JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 55/99

BEFORE: THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE HARRISON, J.A.
THE HON. MR. JUSTICE SMITH, J.A. (Ag.)

BETWEEEN:	ADMINISTRATOR-GENERAL OF JAMAICA (ADMINISTRATOR ESTATE ALVIN AUGUSTUS CARGILL- DECEASED)	PLAINTIFF/ APPELLANT
A N D	VIVIAN PLOWRIGHT	1ST DEFENDANT/ RESPONDENT
	FERDINAND MURPHY	2ND DEFENDANT/ RESPONDENT

Judith Clarke for the Appellant
Christopher Samuda and David Johnson
instructed by Piper and Samuda
for 1st Defendant/Respondent

February 5, 6, 7, 8 and July 19, 2001

DOWNER, J.A:

(i)
Introduction

This is an interlocutory appeal from the order of Gloria Smith J. in which she refused an application to extend time in which to file a Statement of Claim and she also made a consequential order dismissing the action pursuant to the inherent jurisdiction of the Court.

To ascertain the scope and limits of the learned judge's discretion it is necessary to advert to sec. 192 (a) and(b); sec. 676, and sec. 244 of the Judicature (Civil Procedure Code) Law hereinafter referred as ("the Code"). The relevant sections of the Code read as follows:

> "192. The filing of statements of claim shall be regulated as follows:
>
> (a) Where the writ is specially indorsed with or accompanied by a statement of claim under section 14 of this Law, no further statement of claim shall be filed unless the Court or a Judge otherwise orders
>
> (b) Subject to the provisions of section 78 of this Law, as to filing a statement of claim when there is no appearance, the plaintiff shall (unless he has filed a statement of claim under section 14 of this Law, or the Court or a Judge otherwise orders) file a statement of claim either with the writ of summons or notice in lieu of writ of summons, or within ten days after appearance, or within such extended time as may be fixed by the parties by consent in writing or by the Court or Judge."

Then sec. 676 reads:

> "The Court shall have power to enlarge or abridge the time appointed by this Law, or fixed by any order enlarging time, for doing any act or taking any proceeding, upon such terms (if any) as the justice of the case may require; and any such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed."

Further, sec. 244 is relevant because both in the ruling and the order which flowed from it in the Court below, there was a dismissal of the action for want of prosecution. It reads:

" *TITLE 26. Default of Pleading.*

Non-delivery of statement of claim.*

244.If the plaintiff, being bound to file a statement of claim and deliver a copy thereof, does not file the same and deliver such copy within the time allowed for that purpose the defendant may, at the expiration of that time, apply to the Court or a Judge to dismiss the action, with costs, for want of prosecution; and on the hearing of such application the Court or Judge may, if no statement of claim shall have been filed and a copy thereof delivered, order the action to be dismissed accordingly, or may make such other order on such terms as the Court or Judge shall think just."

In the context of this case, quite apart from the inherent jurisdiction of this Court to dismiss for want of prosecution, enlargement of time is also in issue. In consequence of the way that this case was argued on appeal, it is necessary to set out in full the learned judge's reasons and her order to ascertain what issues were before Her Ladyship.

The relevant summons reads:

" **LET ALL PARTIES CONCERNED** attend before the Master or a judge in Chambers at the Supreme Court, King Street, Kingston on Monday the 11th day of January, 1999 on the hearing of an application on the part of the Plaintiff for an order that the Plaintiff be granted leave to serve Statement of Claim and Amended Statement of Claim within such time as this Court seems just.

AND TAKE NOTICE that the Plaintiff intends to rely on the Affidavit of Judith M. Clarke filed herein."

Turning to the ruling of the learned judge, it reads:

"Having had an opportunity to look at the authorities particularly **West Indies Sugar Co, vs Stanley Minnel**, I find them most instructive.

There has been inordinate delay on the part of the Plaintiff.

> Writ filed on 4/6/96 and also the Statement of Claim. The statutory period of limitation has expired, the accident having occurred on 18/7/90. There was an order setting aside the Writ against the First Defendant as far back as 24th November, 1996 even though Miss Judith Clarke stated that the Summons was served as far back as 11th August, 1996.
>
> The Court record indicates that the Summons for Leave to serve Statement of Claim and Amended Statement of Claim out of time came before Court on 23rd July, 1998. Matter adjourned sine die.
> Mr. Samuda present. Miss Judith Clarke not present.
>
> Came before Court also 11th January, 1999. Again matter adjourned sine die. Mr. Samuda in attendance. No one came on behalf of the Plaintiff.
>
> Mr. Samuda also attended on the 23rd March, 1999 for the hearing. No one for the Plaintiff.
>
> I also find that the Affidavit does not disclose an excuse sufficient in law to grant the application as prayed.
>
> There would be prejudice to the Defendant if application is granted based on the submissions of Mr. Samuda.
>
> I therefore, refuse the application and accordingly dismiss the action in respect of the First Defendant.
>
> Costs for the First Defendant against the Plaintiff to be taxed if not agreed.
>
> Certificate for Counsel granted
>
> Leave to Appeal granted."

It will be demonstrated that evidence adduced in this Court gives the true explanation for Ms. Clarke's absences. The excuses proffered by her for a nine month delay will be considered to determine whether it was both inordinate and unreasonable. A factor to be taken into account was stated thus:

> "4. That I was put in a position by the Plaintiff to commence proceedings herein in June, 1996 and the Plaintiff avers that the delay on its part was due to the inability on its part to obtain statements from the police."

It is clear from the order that the matter was heard on 28th April 1999 and it reads:

> "1. The Summons for Leave To Serve Statement of Claim and amended Statement of Claim Out of Time be dismissed.
>
> 2. The action against the First Defendant herein be dismissed for want of Prosecution.
>
> 3. Costs to the First Defendants be agreed or taxed.
>
> 4. Certificate for Counsel Granted to the First Defendant.
>
> **BY THE COURT**"

A significant feature to note is that there was no summons by the first respondent Vivian Plowright or any affidavit to dismiss the action for want of prosecution. Here is how this fact was stressed on the appellant's behalf:

> "7. That having regard to the fact that there was before the court no substantive application to dismiss the action herein for want of prosecution, I omitted to produce to the court documentary data which may indicate that in the peculiar circumstances of this case, the First Defendant could not reasonably maintain that the granting of the extension would prove prejudicial to him."

(ii)

Did the learned judge exercise her discretion correctly in refusing to enlarge time for serving the Statement of Claim and amended Statement of Claim as prayed?

To appreciate the scope of the discretion of the learned judge, some

attention must be given to the history of these proceedings. The accident in issue occurred on 18th July, 1990. Here are the relevant averments in the Statement of Claim:

> "6. On or about the 18th July, 1990 the Second Defendant so carelessly, recklessly and negligently drove, managed and/or controlled the First Defendant's said motor vehicle along Roselle main Road in the Parish of Saint Thomas that same collided with a utility pole whereupon the deceased sustained severe injuries from which he died on the same day, 18th July, 1990.
>
> 7. Further or in the alternative on or about the 18th day of July, 1990 the First Defendant permitted the Second Defendant to drive his said vehicle notwithstanding that it was defective as a consequence of which the deceased sustained serious injuries from which he died on the 18th day of July, 1990."

Turning to paragraphs one to five of the Statement of Claim and the amendment they read:

> "1. The Plaintiff is the Administrator-General for Jamaica and Administrator of the Estate of Alvin Augustus Cargill and brings this action for the benefit of the said estate under the Law Reform (Miscellaneous Provisions) Act and under Fatal Accident Acts for the Dependents of the deceased.
>
> 2. Letters of Administration were granted on the 7th day of March, 1996.
>
> 3. The First Defendant was at all material times the owner of the motor vehicle licenced Number PP9048
>
> 4. The Second Defendant was at all material times the driver of the First Defendant's said motor vehicle and the servant and/or agent of the First Defendant.

5. The deceased, ALVIN AUGUSTUS CARGILL was at all material times a passenger in the First Defendant's motor vehicle."

The damages claimed under the Fatal Accidents Act and the Law Reform (Miscellaneous Provisions) Act are as follows:

"PARTICULARS PURSUANT TO THE FATAL ACCIDENT ACT

The claim herein under the Fatal Accidents Act is brought on behalf of the following persons:-

1. PATRICIA CARGILL born on May 19, 1978 – daughter of deceased

2. ICILDA LENNON an adult (age 59 years) – mother of deceased.

8.At the time of his death the said ALVIN AUGUSTUS CARGILL was twenty-seven years old having been born on the 27th day of April, 1967. He was a farmer, earned a minimum net income of Thirty Thousand Dollars ($30,000.00) monthly, enjoyed good health and was a happy person with a normal expectation of life and by his death his expectation of a healthy and happy life was considerably shortened and his estate has suffered damage.

9.By reason of the foregoing the estate of the said deceased has incurred expenses."

This statement of claim was filed 4th June, 1996, and a conditional appearance entered on 5th September, 1996. The pertinent clause of the Unless Order reads:

> **"THIS APPEARANCE** is to stand as unconditional unless the said First Defendant apply within 21 days to set aside service of the Writ of Summons and Statement of Claim and/or the proceedings."

The Notice of Motion before Theobalds J. read in part:

> "1. Service of the Writ of Summons and Statement of Claim and dated the 4th day June, 1996 and

> filed herein be set aside for irregularity in that the same was effected in the long vacation."

Theobalds J. gave no reasons for his decision but his Order so far as is material reads:

> "1. Service of the Statement of Claim dated the 4th June, 1996 and filed herein be set aside for irregularity in that the same was effected in the long vacation."

We have repeatedly in this Court reminded judges in the Court below that an essential part of the judicial function is the delivery of reasons for their decision. A citation from **Eagil Trust Co Ltd v Piggott-Brown and another** [1985] 3 All ER 119 emphasises the point. At page 122, Griffiths LJ, as he then was said:

> "The next general observation I ought to make is as to the judge's duty to give his reasons for his decision. A professional judge should, as a rule, give reasons for his decision. I say 'as a general rule' because in the field of discretion there are well-established exceptions. The most obvious and frequently used is the exercise of the judge's discretion on costs. As a general rule the judge gives no reasons for the way in which he is exercising his discretion on costs, although if he were to make an unusual award of costs, it is clearly desirable that he should give his reasons for doing so. Another recent example of the judge not being required to give his reasons is when he refuses leave to appeal to the Court of Appeal, having refused leave to appeal from an arbitrator (see Lord Diplock in **Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios, The Antaios** [1984] 3 All ER 229 at 237, [1985] AC 191 at 205).
>
> Apart from such exceptions, in the case of discretionary exercise, as in other decisions of facts or law, the judge should set out his reasons, but the particularity with which he is required to set them out must depend on the circumstances of the case before him and the nature of the decision he is giving. When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of

> Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he has acted, and if it be that the judge has not dealt with some particular argument but it can be seen that there are grounds on which he would have been entitled to reject it, this court should assume that he acted on those grounds unless the appellant can point to convincing reasons leading to a contrary conclusion (see Sachs LJ in **Knight v Clifton** [1971] 2 All ER 378 at 392-399, [1971] Ch. 700 at 721)."

Earlier, Griffiths LJ. had this to say concerning the appropriate approach of this Court at page 121. Here it is:

> "Before I turn to the particular grounds on which the exercise of the judge's discretion is attacked in this case on behalf of the first appellant, I should like to make one or two general observations about the court's approach to appeals of this nature from the exercise of a judge's discretion.
>
> The House of Lords has in a series of recent decisions reminded this court that its function is to review the exercise of the judge's discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the judge. It appears to me that there is an ever-increasing tendency on the part of the profession to use the decision of a High Court judge in a matter of discretion as a mere conduit-pipe to this court. If I am right in this belief, the sooner it is appreciated that that is a practice that cannot be tolerated the better. In the context of an action to strike out for want of prosecution, the Court of Appeal had pointed out to it by the House of Lords in the speech of Lord Diplock in **Birkett v James** [1977] 2 All ER 801, [1978] AC 297 the very limited nature of its function of review in an appeal against the exercise of a judge's discretion.
>
> Obviously, where the court is developing a new discretionary jurisdiction in, for example, actions to

> strike out for want of prosecution, or the development of what has come to be known as the Mareva injunction, there will inevitably in the early days be a number of appeals to this court so that clear guidance can be given as to the principles on which a judge at first instance should exercise his discretion. But, once those principles have been clearly settled, there is a heavy burden on an appellant to demonstrate to this court that the judge has either failed to apply well-settled principles or, alternatively, that his discretion can be attacked on what are colloquially known as 'Wednesbury' grounds (see **Associated Provincial Picture Houses Ltd v Wednesbury Corp** [1947] 2 All ER 680, [1948] 1 KB 223)."

The learned judge had before her the basis on which the Statement of Claim was set aside. It is true that Theobalds J. gave no reasons for his decision, but his order made it clear that the Statement of Claim was set aside for irregularity in that it was delivered in the long vacation. Gloria Smith J., had this to say of the order of Theobalds, J.

> "There was an order setting aside the Writ against the First Defendant as far back as 24th November, 1996, even though Miss Judith Clarke stated that the Summons was served as far back as 11th August 1996."

In **Benjamin Leonard MacFoy v United Africa Co. Ltd.** [1961] 3 W.L.R. 1405 Lord Denning had this to say at page 1409:

> "So the whole question is whether the statement of claim was validly delivered and filed on September 5, 1958. There is no doubt that it was a breach of the Rules for it to be delivered in the long vacation: for it is quite well settled in England, either by the terms of Ord. 64 r. 4, or by the practice of the court (see the note in the Annual Practice to Ord XX, r. 1) that in such a case as this pleadings are not to be delivered or filed during any part of the long vacation except by direction of the court or a judge. The plaintiffs did not comply with this rule. They delivered the statement of claim in the long vacation and filed it without any direction of the court or a judge."

In this jurisdiction section 4(2) (c) of the 1961 Judicature (Rules of Court) Act reads:

> "...
>
> (2) Rules of Court may make provisions for all or any of the following matters
>
> ...
>
> (c) for regulating the vacations to be observed by the Supreme Court and the Court of Appeal and in the offices of the Supreme Court."

The effect of the rules and practice of the Supreme Court on the matter of filing and delivery of pleadings during summer vacation is the same as obtains in England. Before 1961, the rules were promulgated by the Governor in Privy Council and embodied in the Supreme Court's General Rules and Orders Part VII made pursuant to the 1879 Judicature Law. See **Jamaica Gazette** dated 29th October 1925 which read as follows:

> "38. No pleadings shall be amended or delivered during the Vacation appointed by the said Order in Privy Council unless directed by the Court or a Judge.
>
> 39. During the Vacation appointed by the said Order in Privy Council, the time of such vacation shall not be reckoned in the computation of the times appointed or allowed by the Civil Procedure Code 1888, for filing, amending and delivering any pleadings unless otherwise directed by the Court or a Judge."

Then Lord Denning continues in **MacFoy** thus on the same page:

> "But if an act is only voidable, then it is not automatically void. It is only an *irregularity* which may be waived. It is not to be avoided unless something is done to avoid it. There must be an order of the court setting it aside: and the court has a discretion whether to set it aside or not. It will do so if justice

> demands it but not otherwise. Meanwhile it remains good and a support for all that has been done under it. So will this statement of claim be a support for the judgment, if it was only voidable and not void."

It is true that in the instant case the Statement of Claim was set aside, but this Court is empowered to decide whether Theobalds J. exercised his discretion correctly pursuant to Rule 18 (6) of the 1962 Court of Appeal Rules. The empowering section reads:

> "(6) The powers of the Court in respect of an appeal shall not be restricted by reason of an interlocutory order from which there has been no appeal."

There was no appeal from the order of Theobalds J. so Rule 18(6) is applicable.

To restate what was said by Lord Denning in **MacFoy** at page 1410:

> "... and the court has a discretion whether to set it aside or not. It will do so if justice demands it but not otherwise."

Theobalds J. should have exercised his discretion to rule that the Statement of Claim ought to take "effect at the end of the long vacation and the time for defence then began to run". Such a ruling would have met the justice of the circumstances of this case. There is no indication that Theobalds J. took the principle of **MacFoy** into consideration. It is clear from her reasons that Gloria Smith J. did not advert to it. So it is appropriate to set aside her order and reinstate the original Statement of Claim. The reason for this decision will now be considered in relation to the grounds of appeal.

The relevant grounds of appeal

Grounds 1, 2 and 5 read:

> "1. The learned Judge erred in finding that there was inordinate and inexcusable delay in the Plaintiff's application to extend the time within

which to serve the Statement of Claim and Amended Statement of Claim.

2. The learned Judge erred in finding that the delay in serving the said Statement of Claim and Amended Statement of Claim was prejudicial to the First Defendant.

...

5. The learned Judge erred in refusing to grant the extension herein and in Dismissing the action for want of Prosecution."(Emphasis supplied)

A preliminary point that must be noted was that this Court, (Downer, Panton, JJ, Cooke J.A (Ag.)) granted a motion on 27th October, 2000 permitting the appellant to adduce further evidence. The terms of that Order read:

"1. That the Plaintiff be granted leave to adduce further evidence by way of Affidavit, in response to the findings of the learned judge and which evidence the Plaintiff was not given an opportunity to adduce at the hearing of the Summons for Leave to Serve Statement of Claim and Amended Statement of Claim out of time."

This order was granted because of the explanations given by Ms. Judith Clarke, for the appellant, concerning the adjournments and her absences which coincided with the explanations related by Mr. Samuda for the 1st respondent, Vivian Plowright. It was not fresh evidence in the classic sense which arose in **Beckford v Cumper**(1987), 24 J.L.R. 470. That was a case where the application was made after trial and the appeal on the merits of the case was heard and determined. The instant case as previously stated, is an interlocutory appeal from the order of Gloria Smith J. where a previous interlocutory order of Theobalds J. was also in issue. The relevant powers of this Court are to be found in Rule 18(2) and (3) of the 1962 Court of Appeal Rules:

> "18(2) The Court shall have full discretionary power to receive further evidence upon questions of fact, either by oral examination in Court, by affidavit, or by deposition taken before an examiner or commissioner:
> Provided that in the case of an appeal from a judgment after trial or hearing of any cause or matter upon the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted *except on special grounds.*
>
> (3) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require."

Beckford v Cumper was governed by the proviso to Rule 18(2) while the application in the motion of October 27, 2000 (supra) was governed by rule 18(2). Therefore the ground of appeal 4 which reads:

> "4. The learned Judge erred in relying on the notes from the minutes of Order without more, to arrive at her findings herein."

was in effect argued when on the motion of 27th October this Court granted leave to adduce further evidence.

It has already been decided that the learned judge below was entitled to examine the order of Theobalds J. And since this Court has had the benefit of the reasons for the adjournments granted below, which were not before Her Ladyship, then there are facts which must be considered by this Court in the exercise of its discretion. In particular the learned judge's finding that:

> "I also find that the Affidavit does not disclose an excuse sufficient in law to grant the application as prayed,"

must be reconsidered in the light of the evidence before this Court.

The mislaid file

Counsel for the appellant was candid with this court and stated her position as follows:

> "2.That the Writ of Summons and Statement of Claim herein were served on the Defendant personally on August 17, 1996.
>
> 1. That subsequently the First Defendant set aside service of the Statement of Claim on the ground that same was served on him during the legal vacation.
>
> 4 That thereafter on the 22nd day of May, 1997, the Statement of Claim herein was served on the First Defendant's Attorney-at-Law who acknowledged receipt of the document but has intimated that they will not accept service thereof and I exhibit herewith a copy of the letter from the First Defendant's Attorneys-at-Law dated May 28, 1997 marked "JMC.1" for identification.
>
> 5. That some time, shortly thereafter, my entire file herein went missing and I was unable to locate same.
>
> 6. That I have now located the file which was removed from my office in error.
>
> 7. That the First Defendant will not be prejudiced by the extension of the time sought herein."

There is no doubt that there has been delay of some nine months because the file was mislaid. Counsel, in her admission, stated that she did not think of making up a substitute file from the records of the Court or from the other side. That cannot be the end of the matter, since the modern approach is reflected in the judgment of **Gatti v Shoosmith** [1939] 3 All ER 916 followed by this Court in **Keith Williams v Attorney-General** (1987) 24 JLR 334 where at page 335 it was stated:

> " The question for determination is whether this Court ought to exercise its discretion to grant leave to appeal out of time in the face of the determined opposition from the respondent. The answer depends on whether the discretion embodied in Rule 9 of the Court of Appeal Rules 1962 Proclamations Rules and Regulations dated October 11, 1962, ought to be exercised in favour of the applicant in the circumstances of this case. The rule reads as follows:
>
> > '(9) subject to the provisions of subsection(3) of section 15 of the Law and to rule 23 of these Rules, the Court may enlarge the time prescribed by these Rules for the doing of anything to which these Rules apply, or may direct a departure from these Rules in any other way where this is required in the interest of justice'."

Then at page 337 the judgment stated:

> "It was not surprising therefore that Mr. Daly found an authority albeit in reply, to illustrate the application of the principles quoted previously to the facts of his case. **Gatti v. Shoosmith** (1939) 3 All E.R. 916 was a case where there was a misreading of a rule which led to the appeal being filed out of time. On an application for enlargement Sir Wilfred Greene M.R., at 919 said:
>
> > 'What I venture to think is the proper rule which this court must follow is that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time, and whether the matter shall be so treated must depend upon the facts of each individual case'."

The same principle is to be applied in the instant case where the file was missing as the overriding concern is the interests of justice.

Letters of Administration were granted 7th March 1996 and the Writ filed 4th June 1996. The Statement of Claim was also filed, but served during the legal vacation. At the instance of the first respondent it was set aside wrongly

to my mind. So it is in the interests of justice to enlarge time, having regard to the error of Theobalds J. When the identical Statement of Claim was served after a delay of some eight months Gloria Smith J. refused to enlarge time partly because she did not examine how Theobalds J exercised his discretion in setting aside the original Statement of Claim: and further the true circumstances for the adjournments were not before her. She was not to be blamed for this. Further, there was a default judgment, which is in effect an admission of liability by the second defendant. On that basis there will be proceeding to assessment. That course is perhaps best postponed until liability is determined with respect to the first respondent. It was common ground that the default judgment was filed although it seems that document was not considered necessary to be included in the Record of Appeal.

The defence of the first respondent is foreshadowed in a "without prejudice" letter by the insurers of 21st August 1996 which reads thus:

> "We have received a copy of the Writ of Summons served on our Insured, Vivian Plowright. Mr Plowright did not give permission to his driver to operate the vehicle at the time of the accident, and so is not legally liable for any losses resulting therefrom."

In these circumstances, no prejudice ought to be inferred having regard to the defence foreshadowed. Here are the particulars of negligence against the first defendant:

> "(a) Failing to keep and maintain the said vehicle in good and proper repair.
>
> (b) Permitting the Second Defendant to drive a defective vehicle."

It is useful to add the particulars averred against the second defendant against whom there is a default judgment on the issue of liability:

"PARTICULARS OF NEGLIGENCE OF SECOND DEFENDANT

i) Driving at a speed which was excessive in all the circumstances

ii) Driving without due care and attention

iii) Failing to keep any or any proper lookout

iv) Failing to stop, swerve, slow down or in any manner so as to manage or control the said motor vehicle so as to avoid the said accident.

v) Driving a defective motor vehicle."

In the light of the foregoing analysis I would rule that the Statement of Claim filed on the 4th June 1996 be reinstated and be served within 10 days hereof pursuant to sec. 192 (b) of the Code (supra).

(iii)

Did the learned judge exercise her discretion correctly in dismissing the action for Want of Prosecution?

Ms. Clarke, for the appellant submitted with great force that there was no summons before the learned judge contending that the action ought to be dismissed for Want of Prosecution. However, it seems that it was argued below, and there is an order pertaining to the issue. Further it was certainly argued in this Court. To reiterate, ground 5 of the notice of appeal reads:

"5. The learned Judge erred in refusing to grant the extension herein and in Dismissing the action for Want of Prosecution."

Additionally, Ms. Clarke in her skeleton arguments stated:

> "Essentially, the arguments in support of grounds 1,2 and 5 are founded on the same legal authorities and may therefore be dealt with together."

There is a notable statement of the nature of the Court's power to dismiss for want of prosecution by Lord Diplock in **Bremer Vulkan v. South India Shipping** [1981] 2 W.L.R. 141 at 147:

> "The High Court's power to dismiss a pending action for want of prosecution is but an instance of a general power to control its own procedure so as to prevent its being used to achieve injustice. Such a power is inherent in its constitutional function as a court of justice. Every civilized system of government requires that the state should make available to all its citizens a means for the just and peaceful settlement of disputes between them as to their respective legal rights. The means provided are courts of justice to which every citizen has a constitutional right of access in the role of plaintiff to obtain the remedy to which he claims to be entitled in consequence of an alleged breach of his legal or equitable rights by some other citizen, the defendant. Whether or not to avail himself of this right of access to the court lies exclusively within the plaintiff's choice; if he chooses to do so, the defendant has no option in the matter; his subjection to the jurisdiction of the court is compulsory. So, it would stultify the constitutional role of the High Court as a court of justice if it were not armed with power to prevent its process being misused in such a way as to diminish its capability of arriving at a just decision of the dispute.
>
> The power to dismiss a pending action for want of prosecution in cases where to allow the action to continue would involve a substantial risk that justice could not be done is thus properly described as an "inherent power" the exercise of which is within the "inherent jurisdiction" of the High Court. It would I think be conducive to legal clarity if the use of these two expressions were confined to the doing by the court of acts which it needs must have power to do in order to maintain its character as a court of justice."

Then Lord Diplock continued thus at page 153-154:

"My Lords, up to the 1960s, the High Court had applied the maxim vigilantibus non dormientibus, jura subveniunt to applications by defendants to dismiss an action for want of prosecution. The practice was that an action would not be dismissed for this reason upon the application of a defendant, unless he had previously obtained from the court a peremptory order requiring the plaintiff to take within a specified time the next step in the procedure that was incumbent upon him under the rules of court and the plaintiff had not complied with the order; or had given reasonable notice to the plaintiff of his intention to apply for the dismissal of the action if the plaintiff did not take that step within a limited time. In the 1960's, however, largely as a result of legal aid, this practice had proved inadequate to prevent such inordinate delay by solicitors acting for plaintiffs in bringing actions on for trial, that, because memories would have faded and witnesses would have become unavailable, there was substantial risk that at the hearing the court would be unable to do justice. The mischief which the Court of Appeal sought to cure by the abandonment of the maxim about vigilantes in the case of applications for dismissal for want of prosecution is described in the judgments in **Allen v. Sir Alfred McAlpine & Sons Ltd.** [1968] 2 QB 229 [1968] 2 WLR 366 [1968] 1 All ER 543 The change in practice was instituted primarily to protect the interests of plaintiffs who had the misfortune to be represented by negligent solicitors, rather than in the interests of defendants, who already had adequate powers under the rules and practice of the court to compel the plaintiff to proceed (through his solicitors) with reasonable dispatch. But, for the reasons given in **Allen v. Sir Alfred McAlpine & Sons Ltd.**, it was seldom in the defendant's interest to have resort to those powers, since long delay was more likely to operate to the detriment of the plaintiff upon whom the onus of proof would lie at a belated trial, and any interlocutory proceeding initiated by the defendant would add to his costs, which would be irrecoverable against an unsuccessful legally-aided plaintiff. It was generally in the defendant's interest to let sleeping dogs lie. So the Court of Appeal, of which I was then a member, had to devise some other sanction against negligent dilatoriness on the part of solicitors for plaintiffs. This it did by dismissing the action for want of prosecution, notwithstanding that the

> defendant had let sleeping dogs lie, if the delay had become so inordinate and inexcusable that there was a substantial risk that justice between the parties could not be done at the trial and, as was later decided by this House in **Birkett v. James** [1978] A.C. 297, the delay had also extended beyond the end of the limitation period for the cause of action."

So this Court is empowered to take action if necessary because the issue was debated below and there was a finding on it.

Another word concerning how this Court should approach an appeal against the decision of the Court below is appropriate. In **Birkett v James** [1977] 2 All ER 801 at p. 804, Lord Diplock said:

> "Where leave is granted an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) as in **Ward v James [1965] 1 All ER 563, [1966] 1 QB 273,** in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."

In this context it is convenient to cite the following passages from the judgment of Sir Thomas Bingham MR in **Costellow v Somerset County Council** (1993) 1 All ER 952. There were appropriate citations from this case in **West Indies Sugar v Stanley Minnell** (1993) 30 JLR 542 at 545 by Forte J.A. and at 547-548 by Downer J.A. On this occasion I will cite another passage of equal importance. It runs thus at page 559:

> "As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the courts a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1 (4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
>
> The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings."

Then the learned Master of the Rolls continued thus:

> "Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule."

There is need to cite two further passages, this time from **Birkett v James** (supra) at 804, Lord Diplock said:

> "To remedy this High Court judges began to have recourse to the inherent jurisdiction of the court to dismiss an action for want of prosecution even where no previous peremptory order had been made, if the delay on the part of the plaintiff or his legal advisers was so prolonged that to bring the action on for hearing would involve a substantial risk that a fair trial of the issues would not be possible. This exercise of the inherent jurisdiction of the court first came before the Court of Appeal in **Reggentin v Beecholme Bakeries Ltd [1968] 1 All ER 566, [1968] 2 QB 276** (reported in a note to **Allen v Sir Alfred McAlpine & Sons Ltd [1968] 1 All ER 543, [1968] 2 QB 229 and Fitzpatrick v Batger & Co [1967] 2 All ER 657.**
>
> The dismissal of those actions was upheld and shortly after, in the three leading cases which were heard together and which, for brevity, I shall refer to as **Allen v McAlpine [1968] 1 All ER 543, [1968] 2 QB 229,** the Court of Appeal laid down the principles on which the jurisdiction has been exercised ever since. Those principles are set out, in my view accurately, in the note to RSC Ord 25, r 1, of the current White Book **Supreme Court Practice 1976 vol 1 pp 124-127.** 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. In the instant appeal your Lordships are concerned with the application of principle (2) only. Contumelious default is not relied on by the defendant."

The other passage at page 809 is again taken from the speech of Lord Diplock and reads:

> "As so often happens, this problem arises at the intersection of two principles, each in itself salutary. The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the courts a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1 (4) and (5), Ord 28, r 10(1) and Ord 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
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The other passage at page 809 is again taken from the speech of Lord Diplock and reads:

> "Contrary to the later preference expressed by the Court of Appeal I would hold the principle to be that which had been laid down in **William Parker Ltd. v F J Ham & Son Ltd. [1972] 3 All ER 1051, [1972] 1 WLR 1583.** To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from the subsequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step. Dicta to the contrary in **Thorpe v Alexander Fork Lift Trucks Ltd [1975] 3 All ER 579, [1975] 1 WLR 1459** are, in my view, wrong."

Another relevant authority cited which affirms the principle in **Birkett v James,** is **Department of Transport v Chris Smaller (Transport) Ltd** [1989] 1 All ER 897.

Turning to the circumstances of this case, the first respondent has not demonstrated that he has suffered the necessary prejudice to have the action struck out by resorting to the inherent jurisdiction of the court. That onus was on him as is illustrated in the following passage from the case of **Shtun v Zalejska** [1996] 1 WLR 1270 at 1283 per Peter Gibson, L.J:

> "The only post-**Birkett v. James** [1978] A.C. 297 authority referred to in any of the judgments was the **Smaller** case 1989 A.C. 1197 and Lord Griffiths's remarks to which I have referred were cited. Waite L.J. identified four applicable principles:
>
> > '(1) The onus of proving additional prejudice in the post-writ period lies on the defendant. (2) The discharge of that onus will normally require evidence specifying the particular disadvantage suffered or anticipated by the defendant on which he relies as constituting additional post-writ prejudice, but in plain cases where such prejudice

> is self-evident the court may act on it without affirmative evidence'."

Wood v H.G. Liquors Ltd. and Another (1995) 48 W.I.R. 240 (Carey J.A. dissenting Gordon and Wolfe JJA) was a case where the majority held that it was a plain case and the prejudice was self-evident.

Peter Gibson L.J. in **Shtun** continued thus:

> "I stress that paragraph because it shows that Waite L.J. accepted that in a clear case even without affirmative evidence prejudice may be inferred. Waite L.J. continued:
>
> > '(3) The prejudice relied on must be genuinely 'additional' to prejudice existing at the date of the writ. If the defendant relies on prejudice of the same kind as he has already suffered he must show that the culpable delay has significantly increased his existing disadvantage. (4) The consequence of (3) is that in cases where the head of additional prejudice relied on is the dimming of witnesses' memories through the passing of time, a generalized assertion that memories must have grown fainter during the period of post-writ delay will not do. The defendant must be able to demonstrate that in some specific respect particular witnesses have become disabled by reason of the lapse of time during the period of culpable delay, from giving at the trial when in due course it takes place evidence as cogent or as complete as the evidence which they would have been in a position to give if the trial had taken place at the date at which (had it not been for the culpable delay) it could in the ordinary course have been expected to be listed'."

The learned judge below found as follows:

> " There would be prejudice to the Defendant if application is granted based on the submissions of Mr. Samuda. "

In the instant case there was no summons to dismiss. More importantly there was no affidavit evidence to demonstrate post-writ prejudice. Additionally, there were no primary facts from which such an inference could be drawn.

Conclusion

I have to say I did not find this case easy to decide. The submissions of both counsel were helpful. In the end I am convinced that the appeal must be allowed, the orders of Theobolds J. and Gloria Smith J. below set aside. Costs should be costs in the cause. The original Statement of Claim must be reinstated. It must be served within ten days hereof. There should be an order for a speedy trial.

HARRISON, J.A.

I agree with the judgment of Downer, J.A. and have nothing further to add.

SMITH, J.A.(Ag.)

I have read the judgment in draft of Downer, J.A. and I agree with the reasons, conclusion and the order proposed.

ORDER

DOWNER, J.A.

Appeal allowed. The orders of Theobalds J. and Gloria Smith J. are set aside. Original statement of claim reinstated and must be served within ten days hereof. Order for speedy trial. Costs to be costs in the cause.