 2016.
30. The *White Book (1999 Edition)* is clear as it relates to claims which are made outside of the constraints of the Act, 18/19/6:

“...Thus, where there statement of claim discloses that the cause of action arose outside the current period of limitation and it is clear that the defendant intends to rely on the Limitation Act and there is nothing before the Court to suggest that the plaintiff could escape from that defence, the claim will be struck out as being frivolous, vexatious and an abuse of process of the Court...”

31. Ms Pedro has not raised any valid argument that she can escape the reliance of the Defendant on her claim being time barred in accordance with the Act. Allowing Ms Pedro to proceed with this claim would amount to clearly frivolous, vexatious (*David Tucker and Hamilton Properties Limited*) and an abuse of process of the courts (*White Book (1999 Edition) 18/19/19*) as it would effectively give her a second bite of the cherry. The Plaintiff did not appeal the decisions made in the Magistrates’ Family Court or make any reasonable effort to bring this matter before the court in a timely manner (despite all the applications put before the Magistrates’ Court all being consented to by her).
32. The Defendant and the Plaintiff appeared in the Magistrates’ Family Court for applicaitons made by the Defendant for supervision orders of the Plaintiff’s son on four occasions in 2008 and 2009. I fully accept the Plaintiff consented to these applications as she admitted this during the hearing. Furthermore, she also was admittedly represented by Counsel throughout these proceedings. At no point did Ms Pedro appeal any of the orders made in relation to the Defendant’s applications. Further, on her own admission, she made no attempt to view the court files until 2016 despite remaining in Bermuda until 2011. She was passive in her attempts to bring any action (*Jim Bailey v Wm E Meyer & Co Ltd [2017] Bda LR 5*).
33. The Plaintiffs attempts to assert her lack of knowledge of the appeal process and statutory time limits for bringing an action does not have any footing and had this been accepted would place the Defendant in a disadvantageous position (*Barton v Wright Hassall LLP*).

Conclusion

34. The Plaintiff’s claim is struck out in its entirety as it is frivolous, vexatious and an abuse of process.
35. Costs in this application to the Defendant, on a standard basis, to be taxed if not agreed.

Dated this 28th day of November 2019

ALEXANDRA WHEATLEY
ACTING PUISNE JUDGE OF THE SUPREME COURT