JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 109/01

MOTION

COR: **THE HON. MR. JUSTICE FORTE, P**
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE SMITH, J.A.

BETWEEN **D. R. FOOTE CONSTRUCTION CO. LTD.** **RESPONDENT**

A N D **LESTER CROOKS** **APPLICANT**

Judith Clarke for applicant
Stephen Shelton instructed by **Don O. Foote** for respondent

March 25, 28 and July 31, 2003

FORTE, P:

I have read the judgments, in draft of Walker and Smith, JJA which were complementary of each other. The reasons and conclusions expressed therein are consistent with mine. Consequently, I have nothing to add.

WALKER, J.A.

On March 28, 2003, we granted the applicant's Motion to dismiss this appeal for want of prosecution and awarded costs to the applicant to be agreed or taxed. We promised then to give our reasons for so doing at a later date and now do so.

The applicant averred that on or about August 2, 1997 he sustained injuries, suffered loss and damage and incurred expenses as a consequence of a motor vehicle accident involving the applicant's motor car driven by himself and another motor vehicle driven by Desmond Chasdy and of which the respondent was the registered owner.

On October 20, 1998 by common law suit no. CL 1998/C-356 the applicant sued both Chasdy and the respondent company.

On February 5, 1999 the respondent company having entered an Appearance to this suit but not having subsequently filed a Defence, the applicant (as plaintiff) obtained an ~~interlocutory~~ judgment in default with an order for damages to be assessed and costs to be agreed or taxed.

In the meantime the applicant claimed under an insurance policy he carried with the United General Insurance Company Limited for compensation in respect of property damage and on October 2, 1997 the Insurance Company paid compensation amounting to $505,000.00 to the applicant.

On May 18, 1999 by common law suit of 1999 No.C-147 and unknown to the applicant's present attorneys-at-law, the Insurance Company sued in the applicant's name to recover from the respondent company the sum it had paid over to the applicant in satisfaction of his insurable claim for property damage. On July 25, 2002 the applicant obtained a judgment in this suit in an amount of $629,450.00.

Subsequent to the entry of the default judgment in suit No. C.L. 1998/C-356 the respondent company filed a summons to set aside that judgment. That summons was heard and dismissed on July 20, 2001 by Cole-Smith J. (Ag.) who on the same date granted the respondent company leave to appeal that order of the court. On July 26, 2001 the respondent company filed notice and grounds of appeal in the matter.

On February 26, 2002 the application for assessment of damages in suit No. C.L. 1998/C-356 came on for hearing in the Supreme Court at which time it was adjourned sine die pending the outcome of the respondent company's appeal.

On January 27, 2003 the applicant filed the present Motion to strike out the respondent's appeal for want of prosecution.

On February 27, 2003 the respondent filed a Summons for extension of time for filing the Record of Appeal herein.

The three criteria by which we have been guided in our deliberations are set out in ***Granville Gordon and another v William Vickers and another*** [1990] 27 JLR 60. There in the course of delivering the judgment of the court Rowe P said at pp 63-64:

> "There is a discretionary power in this Court to enlarge the time within which an appellant must file the Record of Appeal – Rule 30(1) and Rule 9 of the Court of Appeal Rules, 1962. This discretion must be judicially exercised and with care so as to ensure that no injustice is done to any of the

parties in the case - ***Wright v Salmon*** [1964] 7 W.I.R. 50. It is intended that the Rules of the Court should be scrupulously obeyed and that the time schedulers (sic) provided should be maintained. Lord Guest in delivering the judgment of the Privy Council in ***Ratnam v Cumarasamy*** [1964] 3 All E.R. 933 at 935 said:

> 'The rules of court must, prima facie, be obeyed, and, in order to justify a court in extending the time during which some step in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation'.

Applications for extension of time to file the Record of Appeal have been considered by this Court on numerous occasions. In ***City Printery Ltd. v. Gleaner Co. Ltd.*** [1968] 10 J.L.R 506, there was a lapse of two years between the filing of the Notice of Appeal and the application by the respondent to have the appeal dismissed for want of prosecution, in that the Record of Appeal had not been filed. The court held that the delay was inordinately long and was not excused by the solicitor's explanation that staff changes and a change of office had occasioned the delay. Reliance was placed upon the judgment of Lord Guest in the ***Ratnam*** (supra) case. ***Brown v Neil*** [1972] 12 J.L.R. 669 concerned the extension of time for the filing of Notice and Grounds of Appeal. It was held that:

> 'Where the Court of Appeal is moved to exercise its discretion in favour of an applicant in order to enable him to file notice and grounds of appeal out of time, it must be shown:

(i) that at all material times there was, in the applicant, a serious continuing intention to prosecute his appeal;

(ii) that his appeal is possessed of merit to which the court should pay heed; and

(iii) that the delay in moving the court is understandably excusable'."

These three criteria, it is abundantly clear, must be taken conjunctively and not disjunctively. So interpreted, and for reasons which will immediately become apparent , we would apply firstly criterion (iii) on which it may be said counsel for the respondent company laid the greatest emphasis in argument.

The first point to notice is that the outstanding Record of Appeal was settled from as far back as May 7, 2002. Since that time the respondent company has taken no step either to file the settled Record, or otherwise to prosecute its appeal. The excuse for this default is to be found in the affidavit of Dane Foote dated February 28, 2003 and reads thus:

> "That the First Defendants Attorney-at-Law has informed me and I verily believe that the Record has not to date been filed as he has been awaiting a transcript of the proceedings and the Judges reason in the Record of Appeal and to date this has not been received".

Later in the same affidavit as an explanation for the failure to make a timely application for an extension of time within which to file the Record the deponent says:

> "The First Defendant said Attorney-at-law has also informed me and I verily believe that he should have made an Application for an Extension of Time to file the Record of Appeal before the expiration of six (6) weeks of the appeal, but due to inadvertent oversight on his part and severe pressure of work and other public duties at about the time when this Appeal was filed he overlooked making the Application for extension of time to file the Record until the 27th day of February 2003."

In opposition to this Motion Mr. Shelton for the respondent company conceded straight away that there was delay on the part of his client in prosecuting this appeal, but he argued that the applicant has suffered no prejudice thereby. Furthermore, Mr. Shelton argued that such delay as there was was not due to any fault on the part of counsel, but rather to the fact that neither the transcript of the proceedings in the lower court nor the trial judge's reasons for judgment have to date become available.

Having looked at all the facts and circumstances of the case we have concluded that the respondent company's delay in filing the Record of Appeal is inordinately long and inexcusable. That delay of some ten months to the date of hearing of this Motion has operated, and continues to operate, to the great prejudice of the applicant who is

estopped by order of the court from proceeding to an assessment of damages and so to a consummation of his claim. The delay is not excused by the unavailability of the transcript or the trial judge's reasons for judgment in the Supreme Court. Indeed, the evidence before us indicates that these matters did not form part of the settled Record and, in fact, have never been requested by, or on behalf of, the respondent company. Furthermore, there was not a timely application made for filing the outstanding Record out of time, and we consider as wholly unacceptable the excuse as proffered above by the respondent company (through Dane Foote) ~~for the default~~.

Now having concluded as we have done with respect to the effect of the applicability of criterion (iii) above, we think that no useful purpose would be served by debating the applicability of criteria (i) and (ii), and we refrain from doing so.

SMITH, J.A.:

I have read the draft of the reasons for judgment of Walker, J.A. with which I agree. However, I wish to add a word on the issue of "cause of action estoppel" which was raised by Mr. Shelton, counsel for the appellant.

In seeking to resist the Motion of the respondent to dismiss the appeal for want of prosecution, counsel for the appellant drew the

court's attention to the following facts: This matter had given rise to two suits arising from the one cause of action. The first, suit no. C.L.1998/C-356 was filed by the respondent on October 20, 1998. The Writ of Summons and Statement of Claim were served on the appellant on the 2nd day of November, 1998. An Amended Statement of Claim was served on November 30, 1998.

The appellant entered appearance on the 6th of November, 1999 but filed no defence. Consequently judgment in default of defence was entered against the appellant on February 5, 1999. The appellant filed a summons to set aside the interlocutory judgment which was dismissed on July 20, 2001.

In an affidavit sworn to on the 4th of March 2003, Miss Judith Clarke, counsel for the respondent stated:

> "5. That the learned judge in refusing to set aside the default judgment herein took note of the fact that there is in existence a judgment against the 1st Defendant/Appellant, in favour of the plaintiff/respondent, at suit no. C.L.C 147 of 1999. That suit arose from the very same accident giving rise to this action but the insurers for the plaintiff/respondent retained counsel on his behalf and initiated that suit for negligence against the identical parties as the ones here to recover damages in respect of his property damage.
>
> 6. That the 1st Defendant/appellant did not defend that suit and final judgment had already been entered therein at the time when the 1st defendant sought to set aside the judgment herein. That judgment is still subsisting."

In a further affidavit sworn to on the 26th March, 2003, Miss Clarke stated:

> "1. ...
>
> 3. That during the course of taking instructions from the Plaintiff/Respondent herein **(No. CL.C 356 of 1998)**, I was informed by him that he had made a claim on his own insurers United General Insurance Company, in respect of his property damage arising from the motor vehicle accident and that the said insurers had settled his claim.
>
> ...
>
> 5. That having regard to the fact that his insurers had already settled his claim for property damage and in keeping with my instructions, the suit was limited to a claim in respect of his personal injuries, sustained as a result of the accident.
>
> 6. That on the 25th day of March, 2003, I attended upon the attorneys having conduct of the matter filed at **Suit no. C.L.C. 147 of 1999** namely McGlashan, Robinson & Co.
>
> 7. That during the course of my meeting with the said attorneys they confirmed that they had in fact filed suit at No. **Suit no. C.L.C. 147 of 1999** on the 18th day of May, 1999 with the main objective of recovering from the Appellant herein, for the benefit of its institutional client, United General Insurance Company, the sums paid to the Plaintiff/Respondent to satisfy his property claim arising from the accident.
>
> 8. That the said attorneys confirmed this position in writing by letter dated March 25,2003 with copy cheque and Release and Indemnity (signed by the Plaintiff/Respondent) enclosed and I exhibit herewith a copy of the said letter

(with enclosures marked "**JMC/LC1**" for identification.

9. That the claim filed at **Suit No. C.L.C 147 of 1999** was instituted on the instructions of the Plaintiff's insurers, its primary objective being to recover sums paid out to him to satisfy his insurable claim in respect of property damage.

10. That in any event, by the time the Plaintiff's insurers took steps to recover these sums, the suit herein had already been filed and interlocutory Judgment entered. A copy of the interlocutory Judgment is attached hereto."

The letter referred to in para. 8 above is reproduced in part below:

"Judith M Clarke & Co.
Attorneys-at-law
26 East Street

Kingston

ATTENTION: MS. JUDITH CLARKE

Dear Sirs:

Re: Suit No.C.L. 1999/C-147
Lester Crooks v D.R. Construction Co. Limited

We write further to your enquiries concerning the captioned suit in which we act for and on behalf of Mr. Lester Crooks, the plaintiff therein on the instructions of his Insurer United General Insurance Company Limited.

Mr. Lester Crooks was involved in a motor vehicle accident on August 2, 1997 and further to this, submitted a claim to our institutional client, United General Insurance Company Limited for compensation regarding his property damage.

The claim was satisfied by United General Insurance Company Limited as evidenced by

copy cheque numbered 016036 in the amount of Five Hundred and Five Thousand Dollars ($505,000.00 attached herewith where insured losses were paid over to the captioned Plaintiff, United General Insurance Company Limited satisfied the claim for property damage less the excess which was borne by Mr. Crooks. Thereafter, further to rights of subrogation, instructions were given to our firm by United General Insurance Company Limited to effect recovery against the named Defendant for damages, interest and costs. The overriding intention however was to recover the sums paid out to Mr. Crooks by his insurer. On July 25, 2002 the captioned Plaintiff obtained judgment in the sum of $629,450.00 and that sum was arrived at as follows:-

Value of Vehicle	$540,000.00
Assessor's Fee	4,450.00
Wrecker Fee	60,000.00
Loss of Use	25,000.00
Total	**$629,450.00**

...

We subsequently learned that at the time of our instructions, a suit had already been filed by your firm in respect of personal injuries sustained by Mr. Crooks further to this accident and that your suit was at the stage of Interlocutory Judgment which was entered on February 5, 1999.

...

Yours faithfully
McGLASHAN ROBINSON & COMPANY

PER.....
ALTHEA WILKINS (Ms.)"

Thus there are now two judgments in respect of a single cause of action–one for property damage and the other for damages for personal injuries to be assessed. This appeal is from the order of the

learned judge at first instance whereby she refused to set aside the default judgment in respect of which damages are to be assessed.

It was the contention of Mr. Shelton that the judgment for damages for personal injuries to be assessed could not stand as it was barred by "cause of action estoppel". He also contended that the plea **res judicata** should apply to bar the said judgment. To permit the judgment for damages for personal injuries to stand, he urged, would allow an abuse of the process of the court. He relied on ***Clarence Ricketts v Tropigas S.A. Ltd. and Others*** SCCA No. 109/99 (unreported) delivered 31st July, 2000.

Miss Clarke on behalf of the respondent submitted that the suit which is the subject of this appeal preceded the one in which judgment was given.

A feature of the law of damages is that, except in special cases, the damages to which a plaintiff is entitled from a defendant in respect of a wrongful act must be recovered once and for all . See Winfield and Jolowicz on Tort 15th Edition p. 740. The general rule is that only one action may be brought in respect of one cause of action.

In ***Clarence Ricketts v Tropigas S.A. Ltd.*** (supra) this Court examined a long line of cases in which this rule was considered. Among these cases are ***Henderson v Henderson*** [1843-60) All E.R. (Rep.) 378; ***Brunsden v Humphrey*** [1881-5] All E.R. (Rep) 357; ***Talbot v Berkshire County***

Council [1993] 4 All E.R. 9; ***The Indian Endurance Republic of India v India Steamship Co. Ltd.*** [1993] 1 All E.R. 998; ***Letang v Cooper*** [1965]1QB 232; ***Wain v F Sherwood & Sons Transport Ltd.*** (The Times Law Report July 6, 1998 p. 440).

The Court in ***Ricketts v Tropigas Ltd.*** accepted and applied the rule as stated in ***Henderson v Henderson*** that in the absence of exceptional circumstances the rule of ***res judicata*** applies to prevent a party raising in a subsequent action a matter which he could, with reasonable diligence, have raised in earlier proceedings. The Court did not accept the decision in ***Brunsden v. Humphrey*** that where one act of the defendant violated two distinct rights of the plaintiff, he could bring successive actions in respect of those rights, so that, having recovered damages in one action for his cab, the plaintiff was allowed to bring a second claim for personal injuries.

The rule in ***Henderson*** was approved and applied in ***Talbot v Berkshire County Council*** and in ***Wain v. Sherwood and Sons Transport Ltd.*** (supra). Thus, it may be said with certitude that the rule in ***Henderson*** is now settled law.

The question then is: Is the rule applicable to the facts of this case? I have already stated that Judgment in Default of Defence was entered against the appellant in respect of the first suit, No. C.L. 1998/C-356. The assessment of damages was adjourned pending the outcome of the

appeal. The second suit No. C.L. 1999/C-147 was initiated by the insurers. It seems that the second suit was in respect of damage to property (motor vehicle). Final judgment was entered.

It is clear that cause of action estoppel should have been raised in bar of the second suit. This was not done and it may now be too late to do so. I think that the contention of Mr. Shelton that the assessment of damages in the first suit should be barred by cause of action estoppel is misconceived. Accordingly in my judgment the rule in ***Henderson v Henderson*** does not apply to the particular facts of this case. Therefore cause of action estoppel and the principle of res judicata will not operate to bar the first suit filed for personal injuries.