NMLS

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO.C.L. L 047 OF 1999
IN CHAMBERS

BETWEEN	MICHAEL LORNE	PLAINTIFF
AND	THE GLEANER COMPANY	1ST DEFENDANT
AND	WYVOLYN GAGER	2ND DEFENDANT
AND	GLEN CRUICKSHANK	3RD DEFENDANT

Mr. Michael Lorne the plaintiff in person

Miss Alecia Richards instructed by Messeurs Dunn, Cox and Orrett for the first and second defendant

APPICATION TO DISMISS ACTION FOR WANT OF PROSECUTION

May 30, June 4 and June 7, 2002

Sykes J (Ag)

A new day dawned on the common law world on January 11, 1968. The Court of Appeal of England delivered the much anticipated judgment in ***Allen v Sir Alfred McAlpine*** [1968] 2 Q.B. 239. It established this principle: tardy plaintiffs may find themselves out of court in appropriate circumstances. The House of Lords affirmed the decision in ***Birkett v James*** [1978] A.C.296. Lord Diplock formulated the principle in this way 318F-G:

The power should be exercised only where the court is satisfied either (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) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers, and (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.

The Judicial Committee of the Privy Council in the case of ***Warshaw v Drew*** (1990) 38 W.I.R. 221 approved the cases of ***Allen*** (supra) and ***Birkett*** (supra) as being applicable to Jamaica. Lord Brandon of Oakbrook summarise the principles at page 228a-c:

Leaving aside cases of contumelious behavior on the part of a plaintiff or his lawyers, of which the present case is clearly not one, the authorities referred to show that dismissal of an action for want for want of prosecution will only be justified if the following matters are established: first, that there has been inordinate and inexcusable delay in the prosecution of the action on the part of the plaintiff or his lawyers; and secondly, that such delay has given rise to a substantial risk that a fair trial of the action would no longer be possible, or has caused

serious prejudice to the defendant in one way or another….

Some how the lesson has been lost on some litigants.

Many delinquent plaintiffs have sought solace in Lord Diplock's oft quoted dictum. They say their action cannot be struck out unless the defendant shows that they (the defendant) have been prejudiced. Until 1997 in the United Kingdom they were able to say that mere delay was insufficient to strike out their writ on the basis of that delay was an abuse of process. They even had the boldness to say that a fair trial was still possible regardless of how long they delayed. Never mind that the defendant is constantly exposed to a seemingly never ending law suit. Never mind that the defendant has to commit his resources to having lawyers and solicitors at the ready, waiting to fend off an action that has been in gestation for a long time. Never mind that the quantum of damages may be adjusted to take account of inflation and/or devaluation to say nothing of the interest payable. All this the defendant must endure unless he can point to some specific prejudice such as dead or missing witnesses, missing records or faulty memories of witnesses.

Even after the Jamaican Court of Appeal said that in some instances delay per se may give rise to the possibility that a fair trial is impossible, the delinquent plaintiffs did not quicken their steps (see ***West Indies Sugar v Minnel*** (1993) 30 J.L.R. 542). Surely this state of affairs must be intolerable.

The cases of ***McAlpine*** (supra) and ***Birkett v James*** (supra) reflected growing judicial disquiet at the arthritic pace of litigation. The snail-like pace of

litigation produces deliterious effects: it clogs court lists, it increases costs, it impedes other litigants from pursuing their cases with due speed, it delays the delivery of justice and it prolongs litigation unnecessarily. It was hoped that the twin horns of Lord Diplock's dictum would have quickened the steps of plaintiffs and their legal advisers. Alas, this has not been the case.

The question of undue delay has occupied the attention of judges, lawyers and members of the public. The public feel that the legal system is productive of much delay and this delay contributes to injustice. Ironically, the courts of justice are accused of injustice.

The concern that the United Kingdom has shown about this thoroughly undesirable state of affairs is also reflected in this jurisdiction. The Court of Appeal of Jamaica in ***Patrick Valentine v Nicole Lumsden*** (1993) 30 J.L.R. 525; ***West Indies Sugar v Stanley Minnel*** (1993) 30 J.L.R. 542; ***Woods v H.G. Liquors Ltd*** (1995)48 W.I.R. 240; ***The Administrator General of Jamaica v Dudley Blake*** SCCA 36 of 1995 (delivered October 21, 1997) and ***Porter Services Ltd. v Mobay Undersea Tours and another*** SCCA 18/2001 (delivered March 11, 2002) expressed its concern about the delay in prosecuting claims. Six decisions in nine years by the Court of Appeal have simply been ignored.

In Jamaica the situation has reached crisis proportions. Panton J.A. in ***Porter's case*** (supra) said at page 9:

> *In this country, the behavior of litigants, and in many cases, their attorneys, in disregarding rules of procedure, has reached what may comfortably be described as epidemic proportions. The widespread*

nature of this behavior is not seen or experienced these days, I daresay, in those jurisdictions from which precedents are cited with the expection that they should be followed without question or demur here.

…

For there to be respect for the law, and for there to be the prospect of smooth and speedy dispensation of justice in our country, ***this Court has to set its face firmly against inordinate and inexcusable delays in complying with rules of procedure.*** (My emphasis)

I would only say: so should this court.

This was not the first time that the Court of Appeal of Jamaica has used such robust language. In **Woods v H.G. Liquors** (supra) Wolfe J.A. (as he then was) said at page 256 g-h

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

And he warned at page 256 a-b that:

Inordinate delay, by itself, may make a fair trial impossible. Prejudice, in my view, includes not only actual prejudice but potential prejudice……

As time went on it was thought, at least, in the United Kingdom that the ***Birkett v James*** principle was not working as well as was hoped.

From the number of appeals that reached the Court of Appeal of England one gets the impression that lawyers acting for defendants were dissatisfied with the operation of the ***Birkett v James*** rule. Something more was needed. As we shall see that "something more" came in three cases: ***Department of Transport v Chris Smaller*** [1989] A.C. 1197; ***Grovit v Doctor*** [1997] 1 W.L.R. 640 and ***Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** [1998] 1 W.L.R. 1426.

During the 1980's a number of decisions of the Court of Appeal of England catalogued by Lord Griffiths in ***Department of Transport v Chris Smaller*** [1989] A.C. 1197 reflected concerns that Lord Diplock's propositions were inadequate. The House of Lords was asked to review ***Birkett v James*** (supra). They declined the invitation. Despite not acceding to the invitation there can be no doubt that the House of Lords felt the some of the critisms were justified. Lord Griffiths, who spoke for the House, felt constrained to uphold the correctness of ***Birkett v James*** (supra) on the basis that no good reason had been shown to depart from it. He however added at page 1208:

> *Further more is should not be forgotten that long delay before the writ will have the effect of any post writ delay being looked at more 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 casue of action.*

This incidentally was the solution proposed by Lord Denning M.R. a decade earlier in ***Biss v Lambeth Health Authority*** [1978] 2 All ER 125, 132 f which was rejected by

Mustill L.J. (as he then was) in ***Electricity Supply Nominees Ltd. v Longstaff and Shaw*** (referred to by Lord Griffiths at page 1205).

In ***Grovit v Doctor*** [1997] 1 W.L.R. 640 the House of Lords returned to the question of dismissing an action for want of prosecution. Once again Lord Diplock's formulation was under attack on the grounds that it was too narrow and caused much difficulty to defendants who could not prove or establish some specific prejudice that would make the trial unfair. Yet again the House of Lords felt that this case was not appropriate for a review of Lord Diplock's propositions. Lord Woolf was mindful of the fact that the respondents to the appeal were not represented and so the submissions of the appellant were not subjected to the level of scrutiny required to effect such a change in the law. Another modification to the ***Birkett v James*** principle was made: delay without more may amount to an abuse of process. More will be said about this case later in this judgment.

It must be noted that neither Lord Griffiths nor Lord Woolf expressed the view that the criticisms were unjustified. Some of the criticisms were that (1) the necessity for the defendant to show prejudice undermines the court's "power to strike out proceedings as a sanction against delay"; (2) the requirement to show prejudice "prevents the court taking into account the adverse effect which delay can have on the reputation and efficiency of the civil justice system as a whole"; (3) what can be regarded as prejudice is too restricted; (4) too little attention is paid to the "anxiety caused to litigants as a result of litigation"; (5) in order to establish prejudice the "defendant is required usually to show that the delay

has prejudiced him in the conduct of his defence" (per Lord Woolf in ***Grovits case*** at page 643(supra)).

One remedy proposed by Lord Woolf in ***Grovit's case*** (supra) was that defendants need "not wait until there has been inordinate delay before applying for peremptory orders" (see page 644). His Lordship further suggested that the court should more readily make "unless orders". These orders would place the onus on the plaintiff to take certain steps by a certain time. The advantage of such an order, according to Lord Woolf, is that "it places the onus on the plaintiff to justify the action being allowed to continue whereas in the case of an application to strike out the onus is on the defendant to show the action should be struck out" (see page 644).

This solution proposed by Lord Woolf seemed to have arisen because the new Civil Procedure Rules (that came into effect in April 26, 1999) were "on the horizon" and so he felt that rather than make substantial inroads into ***Birkett v James*** (supra) everyone should await the new system (see page 644).

This solution seems to me to have some difficulty. Why should the defendant remind the plaintiff to take steps to try to fix the defendant with liability? Why shouldn't the defendant take full advantage of the plaintiff's inordinate delay and remove the threat of liability from his neck once and for all? Why awake the plaintiff from his Rip Van Winklian slumber? Lord Woolf himself recognised that the defendant is under no obligation to apply for an "unless order" (see page 644).

It is interesting to note that despite paying homage to ***Birkett v James*** (supra) Lord Woolf found an escape route. He said at page 647-648:

> ***The courts exist to enable parties to have their disputes resolved. To commence litigation which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if justice so requires (which will frequently be the case) the courts will dismiss the action.*** *The same evidence relied upon to establish the abuse of process* ***may*** *be the plaintiff's inactivity.* ***However, if there is an abuse of process, it is not strictly necessary to establish want of prosecution under either limb identified by Lord Diplock*****.....***In this case once the conclusion was reached that the reason for the delay was one which involved abusing the process of the court in maintaining proceedings when there was no intention of carrying the case to trial the court was entitled to dismiss the proceedings.*(My emphasis)

When Lord Woolf wrote these words he was sitting in the House of Lords. Eight months later he had to consider the ***Grovit case*** (supra) while sitting in the Court of Appeal as Master of the Rolls; the very court that has been chafing under Lord Diplock's formulation. This was the case of ***Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** [1998] 1 W.L.R. 1426. His Lordship reiterated his view that to continue litigation with no intention of bringing it to a conclusion can amount to an abuse of process (see page 1436). He stated that an abuse of process can be within the first category of ***Birkett v James*** (supra) but "it is also a separate ground for striking out or staying an action" (see

page 1436). His Lordship was restating his proposition formulated in ***Grovit's case*** (supra).

Lord Woolf M.R. in the ***Arbuthnot case*** (supra) not only restated the ***Grovit*** proposition but also added yet another consideration to be taken into account when a court is deciding whether an action should be struck out for want of prosecution. The learned Master of the Rolls said at page 1436:

> *The gradual change to a managed system which is taking place does impose additional burdens upon the courts, involving the need for training and the introduction of the necessary technological infrastructure. It is therefore in the interests of litigants as a whole, that the court's time is not unnecessarily absorbed in dealing with the satellite litigation which non-compliance with the timetables laid down in the rules creates. The substantial argument which was advanced before Sir Ronald Waterhouse and this court in relation to the bank case is just one instance of a phenomenon which is regularly taking up the time of the courts.* ***In Birkett v. James [1978] A.C. 297 the consequence to other litigants and to the courts of inordinate delay was not a consideration which was in issue. From now on it is going to be a consideration of increasing significance. Litigants and their legal advisers, must therefore recognise that any delay which occurs from now on will be assessed not only from the point of view of the prejudice caused to the particular litigants whose case it is, but also in relation to the effect it can have on other litigants who are***

> ***wishing to have their cases heard and the prejudice which is caused to the due administration of civil justice. The existing rules do contain time limits which are designed to achieve the disposal of litigation within a reasonable time scale. Those rules should be observed.*** (My emphasis)

The learned Master of the Rolls while adhering to the ***Birkett v James*** principles saw no difficulty in supplementing them. This was yet another concession to the fierce critics of ***Birkett v James*** (supra).

The dissatisfaction with the pure ***Birkett v James*** rules is not confined to the United Kingdom. In ***Woods' case*** the Court of Appeal of Jamaica upheld the Master's decision to dismiss the action for want of prosecution. The court was prepared to presume prejudice existed from the mere fact of inordinate and inexcusable delay. The difference between the English position and the Jamaican position is that whereas in England inordinate and inexcusable delay may lead to the conclusion that there is an abuse of process in Jamaica it is considered under the heading of a fair trial. Different approach but the result is the same.

This Jamaican position was reaffirmed by Forte P in ***Porter's case*** (supra) at page 4:

> *As I said in … the length of delay per se can give rise to the substantial risk that a fair trial is impossible, and in those circumstances there need not be evidence of prejudice..*

It seems to me that this may have been seeking to avoid the worst effects of a rigid application of the ***Birkett v James*** principle.

From this review of the law the following principles are now well established:

1. where the plaintiff is guilty of post-writ delay, pre-writ delay after the accrual of the cause action will be taken into account and this will more readily lead the court to conclude that the delay in its entirety is inordinate and inexcusable(see ***Dept. of Transport v Chris Smaller*** (supra) and ***Biss v Lambeth Health Authority*** (supra));
2. it is no longer necessary for the defendant to prove any specific form of prejudice. Proof of prejudice is a sufficient condition but not a necessary condition that would enable a court to dismiss for want of prosecution (see ***Grovit v Doctor*** (supra); ***Woods v H.G. Liquors***(supra)); ***Porter Services Ltd. v Mobay Undersea Tours and another*** (supra);
3. prejudice is not restricted to instances of missing witnesses, faulty memories or missing records but includes the prolonged threat of litigation (see ***Biss v Lambeth Health Authority*** (supra));
4. prejudice not only includes actual prejudice but potential prejudice (***Woods v H.G. Liquors*** (supra));
5. the idea of prejudice is not confined to the parties in the particular case but includes other litigants (see ***Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** (supra));
6. delay per se may be enough to conclude that a fair trial is impossible (see ***Woods v H.G. Liquors*** (supra); ***West Indies Sugar Ltd v Stanley Minnel*** (supra));

7. delay without more may amount to an abuse of process of the court (***Grovit v Doctor; Arbuthnot Latham Bank v Trafalgar Holdings Ltd*** (supra));

It is within this legal frame work that this case will be examined.

FACTS OF THE PRESENT CASE

The plaintiff, an attorney law alleges in a writ of summons and a statement of claim filed on June 21, 1999 that he was libeled in a publication of the first defendant published June 22, 1993. The first defendant is a well known publisher of newspapers. The second defendant was, at the material time, the editor of the first defendant. The third defendant is the alleged source of the alleged libellous comments that were allegedly published by the first defendant. The third defendant is not a party to this application.

This action would have been statute barred on June 22, 1999. The plaintiff has waited the five years and three hundred and sixty four days to prosecute his claim. The first and second defendants entered an apperance on July 5, 1999. On July 30, 1999 a defence was filed by the first and second defendants on. The third defendant has not filed any defence. In fact he has not even entered an appearance. No reply was filed by the plaintiff (see section 299 of the Civil Procedure Code). Thereafter nothing was done by plaintiff for over two years. On November 14, 2001 the plaintiff filed a documents, giving one month's of his intention to proceed with the action. This summons to

dismiss for want of prosecution that is dated May 2, 2002 spurred the plaintiff into action.

He filed an affidavit on May 29, 2002 in response to the summons of the first and second defendant. He says that since he filed the notice on November 14, 2001 his attorneys sent a reply to the Supreme Court on at least two occasions and they were told that the file could not be found. He says that he himself made checks but he was told that the file could not be found. Beyond that the plaintiff has not indicated why he did nothing for over two years between July 30, 1999 and November 14, 2001 or indeed why he nothing after December 14, 2001 when the month's notice would have expired.

THE SUBMISSIONS

Miss Richards on behalf of the first and second defendants submits that there is prejudice to them because this law suit has been hanging "over their heads for quite some time now and the inordinate delay would itself suggest that the evidence of any witness called at trial would be questionable, the matter having arisen over nine years ago."

This submission reflects the inhibiting language of Lord Diplock.

Counsel for the first and second defendants further submits that any trial now would take place at earliest 2004 and this is being quite optimistic.

She has pointed to the many procedural steps required by the Civil Procedure Code that the plaintiff has, to understate the case, simply overlooked. She says that he has failed to file a reply if he intended to do so. This

would have closed the pleadings from as far back as 1999 in respect of the first and second defendant. Judgment in default of appearance could have been entered againt the third defendant. Pleadings having closed the next step would be to apply for a summons for directions.

According to section 271(1) of the Civil Procedure Code the summons for directions should be taken out within seven days from the time when pleadings are deemed to be closed.

The plaintiff has failed to take out a summons for directions the importance of which was underlined by the case of ***Bruce Golding v Pearnel Charles*** (1991) 28 J.L.R. 246 C.A. Carey J.A. stated that a matter cannot get to the trial list unless and until a summons for directions is taken out. This summons gives the court the opportunity to see if the matter is ready for trial and where there are deficiencies then the court can make such orders and give such directions as are necessary to have the matter ready for trial.

The plaintiff for his part has not only failed to explain his inactivity for two years but adds that in this case the issues to be resolved do not depend upon the memory of witnesses but on whether the printed words are defamatory and so there is really no prejudice to the first and second defendant. This he submits means that there can always be a fair trial since the questions to be resolved are (1) were the words printed; (2) are they defamatory; (3) and whether the defence pleaded has been established.

The plaintiff adds that the file was mislaid in the court registry and this prevented him from filing his reply after he filed the notice in November 2001.

Mr. Lorne submitted further that the filing of the notice of intention to proceed in November 2001 shows that he intends to proceed with the action and that this court should so find. He added that this court can make an "unless" order that would have the effect of imposing time limits on the plaintiff to "get his house in order".

He also said that in a matter such as this where there is the possibility of a jury being asked to deliberate on the factual questions a court should be slow to deprive a jury of that opportunity.

CONCLUSION

It is true that the passage of time will not have quite the same effect on the trial of a libel action in comparison to a running down case but as my review of the law has clearly shown there are other considerations that the court must now take into account.

The plaintiff would like this court to say that unlike ***Grovit's case*** (supra) it cannot now be said that he is not interested in concluding the matter since he filed a notice of intention to proceed with the matter on November 14, 2001. He asserts that he would have filed his reply after December 14, 2001 but for the mislaying of the file by the registry.

However the fact that a file is missing in the registry does not prevent any litigant from filing a document. The procedure as I understand it is that the person filing the document retains a stamped copy of the document that has been filed. This enables the file to be reconstructed (though this is not the purpose for which the stamp copy is kept) should it become necessary. It is a

notorious fact that almost every day counsel appearing in matters in chambers have to produce their copies to the judge because the one that they filed is not on the registry file.

The plaintiff's explanation for his omission to file a reply or do anything else is to my mind unsatisfactory. There is nothing to indicate that he contacted the Registrar and brought it to her attention that he was impeded in pursuing his claim because of the missing file. Had this been done it is quite likely that a file would be reconstructed and placed in the registry. This has been done in innumerable cases.

A careful examination of the facts of ***Grovit's case*** (supra) shows that the plaintiff filed his action in August of 1989. In 1990 an order was made for the trial of the "preliminary issue whether the words relied on in the libel action were capable of bearing a defamatory meaning". The plaintiff did nothing further. In 1992 the defendants applied to have the matter dismissed for want of prosecution. It was this dismissal that found its way to the House of Lords who upheld the decision. Thus just over three years and two months after filing his writ the plaintiff found himself out of court because of an unsatisfactorily explained delay of two years and three months. In ***Grovit's case*** (supra) the explanation was that the plaintiff was involved in other High Court litigation. Like the case before me the plaintiff submitted in the House of Lords that the defendant had to show that there had been no serious prejudice to the defendants and they had not shown that a fair trial was no longer possible. The House found that the delay was inordinate and inexcusable and that without more was an abuse of process of the court.

It must be acknowledged that the report does not make it entirely clear whether the defendant had attempted to show how he was or might be prejudiced. If it is that the defendant made no such showing then the decision is indeed a remarkable one. There was no discussion of impaired memories of witnesses, missing witnesses or missing records. There was not even any discussion of whether a fair trial on the issues would still be possible. The fact that the plaintiff actively resisted the application to strike out the action all the way to the House of Lords was not found to be evidence of his interest in concluding the matter.

The House upheld the first instance judge's conclusion as well as that of the Court of Appeal who both found that the plaintiff did not have any intention of bringing the matter to conclusion. This conclusion was arrived add by way of inferences drawn from the primary fact of the plaintiff's two-year lithargy. A fortiori I cannot see why I should not come the same conclusion in this case based upon the near three-year inactivity of the plaintiff save for the notice of November 14, 2001.

The conduct of the plaintiff to date does not show that he intends to pursue this action to completion. This case really cannot be distinguished from ***Grovit***. On this basis alone I would dismiss the action for want of prosecution. The fact that he filed a notice of intention to proceed does not in my view interrupt the period of delay because the plain and unvarnished truth is that he has not filed any reply or done anything else. The absence of the file does not in my view absolve him of the responsibility of at least filing the reply.

According to Lord Diplock in ***Birkett v James*** the plaintiff can delay all he wants during the period of limitation. Therefore the fact that the plaintiff waited until the very last day should not be held against him. The limitation period was conferred by Parliament and the court should not seek to whittle it down.

The plaintiff in this case has been inactive for over two years since the defence was filed by the first and second defendants. There has been no explanation for this. It is now a few days short of nine years since the alleged defamatory words were supposed to have been printed.

If the action is allowed to continue the resources of the first and second defendants would be committed for at least another two years. All this in a case where the plaintiff's track record does not inspire confidence that he will proceed with alacrity if the action is allowed to continue.

Miss Richards has referred the court to ***Biss v Lambeth, Southwark and Lewisham Health Authority*** [1978] 2 All ER 125 C.A. where it was held that prejudice is not found solely in cases where the death or disappearance of witnesses, or their fading memories, or in the destruction of records, but might also be found in the difficulty experienced in conducting his affairs with the prospects of an action hanging indefinitely over his head.

The analysis and reasoning of Lord Denning M.R. in that case is quite helpful. The learned Master of the Rolls pointed out that if the ***Birkett v James*** principle is carried to its logical conclusion it would mean that plaintiffs could take full advantage of the limitation period so that if the defendant was hopelessly prejudiced before the issue of the writ, the post writ delay would not

add any more to the prejudiced already sufferred. This would mean that the defendant would find it difficult to succeed on a summons to dismiss for want of prosecution. The most the court could do would be to make an "unless order". This would permit the plaintiff to take that step and begin the delay all over again (see page 131 b-c).

Geoffrey Lane L.J. (as he then was) in ***Biss's case*** (supra) said that if Lord Diplock's proposition in ***Birkett v James*** (supra)(which was "[t]o justify dismissal for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown") were applied strictly to ***Biss' case*** (supra) it might seem that the action should not be dismissed. This is so because the defendant would hardly have been worse off because of the post writ delay than he was before the writ was issued (see page 133 e-h). His Lordship found it "hard to believe that the court should be powerless to intervene to prevent such manifest injustice".

Like Geoffrey Lane L.J. I find it hard to accept that in this case where the plaintiff issues his writ one day before the six year limitation expires on his cause of action, does nothing for over two years after the defence is filed, files a notice of intention to proceed after two years but fails to do so on the basis that the registry said the file was missing, offers no explanation for the two year delay the court is powerless to intervene. Inaddition having regard to the other procedural steps that must be taken the earliest trial date is unlikely to be before 2004.

This court would also be prepared to hold on the basis of the highlighted passages from the ***Arbuthnot case*** (supra)

and ***Biss' case*** (supra) (i.e. that the defendant is impeded in the conduct of his affairs because this action has been hanging over his head indefinitely) that this action should be dismissed. These other reasons if added to the plaintiff's unexplained inactivity would make the case for dismissal even more overwhelming.

Mr. Lorne suggested that this court should make an "unless order". I do not think that this is appropriate. This would merely prolong the agony of the defendants. Enough is enough.

The action against the first and second defendant is dismissed with costs to the first and second defendant to be agreed or taxed.