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Judgement Book

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SYKES J

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2. Dr. Bernard Marshall, attorney at law, for Patricia Tomlinson, the claimant, filed a writ of summons in the Supreme Court on May 1, 2002. The endorsement on the writ indicated that the action was brought under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act. The claimant alleged that the Crown servants and/or agents responsible for the General Penitentiary, now known as the Tower Street Adult Correction

Centre, were responsible for the death of Mr. Randolph Hilton, who was an inmate at the facility. Miss Tomlinson was the mother of Mr. Hilton. It was alleged that Mr. Hilton was assaulted, stabbed, and subjected to pain, humiliation and cruel and inhuman treatment. These acts, it was said, led to the death of Mr. Hilton.

3. The statement of claim was also filed on May 1, 2002. The Director of State Proceedings entered an appearance for the defendant on May 13, 2002. On October 10, 2002, the defendant was granted permission to file his defence out time. The defence was filed on October 11, 2002.

The course of litigation

4. The next act in this matter was a letter, dated December 4, 2003, written by Dr. Marshall to the Registrar of the Supreme Court. In that letter, Dr. Marshall requested the Registrar to fix a date for a case management conference. This conference is required under the CPR.

5. The Registrar duly complied and issued her notice of appointment for case management conference on May 11, 2004. The notice was sent to both parties. They were told that the conference would be held on October 6, 2004, at 11:00am.

6. On October 6, 2004, Master Lindo held the conference and made a number of orders. These orders included the usual orders for disclosure, exchange of witness statements, filing of agreed statement of facts and issues and so on. The trial date was set for February 8, 2005. The Master dispensed with the pretrial review.

7. The defendant has complied with all the orders that he could. By this, I mean that defendant complied with those orders that did not require

cooperation from the claimant. For example, the defendant did not file an **agreed** statement of facts and issues. This was not done because the defendant was unable to get the claimant to do anything after the orders were made.

8. On January 25, 2005, the defendant filed his witness statements in a sealed envelope. A letter, addressed to the Registrar and copied to Dr. Marshall, accompanied the envelope. The letter acknowledged that although witness statements should have been exchanged by December 17, 2004, the date fixed by the order for the statements, compliance was delayed because the claimant's attorney had not indicated whether he would be able to exchange witness statements by December 17, 2004. The letter concluded with a reminder that the trial date was February 8, 2005.

9. This letter is significant for three reasons. First, in addition to being copied to Dr. Marshall, it was served on him on January 27, 2005. There is a stamp acknowledging receipt of the letter at 12:34 pm. The acknowledgment was signed by a K. Gordon. Second, the letter reminded Dr. Marshall of his obligation to exchange witness statements. Third, he was reminded of the trial date.

10. Given the approaching trial date, one would have expected this letter to spur Dr. Marshall into activity. Regrettably, it had the opposite effect.

11. There is another letter from the defendant to Dr. Marshall concerning this case. This one was earlier and is dated January 3, 2005. In that letter, the defendant invited Dr. Marshall to agree to vary the dates of the case management order. The defendant even went as far as enclosing a draft notice of application for court orders. Dr. Marshall was urged to act with due

haste because there was the possibility that the February-8-2005 trial date might be missed. There was no response from Dr. Marshall.

12. Dr. Marshall did not appear in court. His client was absent. The claimant did not comply with a single order made by the Master. The claimant did not prepare any trial bundles as required by the rules. I should add that the claimant even failed to serve the formal order of the case management conference.

Rule 39.5

13. This rule gives the court a discretionary power to strike out a claim if the parties do not attend. The rule states:

Provided that the judge is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules-

- (a) if no party appears at the trial the judge may strike out the claim and any counterclaim; or*
- (b) if one or more, but not all, parties appear appears (sic) the judge may proceed in the absence of the parties who do not appear.*

14. The text of the rule does not require much exposition. It is clear enough. The issue is what considerations should inform a decision to strike out a claim as distinct from any other order. The rule does not lay down any criterion that governs the exercise of the discretion. This is not surprising given the open textured nature of the CPR. I bear in mind rule 1.1(1), which speaks to the overriding objective. Rule 1.1(2) includes a number of factors that ought to be taken into account in order to deal with cases justly. In this

particular case, I take into account that cases are to be dealt with expeditiously and fairly. In so doing, the court needs to ensure that an appropriate share of the court's resources is allocated to the case. These principles recognise that the resources of the court are finite and must be used judiciously so that no litigant is denied justice because the court has allocated a disproportionate share of its resources to another or other cases. It is all about balancing the interest of the litigants in any particular case against litigants in other cases.

15. I recognise that the text of the rule makes it plain that striking out the claim is not the only option. Whether a matter is struck out depends on all the circumstances of the case. For example, if there is evidence that a claimant has complied with all or most of any orders or directions given by a court then that conduct would, prima facie, suggest that non-attendance at the trial might be due to some good reason. In such circumstances, a court may be more inclined to say that having regard to the track record of compliance and cooperation, non-attendance at the trial is out of character. An adjournment to a future date may be an appropriate order in such a case. On the other hand, non-attendance at the trial, in the context of a history of non-compliance and non-cooperation, absent some good explanation, should yield a robust response from the court. The point being made is that the method of dealing with non-attendance at trial depends on all the circumstances of the case. There can be no standard automatic response to such a situation.

16. In dealing with cases justly where there is non-attendance at a trial, it is legitimate to take account of the impact on the administration of justice of any claimant's non-compliance with orders or directions. The court should be

slow to give the impression that claimants or defendants who behave in this manner will benefit from the court's indulgence.

17. The phrase "court's resources", in the context of the CPR, includes judicial time, allocation of a courtroom or chambers as well as the support staff that must be present to enable the court to hear matters whether in chambers or in open court.

18. I should indicate that Miss Mayhew applied to have the dates varied for compliance because although the defendant complied with all the orders he did not do so within the stated time. However having regard to my decision, it is not necessary to deal with that matter. The fact is that the defendant's late compliance with the Master's orders was sufficiently proximate to the date of the orders would have allowed the trial to take place. The effective cause of the trial not taking place is the claimant. She has failed to play her part. The claimant has failed in her obligation to assist the court in furthering the overriding objective.

Application to case

19. Dealing with this case justly requires that I strike out the claim. I am satisfied that Dr. Marshall had knowledge of the trial date. He was present at the case management conference. The trial date was set with his full participation. I am satisfied that this matter was allocated an appropriate share of the court's resources. I also take into account that the claimant, since the case management, has not attempted to comply with a single order made by the Master. Although the defendant was late in his compliance with the orders, his failures did not hinder the court in any way. His failures did not delay the trial. I must not be understood to be promoting

non-compliance with orders but in deciding how best to deal with any particular case I have to take a global view of the matter. The defendant did all that was possible to engage the claimant in working together to comply with the court orders so that the trial date could be met. The claimant failed to respond to the defendant's overtures.

20. The claimant has engaged the resources of the defendant who took expended time and money to procure witness statements and secure legal services. The professional time of the attorneys for the defendant has been expended on a matter that has failed to get off the ground. I note specifically, that the defendant had his two witnesses present in court. The defendant was ready for trial. I am satisfied that the defendant wrote two letters, both of which came to the attention of Dr. Marshall. Both letters specifically referred to the trial date of February 8, 2005. It cannot be in the interest of justice that a claimant, who imposes a cost on a defendant, fails to comply with court orders, fails to attend the date of trial and engages the scarce resources of the court should expect any indulgence from the court in the absence of any explanation.

21. The behaviour of the claimant in this case has deprived other litigants of their opportunity to have their cases heard. The result of the claimant's conduct is that two attorneys from the Attorney General's Chambers, two public servants from the correctional services, a judge of the Supreme Court, a registrar and a police officer have wasted precious time that could have been better spent.

22. My order therefore is

- i. The claim against the defendant be struck out;
- ii. Costs of \$94,000 to the defendant;
- iii. Judgment to be served on the claimant on or before February 18, 2005.