IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L 1993/S228

BETWEEN	DOROTHY SHAND	PLAINTIFF
AND	A. P. TOURS LTD	FIRST DEFENDANT
AND	MERVIN PALMER	SECOND DEFENDANT

Miss A. Christian instructed by Messrs. Derrick Darby and Co.for the Plaintiff
Mr. David Johnson instructed by Piper and Samuda for the Defendant.

IN CHAMBERS

Summons to dismiss action for want of prosecution

Heard March 16, 17; May 6, 1999.

HARRISON J

This application seeks to dismiss the action for want of prosecution. The writ of summons which was filed on the 5th August, 1993 arose out of a motor vehicle accident which occurred on the 27th February, 1990 and it is almost eight (8) years now, since the accident.

The principle of law applicable in these matters has been stated by Lord Denning M.R, in **Allen v Sir Alfred McAlpine and Sons** [1968] 1 All E. R 543 when he said:

> " The principle on which we go is clear; when the delay is prolonged and in-excusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

In the same case, Diplock L.J said:

> ".....where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they can recall of events which happened in the past, memories grow

> dim, witnesses may die or disappear. The chances of the court being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time however, when the interval between the events alleged and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest demands that the action should not be allowed to proceed."

On the question of prejudice, the Court of Appeal in Jamaica has dealt with that issue in the cases of **West Indies Sugar v Stanley Minnell** SCCA 91/92 delivered on the 20th December 1993 and **Vashti Wood v H.G Liquours Ltd and Anor**. SCCA 22/93 delivered on the 7th April, 1995. The Court held in these cases that a long delay would give rise to a substantial risk that there cannot be a fair trial. This is so, in spite of the fact that the defendant has filed no affidavit alleging prejudice. Once there is evidence that the nature of the delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the Court's discretion, prejudice apart. Prejudice in the court's view, included not only actual prejudice but potential prejudice which could include the passage of time.

How then do these principles apply to the circumstances of the instant case? Can it be concluded by the evidence, that there is a real risk that a fair trial is not possible or that the defendants have been prejudiced by the long delay. Let me go through the chronology of events. They are as follows:

1. The accident occurred on the 27th February 1990.

2. The writ of summons was filed on the 5th August 1993.

3. Appearance was entered on the 10th January 1994.

4. By letter dated 23rd August 1994 Derrick Darby & Co, Attorneys at Law for the plaintiff, sent an instrument of consent to the defendants' Attorneys at Law to have the statement of claim filed out of time.

5. The consent was given and by letter dated 29th August 1994, same was returned to the Plaintiff's Attorneys at Law. This consent had validated the statement of claim previously filed on the 25th August, 1994.

6. The Defence was filed and served on the 19th September 1994.

7. On the 19th September 1994, the defendants had requested the plaintiff to give security for costs.

8. As a result of the plaintiff's failure to provide security for costs a summons was filed on an order was sought. The summons was returnable on the 6th April, 1995.

9. On the 6th April, 1995, the order for security for costs was made The Honourable Mr. Justice Reid. The costs were to be paid within 14 days of the order, failing which the proceedings stayed.

10. On the 8th June 1995 the plaintiff applied to set aside the order for security for costs but the summons was adjourned sine die on the 30th April 1996 on application of the plaintiff's Attorneys at Law.

11. An official receipt dated May 15th 1996, issued by the Accountant General for Jamaica, shows where the sum ordered for security for costs was paid.

12. On 12th January 1998 a Notice of Intention to Proceed was filed by the plaintiff's Attorneys.

13. On the 13th February 1998, the Summons for Directions was re-issued.

There is some controversy as to the payment of the sum for security for costs. When the Summons for Directions came before the Master, the minute of order indicated that proof was required of the payment before the Summons could be heard. The summons was therefore adjourned sine die. To date it would appear that no directions have been given.

Mr. Johnson has submitted that the plaintiff's inability to proceed with the Summons for Directions has caused further delay. Furthermore, the plaintiff must obtain an order to remove the stay as the payment of the security does not automatically resume prosecution of the action. His affidavit has revealed that the first defendant has had no information nor knowledge of the whereabouts of the second defendant who was the driver of the first defendant's motor vehicle which was involved in the accident. He further deposed that up to the end of 1995 and at the beginning of 1996 the second defendant had maintained contact with the first defendant but since that date he has failed to communicate with the first defendant. He submitted therefore, that there has been inordinate and inexcusable delay which seriously, will prejudice a fair trial. He urged the Court to take into consideration both pre-writ and post-writ delay.

Ms Christian, submitted on the other hand, that once the condition has been fulfilled for the payment of costs, the plaintiff can proceed and the plaintiff ought not to be punished for trying to get the Summons for Directions set down for hearing. She further submitted that there is delay but it is not inordinate nor inexcusable.

I do agree with Mr. Johnson that once a stay has been ordered, proceedings become static until the court orders otherwise. It is therefore incumbent upon the plaintiff in the instant case to have the stay removed in order to further prosecute the action. The case of **Lambert v Mainland Market Deliveries Ltd** [1977] 1 WLR 825 is quite instructive on the point. In that case Lawton L.J said at

page 834:

> " When an action is 'stayed' it does not come to an end. No judgment is given. Such an order takes away from the action its inherent ability to go forward. It becomes static, in the sense that it cannot move any further. But any action which is stayed can be started up again by an order of the court....."

This is a case in which the evidence regarding liability will depend primarily on the second defendant, the driver of the motor vehicle, but his whereabouts are now unknown. But even if he is located at some time in the future, it cannot be disputed that memories as to the incident may have faded over the years as it is almost eight years now, since the accident. Another factor which the Court must take into consideration is the time when this action would come on for trial if the plaintiff gets going in the near future. Mr. Johnson has deposed that there is a possibility that it could be listed for the year 2000, but from the looks of things, if the order on the Summons for Directions is not yet made, then one could probably look beyond 2000. One cannot rule out the further delay which is likely to arise.

I have given serious consideration to the fact, that the plaintiff has made payment of security for costs but at the same time, in the interest of justice, these actions should be brought to trial with reasonable expedition. Two years have passed since the payment and his Attorneys at Law are still uncertain how to proceed. In my view, I would conclude that the delay is indeed inordinate and really inexcusable and there is a substantial risk that a fair trial is not possible. The sage words of Lord Denning M.R are quite apt and should be heeded when he said :

> " .....it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the business of the courts should be conducted with expedition." (**Fitzpatrick v Batger & Co. Ltd** (1967) 2 All E.R 139)

The action is therefore dismissed with costs to the defendants to be taxed if not agreed. It is my considered view that this is a proper case for the Attorneys at Law on the record for the plaintiff to pay these costs. Accordingly, I further order that the Attorneys at Law on the record for the plaintiff do pay the costs which have been ordered.