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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

SUIT NO. CL. 1997/C256

|         |   |                           |
|---------|---|---------------------------|
| BETWEEN | FINANCIAL INSTITUTIONS<br>SERVICES LIMITED<br>(Substituted Pursuant to the Order of the<br>Hon. Ms. Justice G. Smith made on the<br>24 <sup>th</sup> June 1998) | CLAIMANT                  |
| AND     | PETER CROSSWELL   | 1 <sup>ST</sup> DEFENDANT |
| AND     | CARL CROSSWELL  | 2 <sup>ND</sup> DEFENDANT |

Mr. John Vassell, Q.C. and Miss Shena Stubbs instructed by DunnCox for the Claimant.

Mr. David Henry instructed by Winsome Marsh for the Defendants.

**Heard 10<sup>th</sup> January 2004, 5<sup>th</sup> and 25<sup>th</sup> April 2005**

**Campbell J.**

On the 8<sup>th</sup> November 2004, the Financial Institutions Services Ltd. (Finsac) filed a Notice of Application for Court Orders which sought that:

- (1) The orders made by this Honorable Court on the 26<sup>th</sup> of October 2004 be set aside.
- (2) That the Claimant be granted leave to file Witness Statements, Listing Questionnaire and Statement of Facts and Issues within 14 days of the date hereof.

The grounds on which the Applicant is seeking the orders are as follows;

The respondent was absent from the hearing.

The Notice and Application relied on by the Applicants were short-served.

The Listing Questionnaire filed by the Applicant on the 20<sup>th</sup> of October 2004 materially misled the Court.

Had the Respondent been at the hearing, an alternate ruling would have been very likely.

The Order violates the Overriding Objective of Justice set out in Part 1 of the Rules.

The 1<sup>st</sup> Defendant does not stand to be prejudiced by the Claimant filing its Witness Statements, etc. out of time and especially with trial set for 26<sup>th</sup> April 2005.

The 1<sup>st</sup> Defendant had succeeded in having the Claimant's claim struck out, on the 26<sup>th</sup> October 2004. The ground for the Application was the prejudice that had been occasioned by the Plaintiff's delay. The Writ had been filed on the 22<sup>nd</sup> July 1997. The Defence and Counterclaim on the 20<sup>th</sup> January 1998. On the 27<sup>th</sup> May 1998 the Plaintiff's Attorneys-at-Law wrote to the Registrar, asking for the matter to be set down for trial. On the 24<sup>th</sup> June 1998, the Plaintiff's reissued Summons to Substitute Plaintiff was heard. The Defendants claimed that there was no other step taken until the Claimant requested a Case Management Conference on the 7<sup>th</sup> April 2003.

The prejudice of which the Defendant complains is a result of the deaths of two persons on whom he would have relied for information and his faded memory of vital details. There was also the complaint that the Defendants had not done anything to advise the Claimant of the trial date.

The Defendant complained that the Orders made on Case Management were not complied with by the Claimant who is in breach of the Court's directives.

In an affidavit of Shena Stubbs, it is claimed that the Claimants wrote on the 12<sup>th</sup> April 2000 and the 5<sup>th</sup> June 2000 that the matter be placed on the cause list. The matter was fixed for trial on the 10<sup>th</sup> February 2003, the Attorney-at-Law on the record for the Defendants had died and the Defendants were not in appearance. The Claimants wrote the Defendants on the 12<sup>th</sup> February 2003, suggesting that an Attorney be instructed. Having requested a Case Management

Conference scheduled for the 5<sup>th</sup> October 2003. On the 24<sup>th</sup> June 2003 the Claimant advised the Defendant of the Case Management fixture.

In an affidavit to set aside Orders, Stubbs says that her absence was a result of her being involved in a four-day trial, became engrossed and through inadvertence failed to attend the CMC. She alleges that the Listing Questionnaire filed for the pre-trial review was replete with inaccuracies. The Claimant's List of Documents, made and served on the 1<sup>st</sup> Defendant's Attorney-at-Law, was exhibited. The Defendants had alleged that the Claimant had failed to "make and serve" such a list on the Defendants. A notice to inspect was attached to this list. This contradicts the 1<sup>st</sup> Defendant's allegation in the Listing Questionnaire that "the Claimant has not given the 1<sup>st</sup> Defendant or his Attorney-at-Law any opportunity to inspect any documents subject to the Court Order for standard disclosure."

Has the 1<sup>st</sup> Defendant been prejudiced as alleged, by the delay occasioned by the Claimant? The chief complaint has been that the 1<sup>st</sup> Defendant's benefactor, one Kathleen Dunkley, who it is alleged made a payment through the Plaintiff in favour of the 1<sup>st</sup> Defendant has died, as has the Defendant's bearer, Milton and the wife of the 2<sup>nd</sup> Defendant, Ouida Crosswell. All these persons had died before the Defence and Counter Claim had been filed. Even if the 1<sup>st</sup> Defendant is prejudiced by their deaths, that cannot be a result of any delay caused by the Claimant. The 1<sup>st</sup> Defendant has claimed a fading memory, but at issue is whether or not he is entitled to funds which were deposited to the account. These transactions will leave a paper trail. The 1<sup>st</sup> Defendant has pleaded in the alternative (which they have denied) that if there was an error in crediting the sum to the Defendant's account "then the so-called error was caused by the gross negligence of the Plaintiff" as a result of which the Defendants have suffered loss and damage.

The Claimant has submitted that the Notice and Application relied on by the Applicants, having been filed and served on the 20<sup>th</sup> October 2004, were short- served.

In the first Defendant's written submissions before this Court, it was submitted at paragraph 2:

“No part of that delay can be attributed to any act or omission of the First Defendant or his Attorneys. The Claimant's Attorneys have admitted, in an affidavit by Shena Stubbs, that it took four and a half years for the matter to get to trial, they did nothing before the trial date of February 12, 2003 to inform the First Defendant or his Attorney of the said date. Previously, all they had done to hurry the matter along was to have written two brief letters.”

There is nothing inconsistent with the adversarial nature of the trial process to require an innocent party to bring to the attention of the defaulter a failure to comply with timetables ordered by the Court. The first reaction of an innocent party to a default should be to write to the defaulting party requesting that the breach be remedied within a reasonable time. It is not so that the policy, let sleeping dogs lie, should be instituted in order to let matters get worse for the defaulting party. Any delay which has been incurred by an innocent party in applying for sanctions may be a factor in determining whether to grant the Application sought by the Applicant. There is no intimation that the 1<sup>st</sup> Defendant, at any stage of the delay, took any step to curtail the delay occasioned by the non-compliance of the Claimant. The duty to ensure the achievement of the overriding objective of the Civil Procedure Rules is a shared duty that rests on each party with equal weight. There is a clear duty on the parties to litigation to “further the overriding objective.” See Civil Procedure Rule 1.3.

“It is the duty of the parties to help the Court to further the overriding objective.” An important factor in achieving this objective, is ensuring that cases are dealt with expeditiously and fairly. Rule 1.1 (d).

The Application to Set Aside the Order made to strike out the Claimant's claim is granted. Costs of the proceedings to the Claimant.