IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B395/1996

BETWEEN	JOSHUA BEACON	PLAINTIFF
AND	INSPECTOR FORD	1ST DEFENDANT
AND	THE ATTORNEY GENERAL	2ND DEFENDANT

Mr. Gordon Robinson and Mrs. Priya Levers for the Plaintiff.

Mr. Garfield Haisley instructed by The Director of State Proceedings for 2nd Defendant.

Heard on the 1st and 10th May, 2002 and the 7th June, 2002

CAMPBELL J.

The Second Defendant applied by Summons dated 3rd September 2001 to dismiss the Plaintiff's action for want of prosecution, on the grounds that;

(a) There has been an inordinate and inexcusable delay in prosecuting the action.

(b) The Second Defendant has been prejudiced by the delay.

(c) There is substantial risk that there cannot be a fair trial.

In support of this Summons Garfield Haisley, an Attorney-at-Law in the

Attorney Generals' Department, filed an affidavit dated 3rd September 2001, in which he states inter alia;

(3) On the 9th day of December 1996 the Director of State Proceedings was served with a copy of the Writ of Summons and Statement of Claim dated the 9th of December 1996.

(4) On the 24th day of December 1996 an Appearance was entered on behalf of the Second Defendant.

(5) On the 3rd day of March 1997 Consent to file Defence out of Time was filed on behalf of the Second Defendant.

(6) On the 3rd March 1997 the Second Defendant filed a Defence.

(7) On the 19th day of June 1997 the Director of State Proceedings was served with a copy of a Summons for Directions dated the 6th day of March 1997.

(8) On the 6th day of January 1998 the Director of State Proceedings was served with a copy of a Certificate of Readiness dated the 17th day of December 1998.

(9) On the 7th day of May 1998 the Director of State Proceedings was served with a copy of a Summons for Extension of Time to Set Matter Down dated the 26th day of April 1998.

(10) On the 26th day of May 1998 an Order was made granting the Plaintiff an Extension of Time to have the matter set down.

(11) The Plaintiff took no further step in the matter for almost three years when, on the 22nd day of March 2001, a Summons for Extension of Time to set Matter Down was filed on his behalf. The Director of State Proceedings was served on the 9th day of March 2001.

(12) Almost five years has elapsed since the Writ of Summons was filed, therefore, there is a substantial risk that there cannot be a fair trial of the issue due to the certain possibility of the fading memory of witnesses.

In her affidavit in opposition to the Defendant's Summons, Priya A. Levers

states inter alia:

(3) That due to an oversight, I omitted to set the matter down and an extension was granted on the 26th of May 1997.

(4) That the Certificate of Readiness was filed and served on the 2nd Defendant's Attorney on the 6th January 1998. That although this was done, due to an administrative error, the Registry of the Supreme Court requested me to make a further application asking for an extension.

(5) That subsequently the file could not be located in the Supreme Court, eventually, when it was found I filed another Summons for Extension of Time in January 2001 and it was adjourned Sine Die, as the supporting Affidavit of the Summons was not served on the 2nd Defendant's Attorney.

It was submitted on behalf of the Second Defendant that under Section 342 of the Civil Procedure Code a Defendant to an action commenced by Writ of Summons is entitled to apply to have the action dismissed for want of prosecution if the Plaintiff does not have the matter set down within the period fixed for so doing. The oft-quoted passage from the Judgment of Lord Diplock in **Birkett v James** (1977) 3 WLR 38 at page 46 - 47 was relied on. It was urged that there had been an inordinate an inexcusable delay and there had been an abuse of the process of the Court. The period of delay that was complained of was from the 26th May 1998 to 22nd March 2001. Reliance was also placed on the case of **Grovit v Doctor** (1997) 1 WlR 640 that the Court may strike out an action where there has

been a delay, **although the Defendant is unable to show serious prejudice**. It was urged that there was a risk of prejudice to the Defendant given that the evidence at the trial will primarily depend on the recollection of the witnesses. The Defendant also contended that there was no notice of intention to proceed and that the Plaintiff's Summons for Extension of Time was therefore a nullity or an irregularity.

Mr. Robinson for the Plaintiff argued that on an application for dismissal of an action for want of prosecution, there are two distinct streams of cases i.e. (1) where the delay incurred is brought about by the failure to file a Statement of Claim, and (2) where the delay comes about after the close of pleading. He submitted that if there is delay in filing the Statement of Claim, the Court will more readily find prejudice because the Defendant will be unaware of the case he is required to answer. He contended that the delay was not a period in excess of three years as stated by the Second Defendant, but was to be measured from the last act of the Plaintiff prior to the application to strike-out the Plaintiff's Claim, i.e., the attendance by the Plaintiff at the hearing of the relisted Summons for Extension of Time to set down for trial. That consequently the delay was from the 25th June 2001 to 3rd September 2001 and was neither inordinate nor inexcusable. Mr. Robinson further submitted that the delay prior to "last step" was occasioned

by the Registrar's erroneous refusal to accept a Certificate of Readiness filed by the Plaintiff's Attorney in January of 1998.

The Plaintiff's claim was in detinue seeking damages and the return of his motorcycle. The statement of claim at paragraph 2, filed on the 9th December 1998, alleges that in July 1990 the Plaintiff left his cycle at the Stony Hill Police Station when arrested by a member of the Jamaica Constabulary Force and the Inspector in charge of the station took custody of same.

The Defence of Second Defendant states at paragraph 2:

> "Admitted in part. Denied in part. It is admitted that the Plaintiff's cycle was left at the Stony Hill Police Station when he was arrested on the 16th July 1990. It is specifically denied that the Inspector in charge took custody of the cycle."

This Statement of Claim and the Writ of Summons was filed the same date, the 9th December 1996. The action was therefore commenced some six years and six months after the cause of action arose in 1990. The period of limitation in respect of the Crown was one year at the time the cause of action arose. Section 2(1) (a) of the Public Authorities Protection (Amendment) Act 1995 now prescribes the period of limitation to be six years in respect of torts. The Amending Act has no retrospective effect. See **Lemuel Gordon Administrator Estate Desmond Gordon v The Attorney General for Jamaica** SCCA 96/94

(20.12.95). The arguments and pleadings before me are silent on the issue of the limitation period. In **Winfield and Jolowicz on Tort - Twelfth Edition**, by W.V.H Rogers, in dealing with the limitation Act the learned authors state at p.735;

> "The defendant must plead the Act if he wishes to rely on it, for the court will not of its own motion take notice that the action is out of time."

The Court does not concern itself with delay, which is incurred prior to the launching of the action, for even if struck out for pre-writ delay, the Plaintiff will bring back the action, as long as he is within the limitation period.

The issues for determination are firstly, whether the "last step" taken by the Plaintiff was the Summons for Extension of Time filed on the 26th April 1998, or was it as contended by the Plaintiff's attendance on the hearing on the 25th June 2001 and whether that period was inordinate and inexcusable. Secondly, if the delay is deemed to be inordinate and inexcusable whether the Defendant needed to show that the delay will either result in the impossibility of a fair trial or prejudice the Defendant.

The dispute as between the parties as what constitutes the last step was brought about by the failure of the Plaintiff to file a notice to proceed, as required by S. 682 C.P.C., which provides;

> "Summons to Proceed
>
> In cause or matter where no proceeding had for one year
>
> In any cause or matter in which there has been no proceeding for one year from the last proceeding had, the party who desires to proceed shall give a month's notice to the other of his intention to proceed. A Summons on which no order has been made shall not be deemed a proceeding within this rule, and in no case shall it be necessary to give notice of intention to proceed before setting down an action for trial."

The Second Defendant argues that this failure makes the subsequent Summons either a nullity or irregular, and relies on the decision in **Suede Club Co, Ltd. v Occasions Textiles Ltd.** (1981) 3 All ER. 671, where the Court examined RSC Ord 3. r. 6, which is substantially similar to S. 682 of the C.P.C. at p.673 per Nourse J. where he said;

> "I was at one time impressed by that argument, but counsel for the defendants referred me to the judgment of Lindley LJ in *Webster v Myer* (1884) 14 QBD 231 at 234 where he said:
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> > 'The fact of more than a year having elapsed since the last proceedings, seems to show that the Plaintiff had intended to abandon the prosecution of the action, and it might be very unjust to allow him to sign Judgment without giving the Defendant an opportunity of establishing to the satisfaction of the Court that the Plaintiff is not entitled to proceed further.'

> That shows that the lapse of a year since the last proceeding is taken to demonstrate that the Plaintiff intends to abandon the action. Conversely, until the year is up his assumed intention is to proceed. If during the year he gives notice of his intention to proceed, he does so unnecessarily. If he gives notice however late in the year, but does not then proceed within it, he must still be taken to intend to abandon the action."

It was further argued that the headnote of **Suede Club Co. v Occasions Textiles Ltd.** stated that RSC Ord 3. r. 6 was to be construed literally.

Crown Counsel has said that the literal interpretation of the S. 682 would have the effect of rendering the Plaintiff's Summons for Extension of Time, not a proceeding for purposes of the Section. That is a conclusion from which it is hard to escape. However, it is clear from the chronology that the Plaintiff's conduct was inconsistent with a party who intended to abandon his action. In any event, the delay complained, three and a half years, even if inordinate and inexcusable (and I make no such ruling), is constituted of post-writ delay and there can be no justifiable complaint of a fair trial of the issue being an impossibility due to the inability of the witnesses to recall the events. This is so because the issue joined on the substantive matter is whether the Plaintiff's vehicle left at the police station with a police officer was in the Defendant's custody. The documents of the police station should speak for themselves.

In **Jamaica Car Rental v Wayne Taylor** SCCA No. 28/96, despite a period of nine years and four months from the date of the filing of the Writ to the filing of the Summons to Dismiss, on the question of prejudice, the Court was of the view; per Forte J.A, that: -

> "In taking the extreme course contended for by Counsel for the appellant, we would first have to be satisfied that the respondent's attorneys were guilty of contumelious conduct by their delay of such magnitude **as would now render a fair trial of the action an impossibility**." (Emphasis mine)

In **West Indies Sugar v Minnell** (1993), 30 J.L.R. 542, where a Writ was filed some four years after the cause of action arose; and four years after entry of appearance, the Plaintiff filed a Summons for Extension of Time within which to file Statement of Claim. Forte J.A. in reviewing the principles on which the Court should act in an exercise of its discretion, opined at p 544, letter A:

> "In keeping with these principles, therefore, the Court should not exercise its powers to make an order which would discontinue an action unless one of the alternatives expressed in 2(b) above is applicable. **If there is a substantial risk that a fair trial would not be possible, that would be sufficient ground** for refusing the application for extension of time, and in the other alternative it would also be sufficient ground **if the Defendant would be seriously prejudiced as a result of the prolonged delay**." (Emphasis mine)

and expressed his concurrence with the views of Lord Griffiths on the need to show prejudice or the impossibility of a fair trial for post-writ delay, at page 544, letter C, thus:

> "In *Department of Transport v Chris Smaller Ltd.* (1989) 1 All E.R. 897 at page 903 in response to a submission that once the limitation period has expired, inordinate and inexcusable delay should be a ground for striking out, even though there can be a fair trial of the issues and the defendant has suffered no prejudice for the delay. Lord Griffiths, in keeping with my own view set out above, stated:
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> > 'The principle in *Allen v Sir Alfred McAlpine & Sons Ltd. and Birkett v James* are now well understood and *I have not been persuaded that a case have been made out to abandon the need to show that the post-writ delay will either make a fair trial impossible or prejudice the Defendant.'* (Emphasis added)
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> In determining the degree of prejudice necessary, Lord Griffiths continued:
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> > 'Furthermore, it should not be forgotten that long delay before issue of the writ will have the effect of any post-writ delay being looked at critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action. And that if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result

> of the post-writ delay to justify striking out the action.'"

The action in this case is brought pursuant to the Crown Proceedings Act. The First Defendant is an Inspector of police in The Jamaica Constabulary Force. There are no doubt rules and orders for the recording of exhibits and goods detained, this being an important feature of efficient policing. An efficient police force cannot properly complain that records of goods taken from persons in police custody cannot be retrieved. The Constabulary Force, at the material time maintained records for goods of persons detained, that are not exhibits in any charge to be brought against the accused, e.g., General Property Register. In the case of an exhibit, there is the Exhibit Register. If property is taken from an accused at the lock-ups, there is a Prisoners Property Register. The complaint of substantial risk of a lack of fair trial because of fading memory is not of crucial importance in a matter of this nature, where there ought to be adequate documentation of circumstances in which the Plaintiff's vehicle was been held. The Defendants have raised no other allegation of prejudice.

Upon an examination with the critical eye required by Lord Griffiths (in the *Department of Transport* case), where there is also a prolonged delay before the issuance of the Writ, I am unable to say that the post-writ delay has occasioned either that a fair trial of the issues are impossible or that the Defendant has been

prejudiced. I am fortified in my views by the failure of the Defendant to show either prejudicial factors emanating from the pre-writ delay. The application to dismiss for want of prosecution is refused.