IN THE SUPREME COURT JUDICATURE OF JAMAICA

SUIT NO.CL1995/C203

BETWEEN	PAUL COLLINS	CLAIMANT
AND	AIR JAMAICA LTD.	DEFENDANT

Heard on 29th October and 10th November, 2003

David Wong Ken instructed by Wong Ken & Company for Claimant

Dave Garcia instructed by Myers, Fletcher & Gordon for Defendant

Sinclair-Haynes, J (Ag.)

The claimant, Paul Collins was an employee of Air Jamaica. He was made redundant. He claimed that he was induced into accepting redundancy by a promise by the defendant that he and his immediate family would be entitled to the following:

1. Eight trips per annum at a reduced rate on its airline.
2. Travel benefits which he enjoyed whilst he was employed to the defendant.

Air Jamaica changed ownership and by letter dated 9th December 1994, it refused Paul Collins the trips and benefits. He retained the services of Dr. Manderson-Jones, attorney-at-law who instituted proceedings against Air Jamaica on the 8th May, 1995.

Air Jamaica resisted the claim and contended that he was not legally entitled to those benefits.

On January 26, 1998 the matter came up for trial. It was adjourned sine die because of the absence of the claimant who deponed that he only became aware of the adjournment after the death of Dr. Manderson- Jones. He forthwith retained the services of Wong Ken & Company who is seeking to revive the matter. The defendant is strenuously opposed to the matter being revived and has applied to have it struck out on the following grounds:

1 There has been inordinate and inexcusable delay by the claimant in prosecuting his action resulting in prejudice to the defendant and risk that a fair trial may no longer be possible. A fresh action would be met by a defence that the limitation period has passed.

2 The claimant has been guilty of substantial and contumelious delay in the prosecuting of this action, such that the action amounts to an abuse of the process of the court.

History of matter whilst in conduct of Dr. Manderson-Jones

1. The action was brought up for trial on the 26.01.98
2. Dr. Manderson-Jones applied to have his name removed from the record on 27.01.98.

3 Matter was adjourned sine die on the 03.03.98.

4 He obtained an order to remove his name from the record on the 03.03.98.

The claimant, Paul Collins avered that he was unaware of those events. Counsel for the claimant Mr. Wong Ken submitted that the idiosyncratic qualities of Dr. Manderson-Jones made access to him difficult.

The claimant in his affidavit deponed the following about Dr. Manderson-Jones:

1. He had no secretary.
2. He had no answering service.
3. He, at times, refused to answer his door.

Paul Collins further deponed that upon learning of the death of the said attorney he tried to trace and retrieve his file.

He finally located it with the firm of Ballentyne & Beswick. His attempt to obtain the file proved futile as the said attorneys refused to release the file because they claimed that he had outstanding fees for Dr. Manderson-Jones. This claim Paul Collins denies.

In January 2001 he obtained the services of Wong Ken & Company who, after their unsuccessful attempt to retrieve the file from Ballentyne &

Beswick obtained certain documents from the Registry which aided in reconstructing the file.

Having obtained the documents the following steps were taken:

1. On February 7, 2002 Wong Ken & Company filed Notice of Change of Attorney.
2. On June 14, 2002 the firm filed Notice of Intention to Proceed.
3. July 2002 a letter was sent to Registrar requesting that the matter be placed on the Cause list.
4. On December 31, 2002 the firm filed Certificate of Readiness.
5. On January 17, 2003 a letter was sent letter to Registrar requesting a date for Case Management Conference.
6. On October 29, 2003 the matter came up for Case Management Conference.

Mr. Dave Garcia has argued that the matter should be struck out for the following reasons:

1 The claimant is guilty of inexcusable and inordinate delay.

2 The action is an abuse of process.

3 The defendant suffers liability in that it is required to provide financial statements and provide for liability. A pending matter is a potential for an award and therefore a liability which the defendant must make provision for in its financial statements, thus reducing its net worth.

4 The defendant's ability to obtain a fair trial is prejudiced in that the whereabouts of one of its witnesses is unknown.

5 Two other witnesses are no longer with the company.

6 One witness has no recollection of the matter.

On the other hand Mr. Wong Ken has urged the court to find that:

1. There has been no inexcusable delay on the part of the claimant.

2. The CPR does not recognise dismissal for want of prosecution as a ground.

Mr. Dave Garcia submitted that the court has an inherent jurisdiction which still remains to strike out for want of prosecution. He relied also on the pre - CPR case of **Allen v Alfred McAlphine & Sons Ltd.,** (1968) 2 Q B 229.

Mr. Wong Ken submitted that Pre - CPR cases are not relevant since the CPR has modified the criteria by which it could be done. He referred to Part 26.3 (1) and argued that the court still has an inherent jurisdiction that ought only to be exercised if it appears that the process of the court is being abused, or it poses an obstruction to the just disposal of the proceedings. He further argued that the court can no longer consider inordinate, inexcusable, substantial or contumelious delay in prosecuting a matter as a ground for striking out.

This matter is in fact a transitional case having begun under the old rules. **Lord Woolf in Biguzzi vs Rank Leisure 1999 4 All ER.** 930 had this to say of these cases:

> "You do not ignore the fact that the parties were previously operating under a different regime. But the decision has to be made applying the principles of the CPR, not those under the previous regime."

May L. J. in **Purdy vs Cambran (1999) All ER (D) 1518** CA has set out the ground rules under which the court must now operate when he said:

> "When the court is considering, in a case to be decided under the CPR, 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."

The modern position with regard to striking out and the relevance of pre-CPR cases is that stated by **May L.J. in Purdy vs Cambran.** He said:

> " the effect of this is that under the new procedural code of the CPR the court takes into account all relevant circumstances and in deciding what order to make, makes a broad judgment after considering all the possibilities. There is 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 in Beguzzi 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 "under the former rules" is no longer relevant. Rather it is necessary to concentrate on the intrinsic justice of a particular case in light of the overriding objective."

In the instant case the issues are as follows:

1. Whether the delay by the claimant amounts to an abuse of process.
2. Whether the delay will prevent the defendant from getting a fair trial.

Whether the delay by the claimant amounts to an abuse of process

Lord Justice Nurse, in the case of **Habib Bank Ltd v Jeffer and Anor (2002) All ER (D) 424** declared that the principle that has gained acceptance is that which he expounded in **Chorvaria v Sethia** (1998) CLC 625, 630 as follows:

> "Although inordinate and inexcusable delay alone, however great does not amount to an abuse of process, delay which involves complete, total or wholesale disregard, put it how you will of the rules with full awareness of the consequences is capable of amounting to such an abuse, so that, if it fair to do so the action will be struck out or dismissed on that ground."

The **Habib** case is a classic example of a claimant's abuse of the process of the court. The claimant repeatedly ignored the request of its attorney to give full discovery promptly or to make prompt progress with the witness statements. It disregarded the request and advice of its attorney and ultimately the court's order because it thought it knew better than its attorneys. In so doing it acted contumeliously. The delay in the case was entirely the fault of the claimant.

Paul Collins' evidence is that Dr. Manderson Jones had no secretary; no answering service and at times he did not answer his door. This evidence remains unchallenged. It is therefore the inescapable conclusion that access to him was extremely difficult. In light of that fact, the claimant having done all that he was required to do to have the matter brought to a stage where it was ready for hearing might reasonable have felt it was not as necessary to embark on the difficult task of pursuing his elusive attorney with the same vigor.

Mr. Garcia submitted that the fact that the claimant did not receive the notice of application to remove the attorney's name from the record indicates he was negligent. In light of the inaccessibility of the said attorney, I cannot agree.

In light of the claimants actions in tracing the file upon discovering the death of Dr. Manderson-Jones; the difficulties he encountered in trying to retrieve the file; the efforts of Wong Ken and Company to reconstruct the file and the actions taken by Wong Ken & Company so far, I am satisfied that this case does not fall into the **Habib** category.

Whether the delay will prevent the defendant from getting a fair trial

Miss Noreen Small has deponed that three of the witnesses no longer work with Air Jamaica, and the whereabouts of one is unknown. She further deponed that one of those witnesses has no recollection of the matter.

Counsel has failed to enlighten the court as to the materiality of these witnesses, in particular, the one who cannot be located.

In the cases in which the courts have found that delay prevented the possibility of a fair trial, the witnesses were material.

In **Nasser v the United Bank of Kuwait** (2001) EWCA CIV 1454 the defendant's case depended heavily on the evidence of one Lena Sabbagh, a bank clerk who had accompanied the claimant to her deposit box. That

witness would have testified that the box was heavy when it was given to the claimant, whereas it was not so heavy when it was returned by the claimant. In fact, the messenger was able to carry it easily to the vault.

Mr. Garcia cited the pre - CPR case of **Biss and Lambet** (1978) 2 All ER 125.

The thought processes involved in **Biss v Lambeth** are still quite helpful and operate against Mr. Garcia's submissions. The plaintiff took ten years to institute proceedings against the defendant for negligence. The witnesses, who were nurses, returned to South Africa. Their notes were destroyed and memories faded. Having waited ten years to institute proceedings was definitely prejudicial to the defendant. It was not alerted within a reasonable time so it could preserve its records.

This instant case is distinguishable as this action was instituted one year after the alleged breach of contract and the matter was actually brought up for trial. The defendant filed a defence to the claim. It is therefore reasonable to expect that the defendant would have had statements from its principal witnesses.

Mr. Garcia submitted that June Bailey has no recollection of the matter. There is nothing to suggest that at the time the matter began she

had any recollection and that she was ever privy to the contract between the claimant and the defendant.

Mr. Wong Ken submitted that the defendant has not demonstrated that those witnesses are necessary to defend this claim as this is a matter in which contracts and letters which have passed between the parties are instructive. Further, it is expected that Air Jamaica, being a corporate body, would have had the means to retain its records.

Having considered all the relevant circumstances I am not persuaded that striking out this claim would be just and fair.

Accordingly, the application to strike out is refused with costs in the cause.

Leave to appeal granted.