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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. D 057 OF 1999

BETWEEN	AMOS DOUGLAS	**PLAINTIFF**
AND	CALVERT FALLOON	**1ST DEFENDANT**
AND	ROY CHRISTIE	**2ND DEFENDANT**

Heard: November 28, 2001; February 25, March 14, and December 6, 2002.

Miss Racquel Dunbar instructed by McGlashan Robinson & Company for Defendant/Applicant.
Mrs. Gloria Langrin and Mr. Hugh Hyman for Plaintiff/Respondent.

ANDERSON: J

This is an application on behalf of the defendant Clevert (on the court docket noted as "Calvert") Falloon for an order that this action should be dismissed for Want of Prosecution, either under section 244 of the Judicature (Civil Procedure Code) Law, or under the court's inherent jurisdiction. The application was filed on the 11th May 2001 and came for hearing first on the 28th November 2001 when it was adjourned to the 25th February 2002, and continued on March 14, 2002. The Summons was supported by the affidavit of Racquel Dunbar, attorney-at-law, and associate in the law firm McGlashan Robinson, the attorneys-at-law on the record for the defendants, while the plaintiff's attempts to resist this application, were supported by an affidavit of his attorney-at-law on the record, Mrs. Gloria Langrin.

Miss Dunbar depones that the action arose out of an accident which had occurred on the 5th of February 1995 and was commenced by Writ of Summons dated the 18th May 1999. She depones further, that the Statement of Claim was filed by the plaintiff on the 25th May 1999 and that since the filing of the Statement of Claim, the plaintiff had taken no further steps in these proceedings.

She states that the defendants in this action are prejudiced due to the inordinate and inexcusable delay in prosecuting the action and that they would continue to be so in the event of any further delay in that a substantial period had elapsed since the accident. The defendants' recollections, as well as those of potential witnesses of the event, would be seriously diminished. Further, she claims that the plaintiff had claimed special damages which attract interest to include the period spanning the date of the accident to the date of judgment. The plaintiff has also claimed general damages the value of which would have been increased in line with the consumer price index up to the time when judgment is given making the defendant liable to a much increased level of damages, that may indeed be in excess of his insurance policy limits. In the circumstances the affidavit prayed that the Honourable Court would grant an order in terms of the summons filed.

Miss Dunbar for the applicant in oral submissions urged upon the court that the principles enunciated in the relevant authorities, all supported a view that the court should exercise its discretion in favour of dismissing the action pursuant to Section 244 of the Judicature (Civil Procedure Code) Law. The section provides as follows:

> If the plaintiff, being bound to file a statement of claim and deliver a copy thereof, does not file the same and deliver such copy within the time allowed for that purpose, the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action, with costs, for want of prosecution; and on hearing such application the Court or judge may, if no statement of claim shall have been filed and a copy thereof delivered, order the action to be dismissed accordingly or may make such other order on such terms as the Court or Judge shall think fit.

It was submitted for the defendant, that the period of ten months between the filing of the writ to the filing of the application to dismiss for want of prosecution was clearly in breach of section 244, and the defendant was entitled to apply for the dismissal for such delay, particularly where the plaintiff had waited for so long after the incident to file his action. Counsel for the defendants pointed out that the court also has an inherent jurisdiction to dismiss for want of prosecution, and indeed, when one looks at the **Supreme Court Practice, 1997, Volume 1, Order 25 r 1(4)**, it is noted that apart from the express provisions set out in the Supreme Court Rules, "the court has an inherent

excessive delay in the prosecution of the action. Generally speaking, the same principles are applied whether the court is acting under its express power or under its inherent jurisdiction".

She submitted that the principles to be applied in matters of this nature were stated clearly in the trilogy of cases heard together, but known by the name, **Allen v Sir Alfred McAlpine & Sons Ltd. (1968) 1.A.E.R. 543** and approved in the later case of **Birkett v James (1977) 2 All E.R. 801**, per Lord Diplock, at page 805, citing the then current issue of the Supreme Court Practice:

> The power to strike out should be exercised only where the Court is satisfied (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the Court or conduct amounting to abuse of the process of the Court; or (2) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and such delay will give rise to a substantial risk that it is not possible to have a fair trial or is such as is likely to cause or have caused serious prejudice to the defendants either as between each other or between themselves and a third party.

This leading authority on the subject, was followed and applied by the Jamaican Court of Appeal in **Warshaw v Drew (1986) 45 W.I.R. page 221**, in a decision later upheld by the Judicial Committee of the Privy Council at **1990 Vol 38 W.I.R. 221**.

In the instant case, the application on behalf of this defendant purported to call into question, the second of the two bases. The defendant must therefore show both inordinate delay and risk of prejudice to the possibility of a fair trial. In this regard, she submitted that ***Tabata v Hetherington & Anor., Times Report of December 15, 1983***, defined "inordinate delay" as "a period of time which had elapsed which was materially longer than the time which was usually regarded by the courts and the profession as an acceptable period of time." (Per Cumming-Bruce L.J.). It was counsel's submission that this case satisfied that criterion.

It was her further submission that prejudice to the defendant may take many forms, and that in fact, "the question of the possibility of a fair hearing, and prejudice to the

Defendants are alternative principles upon which courts act in deciding how to exercise its discretion". ***(Per Forte J.A. in West Indies Sugar v Minell (1993) 30 J.L.R. 542 at page 545.)*** In this case, the defendant Falloon did have the suit hanging over his head for a considerable period *before* the filing of the writ, but the time between the Entry of Appearance and the issue of the Summons to dismiss, was only ten months.

Miss Dunbar submitted that the defendant does not have to allege prejudice in his application as, where there is evidence of inordinate delay, the court could find that this, in and of itself, could amount to prejudice. In support of this submission, she cited Downer J.A. in the ***West Indies Sugar*** case (Supra) at page 547A, that "where there is inordinate delay, this by itself, may make a fair trial impossible". I would have to say, with respect, that the first part of this submission, (i.e. defendant does not have to allege prejudice) seems to fly in the face of the judgment of the Court of Appeal in **Warshaw v Drew;** (See per Carberry J.A. at page 271, where he cites with approval, a section from the notes to Order 25 rule 1, in the Supreme Court Practice of 1982 to the following effect:

> On an application to dismiss for want of prosecution, except in a very clear case, it is desirable that the plaintiff should file evidence explaining all the circumstances relied upon and exhibiting all relevant documents, and equally that *the defendant should file evidence to establish the nature and extent of the prejudice occasioned to him by such delay*. (Emphasis mine)

Mr. Hyman for the plaintiff later submitted, (correctly in my view), that the onus is on the Applicant/defendant to show the nature and the extent of the prejudice occasioned to him by the delay. In any event, the mere fact that inordinate delay in and of itself may make a fair trial impossible, does not negative the need to produce evidence of prejudice. Indeed, Miss Dunbar seems to recognize this for she then proceeds to make submissions to the effect of the prejudice that may be or may have been caused to the defendant (See page 2 above). Thus, the defendant, in her submission, could also show that he had suffered prejudice as the meaning of that term was extended in ***Biss v Lambeth Health Authority (1978) 2 A.E.R. 125 (per Lord Denning M.R.)***, where an action hanging over one's head with professional reputations at stake, was a sufficient prejudice.

> "Prejudice to a defendant by delay is not to be found solely in the death or disappearance of witness or their failing memories or in the loss or destruction of records. There is much prejudice to the defendant in having an action hanging over his head indefinitely, not knowing when it is going to be brought to trial". Further the defendant here had also suffered prejudice by virtue of the fact that with the passage of time the damages which may ultimately be awarded, may exceed the limits of coverage accorded by the defendant's insurance policy.

This statement of the law was adopted in ***Patrick Valentine v Nicole Lumsden (1993) 30 J.I.R. 524.*** She accordingly submitted that the defendant had made out his case for the dismissal of this action for want of prosecution and asked that the order be made granting the relief sought in the Summons.

Mr. Hyman for the plaintiff/respondent asked the court to deny the application to dismiss for want of prosecution. In his first submission, he pointed out that this was one of two cases arising out of the accident referred to above. In the other suit, (CL 1997 D 137), the injured wife of this plaintiff, is suing both the defendants and her husband, the plaintiff herein. He suggests that the outcome of that case "will determine the outcome of this matter." For my part, I find that it is not immediately clear why that should be a dispositive factor in determining the proper course to be followed in this application. I say that because it is possible that in that other action, the husband/defendant could be found wholly liable or guilty of contributory negligence. That would clearly have evidential value in this case, beyond the issue of damages.

In the written submissions on behalf of the plaintiff, it was urged that the Summons is defective because it fails to disclose on its face, the bases upon which the application to dismiss is being made. This can be dealt with quite easily. The authorities make it clear that the failure to prosecute an action in an expeditious manner, may give rise to an application, and the court has an inherent jurisdiction to dismiss, if the appropriate criteria as laid out in ***Allen v Sir Alfred McAlpine,*** have been met. It is for the defendant applicant to show that this is so. I accordingly, do not accept this submission.

A second submission for the plaintiff, is that the delay is neither inordinate nor inexcusable, necessary ingredients in grounding a successful application to claims for want of prosecution. In this regard, the plaintiff's attorney adverts to the dates of the various filings in this matter. The point is made that the period between the filing of the Writ of Summons and the Entry of Appearance was over one (1) year later. The application to dismiss was filed less than ten (10) months after the Entry of Appearance. In her affidavit in opposition, Mrs. Langrin, the Attorney-at-law on the record for the plaintiff gave reasons, including the plaintiff's illness, an inability to secure instructions from him, and his wife's subsequent death, and the fact that the file had been mislaid in her office for some time, as reasons justifying the delay.

With respect to the delay, the attorney for the plaintiff pointed out that, in any event, the decision of the High Court in the Trinidadian case of ***Rajack v Water and Sewage Authority # 517/69 SDo, #1484/69 P.O.S.***, while not binding on this court, is persuasive authority for the proposition that a plaintiff may be allowed by the court to file and serve his statement of claim "after the passing of eight (8) years" where "the success and/or failure of this action depends upon the outcome of (another pending case)... both actions being based upon basically the same facts and the issues being the same in both." I have already said enough to indicate that I am not of the view that the existence of the other suit automatically provides a basis for allowing this one to continue. In any event, there is no certainty that the other suit will go ahead, nor that, if it did, it would necessarily determine the outcome of this case.

The third submission for the plaintiff is that the affidavit upon which reliance is being placed in support of the defendant's application, fails to show or establish that there is a substantial risk that a fair trial is no longer possible or that the alleged delay has caused any prejudice to the Defendant. It was submitted that the case of ***Hornagold vFairclough Building Ltd***, reported at **[1993] 137 Sol Jo 153**, contained a correct statement of principle in the following terms:

> It was always incumbent upon the defendants to show a particular reason why they said there was a substantial risk that there could no longer be a fair trial of the issues. Were the mere assertion of prejudice sufficient, then

> that would in effect, transfer the burden of proof on that issue to the plaintiff, a submission that was expressly rejected by the House of Lords in ***Department of Transport v Chris Smaller Ltd [1989] A.C. 1197.***

See also Carey J.A's dissenting judgment in ***Wood v H.G. Liquors Ltd, 1995 48 W.I.R. 240*** at page 244: "The defendant has the burden of proving prejudice". The defendant's counsel in the written submissions had adverted to some factors, (witnesses' failing memories; risk of higher damages which may exceed the insurance coverage; the prospect of paying high rates of interest;) that may give rise to prejudice without giving any hard evidence of the likelihood of any of those factors being realized. This, it was submitted, was not sufficient to ground an allegation of prejudice, even though there were indications in some cases, that delay itself, may ground the application. (See the reference to Downer J.A.'s dicta in West Indies Sugar above) In the ***Wood v H.G. Liquors Ltd*** (supra), Carey J.A. at page 245, adopted the reasoning of Roch L.J. in **Hornagold**, in discussing the prejudice that may be caused by failing memories of witnesses:

> In the present case what was contained in the affidavits was insufficient, as the defendants had neither identified the particular witnesses, nor the particular respects in which their evidence would be impaired. It was always incumbent on the defendants to do so or to show a particular reason why they said there was a substantial risk that there could no longer be a fair trial of the issues".

It was also suggested by the plaintiff that an application to dismiss for want of prosecution ought only to be made after breach of a peremptory order, or after an "Unless Order" had been made by the Court and disobeyed. While not expressly urged by counsel for the plaintiff, it seems implicit in the citing of a section of the judgment of Diplock L.J. in the **Allen v McAlpine** case. There, it was noted that:

> "The application is not usually made until the period of limitation for the plaintiff's cause of action has expired. It is then a Draconian order and will not be lightly made. It should not in any event be exercised without giving the plaintiff an opportunity to remedy his default unless the court is satisfied either that the delay has been intentional and contumelious, or that the inexcusable delay for which the plaintiff or his lawyers has been responsible has been such as to give rise to a substantial risk that a fair trial of the issues in the litigation will not be possible".

It should be noted however, that Carberry J.A. in the **Warshaw v Drew** case adopted the following passage from the Supreme Court Practice:

> "The Court has power to dismiss an action for want of prosecution without giving the plaintiff an opportunity to remedy his default by making what is called an "Unless Order"; there is no rule which requires the defendant's solicitor to give the plaintiff's solicitor prior warning of his intention to apply to dismiss for want of prosecution. 'When the delay is prolonged and inexcusable and is such as to do grave injustice to the one side or to the other or both, the court may in its discretion dismiss the action straight away'. (Per Lord Denning, M.R. in Allen v Sir Alfred McAlpine & Sons Ltd, supra)",

and this court is bound by that decision of the Jamaican Court of Appeal, especially it having been upheld by the Judicial Committee of the Privy Council.

Finally, it was submitted that, where it is sought to deny the plaintiff his day in court, the court needs to be satisfied that it is just and reasonable so to do, in all the circumstances of the case. See per Salmon L.J. in the McAlpine case:

> If the defendant establishes the three factors to which I have referred, the court in exercising its discretion, must take into consideration the position of the plaintiff himself and strike a balance. That means, in other words, that one must look at the justice of the case as a whole.

The plaintiff's attorney challenges the factual bases being put forward as being in and of themselves sufficient to ground the application. In particular, it is submitted that it is not for the court to determine at this time, as suggested by the defendant, that the suit has no merit or that the action is not sustainable. This is a matter for the trial court. Indeed, the counsel for the plaintiff submitted that the application was not well founded, and ought to be struck out. This was denied.

In her response, Miss Dunbar sought to distinguish the several authorities cited by plaintiffs, on the basis that they were either not binding on this court, or that they were only of persuasive and not binding authorities. Thus she suggests that the Rajack case from Trinidad was not binding, and in any event, the plaintiff there had given a good explanation for his delay, which, in her submission, was not the case here. I do not find it necessary to rehearse the response submissions here, in order to state my ruling. The question is what should that ruling be.

In making that determination, I need to acknowledge the recent (and as yet unreported) case ***Gerald Grey v District Constable Esson and the Attorney General C.L. 1992 G-229***, a decision of my learned brother, Brooks J. In that case the learned judge adverted to the context of the more aggressive use of applications to dismiss for want of prosecution, being the untenable delays in the court system in the United Kingdom. He stated that:

> In our own jurisdiction in the case of ***Vashti Wood v H.G. Liquors Ltd and Anor*** (SCCA 23/93 delivered 7/4/95) Wolfe J.A. as he then was, said:
>
> > "I make bold to say, plagued as our courts are with inordinate delays, this court must develop a jurisprudence which addresses our peculiar situation"

The learned Judge of Appeal was contemplating a situation which still obtains today, and which remains a challenge to all of us. I merely state this to say that the court is mindful of its obligations in this regard.

My starting point is the following section from the White Book 1997 Order 3 Rule 5/6. I adopt the passage cited for the purposes herein.

> **Dismissal for want of prosecution** . In ***Costellow v Somerset County Council [1993] 1 W.L.R. 256; [1993] 1 All E.R. 952***, a decision of the English Court of Appeal, the court gave the following guidance for courts confronted by a situation where a defendant applies to have an action dismissed because of a failure of the plaintiff to take some step in the proceedings within the time required by the rules and where the plaintiff at the same time applies (or indicates that he will apply) for an extension of time (under Order 3 rule 5) to take the step in question.
>
> Two principles are to be considered. The first is that the rules of the court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed. The second principle is that the plaintiff should not in the ordinary way be denied an adjudication of his claims on its merits because of procedural defaults unless the default causes prejudice to his opponent for which an award of costs cannot compensate. Neither principle is absolute, but the court's practice has been to treat the existence of such prejudice as a crucial and often decisive factor. In the great majority of cases, it will be appropriate to hear both summonses together so that the case is viewed in the round.....

> But in the ordinary way and in the absence of special circumstances, a court will not exercise its inherent jurisdiction to dismiss a plaintiff's action for want of prosecution unless the delay complained of ***after the issue of proceedings*** (emphasis mine) has caused at least a real risk of prejudice to the defendant.

The affidavit of Mrs. Langrin indicates that the plaintiff is ready and willing to serve the statement of claim immediately, and that the delay post writ, between the Entry of Appearance and the application to dismiss, which was about the same time that the defendant's consent to file the Statement of Claim out of time had been made, was a mere ten (10) months. There is no challenge to these averments and I accept the evidence therein.

The plaintiff submitted as further support for the section of the White Book cited above, and I accept as good law, Lord Griffith's statement ***Department of Transport v Chris Smaller Ltd. 1989 1 All E.R. 897 at page 900***:

> The plaintiff must have been guilty of inordinate and inexcusable delay in the prosecution of the action after the issue of the writ and the defendant must show prejudice flowing directly from the post writ delay which must be additional to any prejudice suffered because the plaintiff did not commence his action as soon as he might have done.

The plaintiff's delay that is called into question, must be delay post filing of the writ.

Lord Diplock's dicta in ***Birkett v James*** (supra) stated at page 808, adds further weight to the submissions:

> "(T)ime elapsed before the issue of the writ within the limitation period cannot of itself constitute inordinate delay however much the defendant may already been prejudiced by the consequent lack of early notice of the claim against him, the fading recollections of potential witnesses, their death or untraceability. To justify dismissal of an action for want of prosecution the delay relied on must relate to time which the plaintiff allows to lapse unnecessarily after the writ has been issued. A late start makes it more incumbent on the plaintiff to proceed with all due speed and a pace which might have been excusable if the action had been started sooner, may be inexcusable in the light of the time that has already passed before the writ was issued."

In other words, "Delay before commencing the action may cause prejudice, but does not give rise to prejudicial delay for the purposes of this action", although the longer the

period before instituting proceedings, the more easy it will be to create a situation of prejudice.

In ***West Indies Sugar v Minnell***, **[1993] 30 J.L.R. 542**, Forte, J.A. (as he then was), in commenting on the judgment of Diplock L.J. (as he then was) in ***Allen v Sir Alfred McAlpine*** had this to say at page 543:

> Later in his judgment, Diplock, L.J. made it clear that in determining whether there may be a substantial risk that a fair trial would not be possible, regard should be given to the earliest date at which, as a result of the delay, the action would come on for trial if it were allowed to continue. It appears that a delay before the filing of the statement of claim which is early yet in the proceedings would invite an assessment of a longer period than if for instance, the action was at the stage of setting it down for trial.

Given the principles of law which I have indicated are applicable to the instant case, and based upon the evidence which has been put before, I find as follows.

1. The appropriate period which is in question for determining whether there has been "inordinate and inexcusable delay" in this matter, is the period after the filing of the writ up to the attempt to secure defendant's consent to file the statement of claim out of time.
2. The period of delay is not "inordinate"
3. The delay was also not "inexcusable" given the information contained in Mrs. Langrin's affidavit.
4. In light of my finding that there was neither inordinate nor inexcusable delay, it is clear upon the authority of **McAlpine** and **Birkett,** discussed extensively above, that the issue of prejudice does not arise. But even were I to consider it, I would be prepared to hold that the defendants have failed to prove on a balance of probabilities, that it would be prejudiced or that there was a substantial risk of not being able to secure a fair trial, by the matter going forward for trial within a reasonable period of time.

I am not unmindful of the fact that the date (1995) of the incident which grounds this action, and perhaps the recollections of prospective witnesses may be rapidly receding

into the abyss of the past and, in deference to this realization, I would accordingly make the following rulings:

A. Summons to dismiss for want of prosecution, denied.

B. Plaintiff shall file his statement of claim and serve it on defendants' attorneys at law, on or before the last day of the current Michaelmas term.

C. Defendant is to file a defence within sixteen days of the commencement of the Hilary Term, and to serve this defence within a further seven (7) days of filing.

D. The attorneys-at-law for the parties shall apply under the New Rules which come into force on January 1, 2003, for the matter to be placed before a case management judge for a case management conference with a view to the making of any appropriate orders to facilitate a speedy trial during the first half of 2003.

E. Liberty to apply.

F. Costs of this application shall be the plaintiff's, to be agreed or taxed.

G. Leave to appeal granted, if necessary.