IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1992/G229

BETWEEN	GERALD GREY	PLAINTIFF
A N D	DIST. CONS. ESSON	FIRST DEFENDANT
A N D	THE ATTORNEY GENERAL	SECOND DEFENDANT

Mr. Marcus Goffe for Plaintiff.

Miss Susan Reid-Jones for Defendants
Instructed by The Director of State Proceedings.

Heard; 8th and 11th October, 2002

Brooks, J.

The Defendants herein have applied for the Court to exercise its inherent jurisdiction of controlling its own procedure, to have the action bought by the Plaintiff against them, struck out. This step, they say, ought to be taken because of the delay by the Plaintiff in prosecuting the action.

The action is one in which the Plaintiff seeks damages for malicious prosecution and false imprisonment arising from an incident occurring in 1992 between himself and the First Defendant who is a District Constable.

The Defendants say that the delay has been manifest in the fact that although over ten years have passed the action has not yet been tried. It had been filed in November 1992 and placed on the cause list after pleadings

were closed. The record shows that the action came on for trial in November 1995 but was removed from the Cause List when the Plaintiff failed to attend for the trial.

Since that time, the Defendants say, there have been some half-hearted steps taken by the Plaintiff in the action by filing and continually re-issuing summonses to enlarge time in which to set down the matter on the Cause List. These steps were never properly prosecuted and the action has up to today's date not been restored to the Cause List.

The delay, the Defendants say, has been inordinate and inexcusable and has caused them prejudice because, to quote from the Affidavit of Susan Reid-Jones in support of the Defendant's application, "it is likely that memories of the event will fade and witnesses will disappear by the time the matter should come on for hearing" and also "that there is therefore a substantial risk that there cannot be a fair trial of the matter."

No specifics were provided to support these allegations of prejudice but Crown Counsel has candidly admitted that the First Defendant was still available and was still in the employ of the Crown.

The Plaintiff on the other hand says that the delay has not been as a result of any willful act on his part. He has given affidavit evidence to show that he attempted to have his previous lawyers prosecute the matter and even

solicited the assistance of the General Legal Council in that regard. He also says that the application to enlarge time (previously mentioned) was stymied as a result of the Court's file not being available at the various and many dates of hearing. In this regard he is relying on information received from his previous lawyers. Some of that information unfortunately is not supported by the records on the Court's file, which show that the file was unavailable on only one occasion (19/12/00).

The Plaintiff also asserts that not only does he have a good excuse for the delay in prosecuting the matter but that the Defendants have failed to provide any detail as to the prejudice from which they claim to be suffering.

Applications of this nature are to be considered against the well established test summarized in the case of Birkett v. James [1977] 2 ALL ER 801 at page 805 where Diplock L. J. stated.

> "The power (to strike out) should he exercised only where the Court is satisfied (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 (my emphasis) (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 his submission resisting the application, counsel for the Plaintiff also proffered the interesting submission that this is an action which involves allegations of abuse by agents of the state. He says that the Court should be slower in these circumstances to strike out the Plaintiff's claim as the state has a "higher accountability" in actions brought against it by citizens.

No authority was provided for this submission but counsel pointed by analogy to what, he says, is a higher standard used in the cases of abuse of state power in the matter of exemplary damages.

I, in the absence of authority which supports this novel submission, and upon consideration of it, cannot accept that the Crown is to be dealt with on a different standard on the issue of the production of witnesses and the integrity of their respective memories, than any other employer.

In assessing the application I have commenced with the principle that, Justice sits more securely for Plaintiff and Defendant when both have had their day in Court and the issues litigated as decided on their merits.

I have also borne in mind the following principles.

(1) The rules outlined in Birkett v James (*supra*) arose in the context an attempt by the High Court of England to correct the situation where the dilatory conduct of proceedings in that

Court "had become a scandal" per Lord Diplock (Binkett per (*supra*) at page 804 d.)

(2) In Allen v. Sir Alfred McAlpine & Sons [1968] 1 ALL ER 543

Lord Denning M. R. in dealing with the issue said at p.547

> "The principle on which we go is clear, when the delay is prolonged and inexcusable and is such as to do injustice to one side or the other, or to both, the Court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

(3) In our own jurisdiction in the case of Vashti Wood vs. H. G. Liquors and Anor. SCCA 23/93 (delivered 7/4/95) Wolfe JA, as he then was, said:

> "I make bold to say, plagued as our Courts are with inordinate delays, this court must develop a jurisprudence which addresses our peculiar situation."

Based on the affidavit evidence presented to me I find that

(a) the delay of seven years by the Plaintiff in having the action returned to the Cause List is undoubtedly inordinate, particularly as I am firmly of the view that the incorrect procedure was being adopted by the Plaintiff's attorneys.

(b) although the Plaintiff himself was at all times interested in having the matter tried the approach by his attorneys was not in keeping with that interest and the delay which resulted was inexcusable.

(c) the delay will result in the prejudice to a fair trial. Whereas the Plaintiff may have the incident clearly etched in his mind, the witnesses for the Defendants would be the First Defendant and perhaps the other two police officers mentioned by the Plaintiff in his affidavit. These officers would quite probably over the past ten years have been involved with a number of arrests resulting in a blurring of the details of any particular one of this vintage in their memories. In those circumstances I find that the Defendants will be at a disadvantage in clearly having the incident recounted by their witnesses. Even, as the Plaintiff's counsel has suggested was possibly the case, if they had statements with which to refresh their memories, the lapse of ten years (and most likely twelve if the matter were allowed to go to trial), would prevent the recollection of the sharp detail required to impress a tribunal as to fact.

It has been held in the cases of West Indies Sugar v Minnell 1993 30 JLR 542 and in the Vashti Wood case that inordinate delay by itself can be relied on to show prejudice. I am satisfied that prejudice has been demonstrated in the instant case.

It is therefore ordered that:

1. This action be dismissed for want of prosecution.
2. Costs of the application and costs incurred in the action be the Defendants to be taxed if not agreed.