IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. L-063/1987

BETWEEN	DAPHNE LYNCH	PLAINTIFF
A N D	UNIVERSITY OF THE WEST INDIES	FIRST DEFENDANT
A N D	JOHN HOPKINS UNIVERSITY	SECOND DEFENDANT
A N D	SAMUEL WERTHEIMER	THIRD DEFENDANT

Mr. W.K. Chin See, Q.C. and Miss Somers instructed by Messrs. Dunn, Cox and Orrett for defendants/applicants.

Mr. D. Daly, Q.C. and Mrs. J. Hylton instructed by Messrs, Daly, Thwaites, Watson and Campbell for plaintiffs/respondent.

HEARD: JANUARY 13 AND MARCH 26, 1992

SUMMONS TO DISMISS FOR WANT OF PROSECUTION

REID, J.

The plaintiff's indorsed writ of summons issued on 6th May, 1987 against the three defendants was amplified by a statement of claim filed on 27th May, 1987. Therein it was alleged that the third defendant as servant or agent of either or both first and second defendants had negligently driven a motor car which had struck the plaintiff who had been standing on a sidewalk. On 15th October, 1987 the Master granted leave for second and third defendants to be served outside the jurisdiction; thereafter on 18th May, 1988 both entered appearance as did first defendant on 12th April, 1988. The defence embracing all three was filed on 24th May, 1988; the plaintiff's reply on 2nd June, 1988 closing the pleadings.

By a summons dated 6th December, 1991 to strike out the action for want of prosecution, the defendants complain of plaintiff's inordinate delay in prosecuting her cause. American Home Assurance Company, the insurer of the motor vehicle, through an affidavit by Wilton Rutty, claims manager, stated that the third defendant had ceased to be employed in Jamaica during 1988. Efforts, so the narrative goes, to ascertain his availability for the trial, were unsuccessful as were similar efforts to "unearth the names and

addresses of witnesses to the accident." Exhibited was a police report dated 2nd February, 1984 that independent witnesses had not been ascertained. Further was the complaint that in the sequel of vicarious liability to which the insurer might be subject, plaintiff's inordinate delay had occasioned serious prejudice to second defendant. That the motor vehicle had been in exclusive use of second defendant and that third defendant was agent of the former, the pleadings bear admission.

The summons evoked a response consisting of two affidavits. The first by Judy Grace Hylton, attorney-at-law of the firm of Daly , Thwaites, Watson and Campbell, states that since August, 1991, she has had conduct of the plaintiff's case and had instructed the firm's legal clerk to file a summons for directions. That this was done, she verily believes, as the other affidavit by Devon Gow, the legal clerk, purports to confirm. Having not been given a date for the hearing of that summons, says Mrs. Hylton, she directed inquiries to the Registry of the Supreme Court, but no response came. Thus, she says, the plaintiff had done everything to prosecute the matter; continuing, she proceeded to challenge Mr. Rutty's posturing on behalf of the second defendant, the assiduity of his inquiries as well as the ensuing prejudice alleged.

Pressing the application to strike out, Mr. Chin See, Q.C. adverted to the pleadings which the plaintiff's reply closed. Thereafter was a long hiatus. Next, Mrs. Hylton, purporting to file a summons for directions had proceeded without filing a notice of intention so to do, the inertia intervening being far in excess of twelve months. Touching the affidavit challenge to Mr. Rutty's averments, Mr. Chin See cited Section 18(1) of the Motor Vehicles Insurance (Third Party Risks) Act by which an insurer is obliged to

> "...pay to the person entitled to the benefit of the judgment any sum payable thereunder in respect of the liability ... including ... costs ... and interest on that sum by virtue of any enactment relating to interest on judgments".

By virtue of the time-frame prescribed by Section 272(1) of the Civil Procedure Code, the plaintiff should have taken out a

summons for directions within seven days of the pleadings being closed. Observance of prescribed procedure should not be lightly regarded as Lord Denning M.R. pointed out in Revici v. Prentice Hall Inc. and Anor. - (1969) 1 All E.R. 772.

Previously, the Master of the Rolls had said:

> "Public policy demands that the business of the Courts should be conducted with expedition".

See Fitzpatrick v. Batger & Co. Ltd. (1967) 2 All E.R. 657.

Mr. Chin See submitted that the fact of delay was per se presumptive of prejudice. Moreover, Mr. Rutty's affidavit demonstrated in paragraph 9:

> "That the second defendant, who would be vicariously liable if the third defendant was found to blame, is seriously prejudiced by the inordinate delay in the prosecution of this action".

More explicitly, the affidavit reads as follows:

> "Paragraph 6. "That I was informed by the second defendant ... that the third defendant left its employment in the year 1988 and my attempts to discover if he still lives at the address stated in the writ of summons or if he would come to Jamaica for the trial of the action have been unsuccessful.
>
> "7. That upon the advice of the Attorneys-at-law for the defendants, I carried out investigations in Falmouth to unearth the names and addresses of persons who might have witnessed the said accident but have been unsuccessful in identifying anyone ..."

He referred to the principles which have guided the exercise of discretion by the Courts and which are set out in the judgments of the Court of Appeal in three cases reported together under Allen v. Sir Alfred McAlpine, etc. (1968) 1 All E.R. 543. These principles were approved by the House of Lords in Birkett v. James (1977) 2 All E.R. 801. In the latter, Lord Diplock commenting on the modern practice of dismissing actions for want of prosecution said:

> "Postponement of a trial until memories had faded and witnesses had vanished created a substantial risk that justice would not be done (ibid at 804).

Further (at page 805) he had said:

> "A late start makes it the more incumbent on the plaintiff to proceed with all due

> "speed and pace which might have been excusable if the action had been started sooner, may be inexcusable in the light of the time that has already passed before the writ was issued".

Mr. Chin See fortified his submission by relying on the judgment of Slade L.J. who in Rath v. C.S. Lawrence and Partners (a firm) and Others (1991) 3 All E.R. 679 at 688, said:

> "Having again studied Birkett v. James, however, I can find no support for the proposition that time elapsed after the issue of a writ but before the expiration of the limitation period cannot constitute inordinate delay for the relevant purpose. The late issue of a writ is one thing; by itself it cannot be regarded as culpable. The casual and dilatory conduct of proceedings in breach of rules, after a writ has been issued is another thing".

The mere filing of a summons for directions could not, Mr. Chin See submitted, in the present circumstances, obviate that prejudice created by inordinate delay.

Replying, Mr. Daly, Q.C. challenged the submission that inordinate delay was itself presumptive of prejudice. That proposition, he submitted, was not supported by authority. Given that there was inordinate delay, none of the defendants had by affidavit indicated how or to what extent that delay had conduced to prejudice as alleged. Touching the Rutty affidavit, there was no contention over the affidavit emanating as it did from a source other than the parties to the action, but what mattered was the relevancy and cogency of its contents to the issue of prejudice. If, as appears, there had been no independent witness available to the defendants, the additional delay by plaintiff in prosecuting would certainly not provide a nexus between culpable inexcusable delay and the prejudice to the defendants which, if present, must have accrued quite independently.

Reliance was placed on the decision of the Court of Appeal in William C. Parker Ltd. v. F.J. Ham & Sons Ltd (1972) 3 All E.R. 1051 in which Russell L.J. said at page 1053 -

> "It has been said, and quite rightly, that a delay before the issue of the writ, although properly permissible according to the rules of limitations of actions, can be relevant in considering the whole matter of dismissal

> "for want of prosecution. This is perfectly true, and one easy example of that is the statement of law in Rowe v. Tregaskes in this court. The situation is that, in ascertaining whether delay after the proceedings have started is inordinate and inexcusable and prejudicial to the defendant, it must be bourne in mind that the delay comes on top of delay in launching the proceedings, but that nevertheless does not mean that the delay before the issue of the writ is to be taken into direct consideration in considering whether there has been prejudice to the defendant". (Underlinings mine)

In fine, submitted Mr. Daly, no prejudice has been established of the kind which would warrant the plaintiff's action being struck out for want of prosecution on account of inexcusable delay.

Lord Diplock in Birkett v. James was not unmindful of the legal right a person has under the limitation Acts "to start his action at any time up to the expiration of the statutory limitation period and the corresponding right to continue to prosecute it to trial and judgment so long as it is done with reasonable diligence".

He examined the previous divergent views in decisions of the Court of Appeal on the question whether or not it must be shown that delay in prosecuting the action after the issue of the writ has added anything to the prejudice which the defendant would have sustained in any event from the time of the issue of the writ however diligently thereafter the action were to be prosecuted.

Holding, as the House unanimously did, that the correct principle was that laid down by the Court of Appeal in William C. Parker Ltd. v. F.J. Ham & Sons Ltd. (1972) 3 All E.R. 1051, Lord Diplock said:

> "To justify the dismissal of the action 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 to have resulted from his subsequent delay (beyond the period allowed by rules of Court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued, it must be more than minimal, and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by the rules

"of Court for taking that step". (Underlinings mine)

In the three cases comprising Allen v. Sir Alfred Alpine & Sons Ltd. Lord Diplock, then a Lord Justice, had defined and analysed the conditions precedent to dismissal for want of prosecution, namely:

(a) the plaintiff's failure to comply with the rules, or

(b) under the Court's inherent jurisdiction.

For such an application to succeed, the defendant must show:

(i) that there has been inordinate delay

(ii) that this inordinate delay is inexcusable

(iii) that the defendants are likely to be seriously prejudiced by the delays.

Moreover, said he,

> "Delay which justifies dismissal of an action for want of prosecution, as distinct from dismissal for disobedience to a peremptory order of the Court, is, ex hypothesi, so prolonged that it involves a serious risk that there will not be a fair trial of the issues". (ibid 554)

The application is not usually made until the limitation period for the plaintiff's cause of action has expired. The order, said he, is a "draconian order (which) will not lightly be made (and) should not in any event be exercised without giving the plaintiff an opportunity to remedy his default, unless the Court is satisfied either that the default has been intentional and contumelious, or that the inexcusable delay... has been such as to give rise to a substantial risk that a fair trial of the issues ... will not be possible at the earliest date at which, as a result of the delay, the action would come to trial if allowed to continue".

At this point, the observation of Lord Salmon in Birkett v. James is relevant. At page 812 he says:

> "When cases (as they often do) depend predominantly on the recollection of witnesses, delay can often be most prejudicial to defendants and to plaintiffs also. Witnesses' recollections grow dim with the passage of time and the evidence of honest men differs sharply on the relevant facts. In some cases it is sometimes impossible for justice to be done because of the extreme difficulty in deciding which version of the facts is to be preferred".

What is or is not inordinate, must depend on the facts of each particular case. The considerations to be taken into account may usefully be illustrated by excerpts from the judgment of Lord Denning M.R. in the Allen v. Sir Alfred McAlpine cases. As to the first appeal he said:

> "The defendants have been gravely prejudiced by the delay. They had a claim for contribution or indemnity from the third party. That claim depended on an investigation of facts which took place nearly nine years ago. The delay has been so great that two out of six witnesses cannot now be traced and the memory of the others must be greatly impaired".

However, in spite of the observation in the second appeal that nine years had elapsed since the accident he nevertheless went on to say this:

> "... but I think that the plaintiff's claim should be allowed to proceed to trial. It was (the plaintiff's) misfortune that her former solicitor was a rogue ... At the trial itself, the lapse of time will tell more heavily against her than against the defendants. She has only her recollection to go by, whereas they have the hospital records from the very beginning with full and complete notes at every stage. I do not think they are prejudiced by the delay".

Of the third appeal where an action had been brought against a widow in her capacity as administratrix of the estate of her late husband who had agreed to indemnify a property company against the claim by subcontractors, this is the view Lord Denning M.R. expressed:

> "I must consider the position of the widow Mrs. Hammond (to whose husband was imputed an allegation of fraud and conspiracy), said to have taken place fourteen years ago. She has to do it for him. She has been unable to administer the estate whilst the claim is hanging over it. Two years ago she protested the delays ... The other alleged conspirators the building company was dissolved nearly three years ago ... It is impossible to have a fair trial after all this time... The judge was entitled in his discretion to throw out the action".

In the present case, the plaintiff has all but exploited the permissible period for filing action. Following the closing of pleadings, she had delayed for a further period of over three years. Of inordinate delay there can be no question. On the other hand,

the failure to ascertain on behalf of second defendant the names and addresses of potential witnesses afflicts him with no new detriment. The police report, if anything worth, confirms this. Plaintiff's tardiness no more exacerbates defendants' dilemma than is the ealier 'permissible' delay capable of constituting inexcusable delay. Moreover, the issues are straightforward and diametrically opposed. On the one hand is an allegation in negligence of a motor-vehicle traversing the sidewalk; on the other hand a pedestrian allegedly indifferent to personal safety while crossing the roadway from behind a parked bus. The issues raised do not go beyond the credibility of the contending parties or are they likely to be affected by fading memories. Quite preposterous is the question of unavailability of the third defendant who to all appearances still stands a represented party, the record not reflecting any application for removal of the name of attorney-at-law.

The plaintiff at this stage requires, perhaps, no further prompting. The summons for directions unaccounted or, as earlier indicated, must in the ordinary course have been nugatory, no prior notice of intention preceding same..

The benign alternative to dismissal provided for in Section 272(4) of the Civil Procedure Code, appears most apt. That subsection reads:

> "Upon an application by a defendant to dismiss the action under Subsection (3) of this section, the Court or judge may either dismiss the action on such terms as may be just, or deal with the application as if it were a summons for directions".

The order for costs in the cause on an ordinary summons for directions will meet the justice of the case.