FMCS

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**CIVIL DIVISION**

**CLAIM NO. C.L. F 076 OF 1991**

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| **BETWEEN** | **MARIA FOLLETT** | **CLAIMANT** |
| **AND** | **BOURNVILLE BRISCOE** | **FIRST DEFENDANT** |
| **AND** | **EDWARD MENDEZ** | **SECOND DEFENDANT** |
| **AND** | **LENWORTH THOMAS** | **THIRD DEFENDANT** |
| **AND** | **RICARDO THOMAS** | **FOURTH DEFENDANT** |

**IN CHAMBERS**

**Mr. Ainsworth Campbell for the claimant**

**Mr. Christopher Samuda instructed by Piper and Samuda for the first and second defendants**

**Mr. Kent Gammon instructed by Dunn Cox for the third and fourth defendants**

**May 8 and 16, 2006**

**APPLICATION TO STRIKE OUT CLAIM FOR WANT OF PROSECUTION**

**SYKES J.**

**1.** This is an application by Mr. Bournevill Briscoe and Mr. Edward Mendez, the first and second defendants, to strike out the claimant's statement of case for want of prosecution. I granted the application with costs to them. The facts come from the affidavits of Mr. Christopher Samuda, counsel for the applicants, Mr. Ainsworth Campbell, counsel for the claimant, and Miss Follet, the claimant. As it has turned out the third and fourth defendants are only in this case to this point as third parties. The claimant failed to serve them but the first two defendants joined them as third parties. These are my reasons.

**The factual background**

**2.** One of the good things about these applications is that the facts are usually incontestable. The debate usually surrounds the reasons that led to the facts and the legal

consequences of the facts. This case is no different. Let me list briefly the events in this gloomy tale of delay and procrastination.

**a.** The claimant was a passenger in a motor vehicle which was involved in a motor vehicle accident that occurred on September 13, 1990.

**b.** Writ of summons and statement of claim were filed on June 25, 1991.

**c.** Memorandum of appearance for the first two defendants was entered on August 22, 1991.

**d.** The defence of the first and second defendants was filed on September 9, 1991.

**e.** The summons for directions was filed on October 17, 1991.

**f.** The summons for directions was heard on December 12, 1991.

**g.** The claimant applied on February 2, 1992, for an extension of time within which to set down the matter for trial.

**h.** The application was granted on March 25, 1992.

**i.** Another application for an extension of time within which to set down the matter for trial was made on January 19, 1993. This application was not heard but adjourned to February 10, 1993, because of the absence of the claimant's attorney.

**j.** On March 22, 1993, the claimant applied to amend the statement of claim. This was granted on May 18, 1993.

**k.** The amended statement of claim was filed on May 28, 1993.

**l.** The next step was on October 19, 1995. This was the filing of a certificate of readiness.

**m.** Obviously, emboldened by acts of judicial benevolence of the past, the claimant on June 14, 1996 applied for yet another amendment to the statement of claim.

**n.** Five years after issuing the writ of summons, the claimant realised that she had not served the third and fourth defendants. This discovery was made on June 21, 1999, when the matter finally crawled unto the trial list. The claimant was indulged yet again by being granted an adjournment.

**o.** Its next appearance on the trial list was October 1, 2001, when it was set down for trial on November 26, 2001. On November 26, 2001, the claimant gave up pursuing the third and fourth defendants undoubtedly because the action was by then statute barred.

I have omitted some of the history but there can be no doubt that there has been inordinate delay. From the history, the first and second defendants have not applied for a single adjournment in over a decade of litigation. They have not made a single application other than to join the third and fourth defendants as third parties and this current application to strike out the claimant's action. The defendants' could be forgiven if they felt that something has gone seriously wrong with the civil justice system. Even Job would be hard pressed to offer a satisfactory explanation to the defendants for a trial to which they have been ready to meet since 1991 has still not been tried fifteen years later.

**The claimant's response**

**3.** The claimant sought to explain her delay by saying that the amendment of her claim in 1993 was precipitated by the discovery that her injuries were much worse than previously thought. Mr. Campbell has said that he thought that the appearance entered by the third and fourth defendants was an appearance to his claim. He found out much later that third and fourth defendants were responding to the first and second defendants' third party claim against them. Mr. Campbell's submission ends with these frightening words, "*It is not unusual for cases to be heard over 20 year period (sic) in this jurisdiction.*" I readily concede that Mr. Campbell's experience in these matters is greater than mine but if his statement is true, that is a very good reason why we should not set that as our standard.

**4.** Mr. Campbell in his written submissions stated that in all the circumstances of this case there was not inordinate delay in the prosecution of the action and the delay has not affected the progress of the action in any way. Any counsel who advances these submissions in the context of this case must be someone of exceptional boldness and confidence.

**The exercise of the discretion**

**5.** It is now well established that the ***Birkett v James*** approach to questions of delay was acutely unsound and that the courts, prior to the introduction of the Civil Procedure Rules ("CPR"), had developed principles to circumvent it. For example in ***West Indies Sugar v Stanley Mitchell*** (1993) 30 J.L.R. 542, the Jamaican Court of Appeal was prepared to infer incurable prejudice without specific proof of prejudice. This was followed in ***Wood v H.G.***

***Liquors Ltd and another*** (1995) 48 WIR 240. Across the Atlantic, the House of Lords in ***Grovit v Doctor*** [1997] 2 All ER 417 developed the idea that in certain circumstances the court could infer that the claimant began action without any intention of bringing it to an end if the delay was sufficiently egregious.

**6.** These case and other cases remain of importance because they identified factors that the court ought to take into account when deciding how to exercise its discretion under the CPR. We no longer speak of prejudice to the defendant alone. We now speak of disposing of cases justly in which prejudice to the defendant is a factor to be taken into account. Under the CPR the court undertakes a review of the all the circumstances of the case; the court looks at the panoply of powers available to it under the rules and see if the powers can be used judiciously to bring about a just disposition of the matter. The powers vary from the draconian striking out to making an unless order. There is power to deprive the successful party of all or some of the costs which he would normally receive. The court can also deprive the successful claimant of interest either totally or in part. There is almost no limit to the orders the court may make to effect a just disposal. This does not mean and could never mean that if the just disposition of the case requires that it be struck out the court should find some less than convincing reason to avoid taking that step.

**7.** On July 30, 2004, the Court of Appeal through Cooke J. A. in ***Alcan Jamaica Company v Herbert Johnson and Idel Clarke*** SCCA No. 20 of 2003 expressed the hope that "[n]ot long from now dismissals for want of prosecution may well be an anachronism – at least in its present guise" (see page 16). It is fair to say that that hope has been realised. The evidence of this is the decline in frequency of these applications over the past eighteen months. Cooke J.A. cited all the important cases from Jamaica and England dealing with delay and he noted two things which are still of considerable importance when the court is deciding how to deal with the case justly on an application to strike out for want of prosecution. These are

- **a.** whether or not there is a substantial risk that a fair trial is not possible when there is inordinate and inexcusable delay;
- **b.** the undermining of public confidence in the administration of justice;

**8.** The CPR has added

- **a.** allocating a adequate amount of the courts' resources to the particular case;
- **b.** the impact on other persons waiting to have their cases heard;

c. keeping the costs of litigation as minimal as possible.

**9.** The case before me is a motor vehicle accident case. This immediately falls within the class of cases where memories of witnesses, even if available, would undoubtedly be impaired. Even if a trial date were set we would be looking at a date in 2007, the earliest. To ask witnesses to recall minute details of an accident that by that time would have taken place sixteen years before would not be fair to them. Mr. Samuda has sworn in his affidavit that the witnesses on which the first two defendants would rely cannot now be found. I have considered the possibility of the Evidence Act being utilised. I am convinced that in the circumstances of this case that solution would not be an adequate one. There would not be any cross examination and the claimant would be able to take advantage of any perceived deficiencies in the statements. This would be unfair in a context where the defendants have been ready to proceed to trial since 1991 and the persistent delay by the claimant has deprived the defendants of producing viva voce evidence.

**10.**The added burden on the defendants has been the imposition of legal fees for a period of fifteen years to date. I take into account that under the new costs regime of the CPR a judge at trial can order the successful party to pay the costs of the losing party. This is one of the powers that can go some way to relieving the defendants of costs if they were to proceed to trial and lose.

**11.**It may be said that the defendants could have acted earlier to have the matter struck out. As one judge said, the defendants "had good reason to suppose that a dog which had remained unconscious for such long periods as this one, if left alone, might well die a natural death at no expense to themselves; whereas, if they were to take out a [notice of application for court orders] to dismiss the action, they would merely be waking the dog up for the purpose of killing it at great expense which they would have no chance of recovering" (see Lord Denning M.R. ***Fitzpatrick v Batger & Co. Ltd*** [1967] 2 All ER 657, 659 C-D). The defendants have waited until the matter has come up for case management to make their application. This they were entitled to do. There was no obligation on them to increase their costs by seeking to have a separate court hearing other than the case management conference.

**Conclusion**

**12.**I have taken all the matters into account and I have concluded that the powers open to the court under the CPR are insufficient to overcome the prejudice to the defendants. They would be unable to present their defence fairly and adequately because their witnesses are now missing. Further, even if the witnesses were available the risk of injustice to them is great because the witnesses would be asked to recall details of an incident that took place over fifteen years ago. There is no evidence that the claimant would be able to pay the costs of the defendant in the event of costs being awarded to the defendants even if the claimant was successful at trial. There is also the substantial prejudice of being exposed to significantly higher damages now than if the matter had come to trial within a few years of 1991. For these reasons the claim is struck out with costs to the defendants.