NOT TO BE DISTRIBUTED

Judgment Book.

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1990/M387

BETWEEN	KIRKLAND MATTIS	PLAINTIFF
A N D	JAMAICA TELEPHONE COMPANY LIMITED	1ST DEFENDANT
A N D	ANTHONY POWELL	2ND DEFENDANT

Mr. C. Cheddar instructed by Nunes, Scholefield, DeLeon for Defendants.

Mr. Huntley instructed by Ms. Elsie Taylor for Plaintiff.

Heard: June 3, 17, 1998 and July 9, 1998

C.A. BESWICK (Master Ag.)

The Plaintiff is a Cable Technician and claims that on 1st December, 1989 while he was a passenger in a motor vehicle owned by the Jamaica Telephone Company Limited and driven by its servant or agent, an accident occurred wherein the vehicle crashed into a utility pole causing the Plaintiff to suffer injury.

He filed suit on November 28, 1990 claiming damages against the Defendants.

No defence was filed by the Defendants although appearance was entered on behalf of both Defendants on January 14, 1991.

The next pertinent pleading was filed on July 16, 1997 and was a summons to dismiss the action for want of prosecution.

Interlocutory judgment was filed on October 6, 1997 but to date has not been entered. Also filed was a summons for order to proceed to assessment of damages which has not been heard.

When the summons to dismiss action for want of prosecution came on for hearing on December 15, 1997 it was adjourned to allow the Plaintiff/ Respondent to file an affidavit in answer to the affidavit in support of the summons to Strike Out.

This affidavit was filed on June 2, 1998, one day before the next scheduled hearing date of the summons on June 3, 1998.

The filing at this time is consistent with the Plaintiff's attitude to the action throughout.

It appears that the only step that the Plaintiff took on his own initiative was to file the writ of summons and the statement of claim.

All other pleadings filed by the Plaintiff followed closely on pleadings filed by the Defendant.

The Plaintiff seemed to be spurred into action only when reminded by the Defendants.

In fact, the affidavit supporting the summons to dismiss the action exhibits correspondence in which the Defendants in 1991 were inviting discussion with a view to settlement and the Plaintiff, rather than responding forthwith, allowed more than a year to pass after which the Defendants again made overtures along similar lines.

The Plaintiff responded in 1992 to indicate there would be some further contact made shortly. There was none.

It has now been over seven (7) years since the accident. The First Defendant states that its witness - the Second Defendant - can no longer be located and this would severely prejudice the Defendants' ability to defend.

Further, the Defendants maintain that the financial burden of any claim to which they are now exposed is substantially increased due to the passage of time.

Consequently by this summons they seek to have the action dismissed for want of prosecution.

The principles governing the Court's power to dismiss an action for want of prosecution are to be found in **BIRKETT v. JAMES (1977) 2 All E.R. 801** where Lord Diplock stated:-

> "The power should be exercised only where the Court is satisfied either (1) that the default has been intentional and contumelious, e.g. disobedience to a peremptory order of the Court or conduct amounting to an abuse of the process 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 each other or between them and a third party."

This approach was endorsed by our Court of Appeal in **WEST INDIES**

SUGAR v. STANLEY MINNEL SCCA No. 91 of 1992

The instant action concerns the Second limb of the principles enunciated.

The first question to be determined therefore, is whether there has been inordinate and inexcusable delay on the part of the Plaintiff or his lawyers.

As this accident occurred in December 1989 and to date there has been no conclusion of the matter the delay may well be considered to be inordinate, considering the lapses of time during which there was no activity.

The next enquiry must be whether there is an acceptable excuse for this inordinate delay.

The reasons proferred are that the Plaintiff's attorney-at-Law became ill and also misplaced the file.

The latter excuse is entirely without merit as effort could have been made to reconstruct any such mislaid file.

Neither does the illness of the Plaintiff's attorney-at-Law provide an excuse. There is no mention of the duration of the illness nor that the fact of this illness was communicated to the Defendants, nor indeed that it caused a prolonged or any delay.

The delay is inexcusable.

However, according to **BIRKETT v. JAMES (Supra)** any inordinate and inexcusable delay must be such as to give rise to a substantial risk that it is not possible to have a fair trial of the issues or that it is likely to cause or to have caused serious prejudice.

Is it possible, after a period of seven (7) years has elapsed since the accident, to have a fair trial of the issues? Is there a likelihood of prejudice?

No defence was filed, nor was any application made to file defence out of time. The exhibits filed by the Defendants' attorney-at-Law indicate that the Plaintiff was being invited to discuss details of the claim.

Without expressly admitting liability, the Defendants have intimated by letter, a willingness to settle.

If the action were not dismissed, it would have to proceed either to settlement or to assessment of damages, there having been no defence filed.

The First Defendant maintains that its witness - the driver who is the Second Defendant - can no longer be located.

What is the effect of that absence where there is no issue as to liability?

The Plaintiff's claim is mainly for damages for personal injuries. The injuries are detailed in the statement of claim.

Would the driver's evidence assist in that determination? I think not.

The instant situation is to be distinguished from **GLORIA v. SOKOLOFF [1969] 1 All E.R. 204** where although liability was admitted the action was struck out. There, the Defendants had requested particulars of special damages which they received late and in an inadequate listing.

There is a further distinction to be found in Lord Denning's words at pg. 206 where he says:

> "The Defendants have had a medical examination and can no doubt deal with the medical position. But the trouble is her money claim. At the time of the writ in 1964 she claimed over £6000 at £40 a week. She said it was continuing ..... The claim could have been investigated promptly and quickly if proper particulars had been given ..... [A] fair trial of the issue of damages is impossible."

Here the claim is simple and particularised. It is not continuing.

In the circumstances of this case I am of the view that the absence of that witness will not give rise to a substantial risk of unfair trial of the issues nor is it likely to cause or to have caused serious prejudice.

The trial would revolve around the quantum of damages to be determined.

Another consideration is whether the delay in itself would give rise to a substantial risk of an unfair trial or of prejudice.

In **WEST INDIES SUGAR v. MINELL (supra)** Forte J.A. held the view that "the length of the delay since the filing of the writ is in itself evidence that there is a substantial risk that a fair trial is not possible."

At page 17 he said:

> "The essential feature to note is that inordinate delay by itself, can be relied on to show prejudice to the [Defendant] and further to show that the enquiry itself would be prejudiced by the delay."

There, the learned Judge was considering a case where the writ was served four years after an accident and the statement of claim four years after that. Therefore, up to eight (8) years following the accident the Defendant had "no

inkling of what the statement of claim would be, so as to prepare its defence."

Not so in the instant case.

It was in those circumstances that Forte J.A. held that view.

Here, within one year of the accident, the Defendants would have known what the claim was.

Such subsequent delay as there was in this case would not in itself give rise to either a substantial risk of an unfair trial or to prejudice.

Counsel for the Defendant relied also on **GROVIT and OTHERS v. DOCTOR and OTHERS [1997] 2 All E. R. 411** as supporting his argument for dismissal. Lord Woolf therein stated that he would prefer not to qualify Lord Diplock's approach in **BIRKETT v JAMES** (Supra) in view of the imminence of proposed legislation. At the same time he acknowledged that where there is abuse of process, it is not strictly necessary to establish want of prosecution under either of the limbs identified by Lord Diplock.

It was his view that "[t]o ....commence and to continue litigation which you have no intention to bring to conclusion can amount to an abuse of process."

It is true that the Plaintiff appeared to be spurred into action only when the Defendants filed process.

However an interlocutory judgment has been filed since 1997 and is yet to be entered.

It is my view that the actions of the Plaintiff do not show that he had "no intention to bring [the matter] to conclusion."

I see no abuse of process and therefore confine myself to the principles in **BIRKETT v JAMES** (supra).

Prejudice has been shown to take many forms.

According to **WARSHAW & Ors v. DREW [1990] 38 WIR 221**, the onus is on the Defendants to file evidence to establish the nature and extent of the prejudice occasioned to them by the delay.

One form of prejudice is financial. Here the First Defendant claims that the value of the money claimed has escalated with the passage of time.

The Plaintiff's response is that this First Defendant is in a special position in that by law it is guaranteed by the Jamaican Government, a certain percentage annual profit, so that whereas decrease in value of money may affect the average Defendant, not so the Jamaica Telephone Company

Limited which is buffered from the vagaries of the economy.

Of far greater importance however is the fact that Courts have the inherent jurisdiction to, and can in fact assess damages as at a certain date, which power could be utilized here.

In **CLOUGH v CLOUGH [1968] 1 All E.R. 1179**, prejudice was considered. A delay of six (6) years was taken to be seriously prejudicial. In that case there were multiple Defendants who laid blame at each other's feet so that the delay seriously prejudiced their ability to defend the action effectively.

" It is impossible", ruled the Court, "to do justice between the Defendants at this distance of time."

Here there is no such issue between the Defendants.

It is my view that the Plaintiff's attorney-at-Law has been tardy throughout most of the proceedings and the delay in concluding the matter is inordinate and inexcusable. However there is no substantial risk that it is not possible to have a fair trial of the issues nor is it likely to cause or to have caused prejudice.

Consequently I dismiss the summons to dismiss the matter of want of prosecution.

Costs to the plaintiff to be agreed or taxed.