Judgment Book

IN THE SUPREME COURT OF JAMAICA

SUIT NO. C.L P-186 OF 1998

IN CHAMBERS

BETWEEN	ISAIAH PATTEN	PLAINTIFF
AND	JOAN GREEN	2ND PLAINTIFF
AND	KAREN M. CRANE	1ST DEFENDANT
AND	LLOYD McNAB	2ND DEFENDANT

Mr. Norman Samuels for the plaintiff

Mr. R. Smellie instructed by Daly, Twaites & Company, for the 1st and 2nd defendants.

Heard: July 2 and 4, 2003

Jones J. (Ag.)

The 1st and 2nd defendants have applied to this court for an order that the action brought by the plaintiff for damages as a result of injuries received from a motor vehicle accident be dismissed for want of prosecution.

The ground on which the Applicants seek the order is that:

> *"the Plaintiffs have been guilty of inordinate and inexcusable delay in prosecuting the action, in particular, in taking the step of filing the Summons for Directions herein, said delay rendering it unlikely that the Defendants will get a fair trial and also causing said Defendants the further prejudice of exposing them to additional liability."*

The evidence of delay was clear enough; it came from the affidavit of Mr. Rudolph Smellie, attorney-at-law for the defendants. He said:

> *"3. That by Writ of Summons filed on the 29th day of September, 1998 this action was commenced against the Defendants jointly and severally for the recovery of damages in respect of injuries allegedly*

suffered by the First Plaintiff in a motor vehicle accident which occurred on the 27th day of April, 1993 along the Discovery Bay main road in the parish of Saint Ann.

4. That with the Consent of the Plaintiff a Defence was filed on behalf of the Defendants on the 11th day of August 1999, and on the 21st day of September 1999, a Reply was filed on behalf of the Plaintiffs.

5. That thereafter no further action was taken by or on behalf of the Plaintiffs until the 12th day of June 2002 when the Plaintiff's Attorney-at-Law filed and served a Notice of Intention to proceed.

6. That thereafter no further step was taken by the Plaintiff until the 19th November, 2002 when the Plaintiffs' Attorney-at-Law sent us a letter dated 16th July, 2002 enclosing Summons for Directions and a Consent Order and asking us to sign, this clearly evidencing inordinate and inexcusable delay by the Plaintiffs in prosecuting the matter and in proceeding to a hearing of a Summons for Directions herein.

7. That I am advised by the Statistical Institute of Jamaica and do verily believe that the following represent the consumer price indices for the months indicated hereunder: -

April 1993	*435.5*
April 1999	*1179.9*
September 1999	*1237.6*
September 2000	*1349.3*
September 2001	*1442.7*
August 2002	*1521.2*
October 2002	*1539.2*
November 2002	*1558.3*

showing a steady increase in inflation over the years.

8. That to my certain knowledge by the beginning of the year 2003 when the new Civil Procedure Rules came into effect cases had already been set for trial in December 2003 and there were many other actions on the trial list awaiting fixture of trial dates after that time, and with it being inevitable that the new system of setting trial dates and disposing of cases will face teething pains, I verily believe that, if this suit is permitted to be further prosecuted, the date of trial will not be before the second or third term in 2004, when, as it is reasonable to project, the Consumer Price Index will have increased further."

In his affidavit the 2nd defendant Mr. Lloyd McNab said that he was driving the motor vehicle owned by the 1st defendant which was involved in an accident along the Discovery Bay main road in the parish of Saint Ann. He said that while driving the deceased who was a passenger in the front seat unexpectedly held onto the steering wheel of the motor vehicle causing it to get out of control and overturn. All the passengers in addition to the plaintiff were injured. One of the passengers died as a result of his injuries. Mr. McNab contends that in the circumstances it is very unlikely that any of the witnesses in the car will support his account of the accident. This fact is significant, as his memory is fading and any further delay in the trial of this matter will result in him not being able to recall the actual details of the accident, which lasted mere moments.

On the other hand, the plaintiff's attorney Mr. Samuels in his affidavit admitted that the family of the deceased had difficulty in locating the 2nd defendant, as well as getting the particulars of the motor vehicle involved in the accident. He was retained in June, 1993, and it was not until 1996 that he had sufficient information to commence an action in court. He said that there were inaccuracies in the pleadings which resulted in them being discontinued; they were subsequently recommenced in the name of the deceased's son Isaiah Patten.

Mr. Samuels agreed that his difficulties were not at an end as he had problems in locating driver of the vehicle and the owner Karen Crane as no one knew their whereabouts. This, he said, resulted in the writ and statement of claim being served on the defendants' years after the incident with appearance being entered on April 28, 1999. The defendants were allowed to file a defence out of time by a consent order filed on August 5, 1999. The defence, however, was not filed until September 1, 1999, and the reply on September 2, 1999. He also complained that although the summons for directions and consent orders

were sent to the attorneys by letter dated July 16, 2002, they were never returned.

The final blow was the delay caused by awaiting the report from the consultant neurosurgeon. Mr. Samuels says that the plaintiff was recommended to see a consultant neurosurgeon, (no date was given in his evidence) and despite several reminders, he was unable to obtain a report until July 15, 2002. As soon as he obtained the report he made arrangements to place the matter on the case management list by letter dated April 10, 2003. On this basis, he argued that there has not been any inordinate or inexcusable delay on the part of the plaintiffs or his attorneys. On the contrary, he says that the defendants are to blame for the delay as they refused to sign and return the summons for directions and the consent order.

In the United Kingdom after the coming into force of the CPR it was held that earlier authorities on matters of civil procedure were generally no longer relevant: see ***Biguzzi vs. Rank Leisure*** **[1999] 4 All ER 934**. Under the old law in ***Allen v McAlpine [1968] 2 QB 229, Birkett v James [1978] AC 297, and Stanley Minnell [1993] 30 JLR 542*** and those line of cases, which were referred to by both counsel for the plaintiff and defendants, an application to strike out for want of prosecution could only fruitfully be made: where the defendant showed that the claimant had been guilty of inordinate and inexcusable delay which resulted in either making a fair trial no longer possible; or an inordinate and inexcusable delay had caused specific prejudice to the defendant. Once either of these was established, the court had discretion to strike out the claim for want of prosecution.

However, with the coming on of the new CPR 2002, this court took the view that the submissions made by counsel for the plaintiff and the defendants referring only to the ***Birkett v. James*** (supra) line of cases was not the proper starting point in approaching the issues in this case. These cases were only relevant in establishing the legal background against which the parties were

operating prior to the CPR 2002. So then, I now turn to consider the application of the CPR 2002, Part I to this case.

The CPR r.1.1 provides as follows:

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes:

(d) ensuring that it is dealt with expeditiously and fairly...

r.1.2 provides that:

The court must seek to give effect to the overriding objective when it:

(a) exercises any discretion given to it by the Rules; or
(b) interprets any rule.

In addition, the court has general powers of management which includes its inherent jurisdiction to control its own procedure. Accordingly, CPR 26.1 (1) (2) (3) and CPR 26.3 provides as follows:

26.1 (1) The list of powers in this rule is in addition to any powers given to the court by any other rule or practice direction or by any enactment

(2)...
(t)where the court considers it just to do so, give the conduct of any matter to any person it thinks fit and make any appropriate consequential order about costs;
(u) direct that notice of any proceedings or application be given to any person; or
(v) take any other step, give any other direction or make any other order for the purpose of managing the case and furthering the overriding objective.

(3)When the court makes an order or gives a direction, it may
(a) make it subject to conditions; and
(b) specify the consequence of failure to comply with the order or condition.

26.3(2) In addition to any other power under these rules the court may strike out a statement of case or part of a statement of case if it appears to the court -
(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;
(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;
(c) that the statement of case or the part struck out discloses no reasonable grounds for bringing or defending the claim;

Although CPR 26(1) expressly preserves the court's inherent power to protect its process from abuse by striking out a claim, the main tool the court uses to reduce delays are its rules and practice directions. Under the new rules the court is no longer constrained to consider only the position of the actual parties in the litigation before it, but must also consider the effect of the conduct of the parties on the administration of justice as a whole. As a consequence, it is important that courts do not appear to close their eyes when parties ignore time limits, as those who do so will have little to fear.

So then, the principal question is this; how should the court approach cases for striking out a claim for want of prosecution under the Civil Procedure Rules 2002?

The answer to this question can be found in the approach of the court in the case of ***Walsh v. Misseltine [*2000] All ER (D) 261** in which Lord Justice Brooke in applying the U.K CPR after and during the transitional period quoted with approval the following passage from the judgment of May LJ in ***Purdy v Cambrian*** **[1999] All ER (D) 1518** at paragraphs 45-46, 48, 50-51:

"The ground rules under which courts are now, however, required to operate are clearly set out by May LJ in his judgment in Purdy (paras 45-46):

'45. Under the Civil Procedure Rules, the court has ample power in an appropriate case to strike out a claim for delay.

The power is to be found, if nowhere else, in rule 3.4(2)(c), which provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction or court order; or in rule 3.1(2)(m), which provides that the court may take any step or make any other order for the purpose of managing the case and furthering the overriding objective; or under the court's inherent jurisdiction, expressly preserved by rule 3.1(1); each of these to be exercised and interpreted in accordance with rule 1.2(a) and (b) to give effect to the overriding objective.

46. The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found in rule 1.1(2). One element expressly included in rule 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to applications to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed...'

'48. [In Biguzzi] Lord Woolf accepted that, for transitional cases, the parties' conduct before the introduction of the Civil Procedure Rules has to be assessed by reference to the rules which were then applicable. Obviously a party will not be considered to have been in breach historically of a former rule when they were not. You do not ignore the fact that the parties were previously acting under a different regime. But the decision has to be made applying the principles under the Civil Procedure Rules, not those under the previous regime:

50. Lord Woolf MR in Biguzzi drew attention to the armoury of power which the court has under the Civil Procedure Rules in addition to that of striking out...In doing so, he was doing no more than emphasising the range of powers available to the court in its search for justice, indicating that the court should

> *consider such powers as may be relevant to a particular case before deciding which to use. He was not indicating that any one of those powers was inherently more appropriate than any other.*
>
> *51 The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case.... Lord Woolf MR in Biguzzi was not saying that the underlying thought processes of previous decisions should be completely thrown overboard. It is clear, in my view, that what Lord Woolf was saying was that reference to authorities under the former rules is generally no longer relevant. Rather is it necessary to concentrate on the intrinsic justice of a particular case in the light of the overriding objective.'..."*

I adopt the statements expressed by May L.J in ***Purdy v. Cambrian*** (supra) and approved by Brooke L.J in ***Walsh v. Misseldine*** (supra). There is no denying it; since April of 2003 the court is obliged to give effect to the new rules and practice directions contained in the CPR 2002, the object of which is to ensure that cases are dealt with justly.

Where the plaintiff postpones the issuing of the writ until the end of the limitation period this by itself cannot be considered as inexcusable delay. However, the delay places the plaintiff under an obligation to proceed with his case with reasonable diligence as a court will deal more stringently with any further delays by him. The bitter truth is that the plaintiff in this case, having commenced proceedings just short of the limitation period, had the responsibility to proceed with the required urgency. He did not.

In my judgment, it is substantially the tardy behaviour of the plaintiff and his attorneys that has caused this case to be at pre-trial stage almost five years since the filing of the action. The overall period of delay since the cause of action arose is ten years. Lest there is any doubt, the court concluded that the

behaviour by the plaintiff and his attorney was just not good enough, whether under the old rules or the new.

The most striking aspect of this sorry tale of delay is the 2nd defendant's unchallenged evidence that the long postponement in bringing the matter to trial has placed him at a substantial disadvantage; his memory is no longer clear to recall the details of the case. Moreover, the defendants contend that in addition to the 2nd defendant's difficulties with recall, they will be further prejudiced if the case were to go on as -- using the consumer price index as a base -- the delay has exposed them to a potentially higher award than would have been possible had the case been heard within a reasonable time.

In giving effect to the overriding objectives in CPR Part 1 of enabling cases to be dealt with justly, and for the reasons which I have given, it seems to me that there is a substantial risk that a fair trial cannot be achieved in this case. As a consequence, the statement of case against the defendants is struck out, and this action dismissed for want of prosecution. There shall be cost to the defendants to be taxed if not agreed. Leave to appeal granted.