IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1995/M – 147

BETWEEN	**HORACE MEAD**	**CLAIMANT**
AND	**CIBC (JA.) Ltd**	**FIRST DEFENDANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**SECOND DEFENDANT**

Miss Suzette Wolfe instructed by Crafton Miller & Company for the claimant

Mr. Kent Gammon instructed by Dunn Cox for the first defendant

Mr. Peter Wilson instructed by the Director of State Proceedings for the second defendant

August 31, 2004 and September 17, 2004

SYKES J (Ag)

APPLICATIONS TO STRIKE OUT CLAIM FOR WANT OF PROSECUTION

These are applications by the two defendants to strike out the claim for damages for false imprisonment made against them by the claimant. Both defendants are relying on the inherent power of the court to strike out the action for want of prosecution on the grounds of

(1) inordinate and inexcusable delay;

(2) prejudice to the defendants because of the delay; and

(3) there is substantial risk that there cannot be a fair trial

The first defendant, through the affidavit of Mr. Kent Gammon, states that the inordinate delay is inexcusable and an abuse of the process of the Court. He also said that trial matters are now listed for 2007 which means that the earliest possible trial date will be thirteen (13) years after the incident. The second defendant, speaking through Mr. Peter Wilson, swore in his affidavit that because of the delay there is a substantial risk that he would be unable, properly, to meet the claimant's case.

In order to decide this case the critical first question is what are the correct legal principles to be applied to this application? The second is how should the principles be applied to this case? The answer to this second question will involve an analysis of the affidavits of the defendants.

A necessary step towards resolving this matter is to have a clear understanding of the chronology of events up to the time of these applications and the allegations that led to the claim being filed.

The chronology of events

(1) The alleged cause action arose in October 1994;

(2) The writ of summons and statement of claim were filed on April 10, 1995;

(3) The first defendant filed its defence on July 26, 1995 to which a reply was filed on August 14, 1995;

(4) The second defendant filed his defence on March 25, 1996;

(5) On May 17, 1996 the claimant filed an application to strike out the defence of the Attorney General and to enter judgment against him;

(6) The Attorney General responded by applying, on October 24, 1996, to amend his defence or in the alternative to strike out the cause of action against him on the grounds that it disclosed no reasonable cause of action;

(7) The summons to amend defence was adjourned in order to hear the application to strike out defence that was filed on May 17, 1996;

(8) On May 20, 1997 the summons to amend defence was withdrawn and the summons to strike out defence was adjourned to June 3, 1997 because the claimant wished to do further research;

(9) On June 3, 1997 the claimant withdrew his summons to strike out defence;

(10) The reply to the Attorney General's defence was filed on July 22, 1997;

(11) On April 19, 1999 the claimant filed a notice of intention to proceed;

(12) A letter dated December 12, 2003 was written to the Registrar of the Supreme Court asking for a case management conference.

The significance of the letter of December 12, 2003 is this: under the Civil Procedure Rules (CPR) failure to apply for a case management conference by December 31, 2003 would result in an automatic striking out of all claims and counter claims that were filed before the new rules came into effect on January 1, 2003 (see rule 73(7)).

As can be seen from this chronology the claimant did nothing between April 19, 1999 and December 12, 2003. I will now look at the pleadings.

The cause of action

Mr. Mead is an entrepreneur. He believed that he would find his fortune in the ground transportation industry. To this end he borrowed money from CIBC Jamaica Limited (CIBC), the first defendant. The money was used to purchase two buses. Though no one has expressly admitted this, it appears that CIBC thought that Mr. Mead was either in arrears or otherwise in breach of some condition of the loan agreement. The first defendant sought to enforce the Bill of Sale it had over the two buses. Some contact was made with the police by CIBC which resulted in Mr. Mead being arrested by the police.

CIBC in its defence to the claim for false imprisonment says that the claimant sought "to prevent the First Defendant (sic) from realizing on the said secured property to collect the sums lawfully owed to the First Defendant by the [claimant], which sum the [claimant] has intentionally refused to repay to the First Defendant."

Mr. Mead's travails were only beginning. He was taken into custody on October 23, 1994 by the police in May Pen then transported to the Mandeville Police Station where he was detained until October 24, 1994. The second defendant states in his defence that "it was reasonably suspected that the [claimant] had committed the offence of obtaining money by false pretence." The second defendant particularises further by adding that not only was Mr. Mead a debtor to CIBC for a sum in excess of two million dollars (JA$2,000,000) but he sold the buses that were used to secure the loan, collected the proceeds of sale and refused to repay the loan. The Attorney General concludes by saying "[i]n the premises the said arrest and imprisonment of the [claimant] was lawful and justifiable."

All this was in response to the claimant's action for false imprisonment filed April 10, 1995.

I pause to make some observations on the offence allegedly committed by Mr. Mead. The Attorney General says that the offence is obtaining money by false pretence. The critical question is to whom was the pretence made and from whom was money obtained because of the false pretence? There is no allegation that Mr. Mead made any false pretence to CIBC. In fact CIBC alleges that the Bill of Sale they wanted to enforce were valid and enforceable. Thus it cannot be said that Mr. Mead obtained the loan by any false pretence. Since no one else was identified as the potential victim of Mr. Mead's false pretence it is extremely difficult to see the lawful justification for Mr. Mead's detention. There is nothing to suggest that the alleged purchaser of the buses had made any complaint to the police that Mr. Mead falsely pretended that he (Mead) could sell unencumbered buses to him. This to my mind would be the most likely false pretence that he could have made in the circumstances of this case but no one has suggested that this is the false pretence in view.

I return to the matter at hand. Is there an explanation for the long delay between April 19, 1999 and December 12, 2003? Miss Vivette Miller-Thwaites, an attorney at law, of the firm of Crafton Miller and Company in her affidavit filed August 25, 2004 provided a terse explanation. She says that the attorney at law who had conduct of the matter left the firm. The attorney did not assign the file to another attorney before leaving. The file was inadvertently misplaced and only found in 2003. The affidavit does not say when in 2003 the file was found.

The legal principles

It is no secret that the old law as enunciated in ***Birkett v James*** [1978] A.C. 297 had become critically ill. It was clinically dead but no one wanted to throw the life support switch. Judges kept finding all sorts of reasons to prolong its existence. It had come under increasing attack. The House of Lords felt the increasing weight of the criticism (see ***Department of Transport v Chris Smaller*** [1989] A.C. 1197 and ***Grovit v Doctor*** [1997] 2 All ER 417). The ***Birkett v James*** principles had proven ineffective to deal with excessive delays (see Lord Woolf at page 420e-f in ***Grovit***). The failure of the principles coupled with the steadfast refusal to rid the law of them led the House in ***Grovit's*** case to establish the principle that if it could be shown that the claimant had begun proceedings without any intention of bringing them to a conclusion then that in and of itself, without specific proof of prejudice to the defendant, was sufficient for the court to strike out the claim. The source of this power was the inherent power of the court to prevent abuse of its process. This radical development was an attempt to slip from under the judgment of Lord Griffiths in ***Smaller's*** case. In ***Smaller***, despite Lord Griffiths' clear dissatisfaction with the ***Birkett v James*** rule he said that notwithstanding the inordinate delay the defendant could not say how specifically he was prejudiced and since it was still possible to have a fair trial the action would not be struck out.

In Jamaica the ***Birkett v James*** rule also proved to be as inadequate as it had proven to be in England. So chronic had the problem become that, after fifteen years with the rule, the Court of Appeal was prepared to hold that inordinate delay by itself was sufficient to strike out a claim (see ***West Indies Sugar v Stanley Mitchell*** (1993) 30 J.L.R. 542). This position was

arrived at in Jamaica some six years before the House of Lords came to the sad but correct conclusion that the existing rules were unsatisfactory.

All this it is said by Miss Wolfe was swept away by the CPR. The old has gone the new has come. Therefore, she submits, this application should be decided under the new procedural code. For her, the powers relating to striking out are to be found in rule 26.3 as well as in the court's inherent power to strike out cases if this is the appropriate remedy. I agree with her on this point. However she goes on to say that on hearing applications to strike out for want of prosecution the court should adopt a broader approach other than the severe one of striking out the claimant's case. This formulation was no doubt influenced by Lord Woolf's judgment in ***Biguzzi v Rank Leisure plc*** [1999] 4 All ER 934 C.A. This way of putting it is undesirable.

Let me say as well that the defendants' approach is equally undesirable. They seem to be relying on the "old law" as reflected in ***West Indies Sugar v Stanley Mitchell*** (already cited) and ***Grovit v Doctor*** (already cited), namely that delay has the inherent power to precipitate a striking out without any specific proof of prejudice.

I do no accept either approach as completely correct on applications of this nature under the new CPR. I will attempt to show that Lord Woolf MR's statement of principle suggests that there is a ranking of powers and also that the striking out should be sparingly used. If this is what he meant I hope I will demonstrate that it is not in keeping with the new approach suggested by the CPR.

Rule 1.1 of the CPR

The cases about to be reviewed are helpful because they discuss rule 3.4 of the English Rules (that is similar in terms and effect to rule 26.3 of the CPR) in light of rule 1.1 which is similar in substance to rule 1.1 of the CPR.

Rule 1.1 of the CPR explicitly states that the overriding objective is to deal with cases justly. The court is obliged to give effect to the overriding objective whenever it is exercising any discretion given to it by the rules. Rule 26.3 confers a discretion on the court whenever an application to strike out a claim is made. To my mind, therefore, this means that on an application to strike out a case for want of prosecution the court must look at all the circumstances of the particular case and make a determination of the best way to deal justly with the case. It may be that dealing with the case justly means that it should be struck out.

Miss Wolfe relies on three cases. They are ***Biguzzi v Rank Leisure plc*** (cited above), ***Walsh v Misseldine*** (transcript of Court of Appeal of England and Wales (Civil Division) case no. CCRTI 99/0999/2 delivered February 29, 2000) and ***Taylor v Anderson and another*** (transcript of Court of Appeal of England and Wales (Civil Division) case no.B1/2002/0593; [2002] EWCA Civ 1960].

The passage relied on from ***Biguzzi*** is one in which Lord Woof MR stated that despite the power to strike out a case this does not mean that the initial approach will be to strike out the statement of case (see page 940c). He added that the CPR (UK) is better than the previous rules in that the Court's powers are much broader than hitherto existed and in many cases there will be alternatives that will enable the court to deal with cases justly rather than take the draconian step of striking out the case (see page 940c). His Lordship

concluded that the earlier cases are no longer generally relevant once the CPR (UK) applies (see page 941j). This is the pillar of Miss Wolf's submissions.

There are two possible ways of understanding this passage. If the learned Master of the Rolls was suggesting that the power of striking out should not be the first option then I have no disagreement with that because all powers are available to be used as the judge sees fit based upon the case before him. If, however, he was saying that the Courts should approach an application for striking out under the CPR on the basis that it should explore all other powers first before considering striking out I respectfully disagree because this suggests that powers are used in a particular order with striking out at the end of the line.

One possible effect of Lord Woolf's approach, if he meant that mentally the court should consider striking out as a last resort, is perhaps demonstrated by the case of ***Taylor*** (already cited). In that case Chadwick LJ stated the test for striking out in this way at paragraph 11:

> *What is required is not "considerable doubt" or recognition that "it was unlikely"; but a substantial risk of the impossibility of a fair trial. It is that risk which the other parties should not be required to accept; in circumstances where the risk has been created by the conduct or inactivity of the claimant.*

What does this mean? This approach has the potential to generate much litigation around the phrase "a substantial risk of the impossibility of a fair trial." This seems to be allowing the ghost of Birkett v James to haunt the new house of the CPR. At the best of times proof of a negative is not easy. How does one prove the " **substantial risk** of [an] **impossibility"**? The formulation by Chadwick LJ does not suggest that the judge exercises his or

her discretion after taking a global view. His test dictates a conceptual approach that says that a claim should not be struck out unless the defendant can show a substantial risk that a fair trial is not possible. The defendant is required, by Chadwick LJ, to show prejudice to him. This seems unduly restrictive under the CPR when the pre – CPR case law, in Jamaica and the United Kingdom, had already reached the point that it was not necessary for a defendant to show any prejudice to him specifically, if he could show that the process of the court was abused (see ***Grovit v Doctor*** (already cited) and ***Arbuthnot Latham Bank Ltd. v Trafalgar Holdings*** [1998] 1 W.L.R. 1426 C.A. per Lord Woolf at 1436). For all these reasons I do not accept the formulation of the test by Chadwick LJ in ***Taylor's*** case (cited above).

The other potential difficulty with Lord Woolf's dictum in ***Biguzzi*** is that it is capable of meaning that the factors that the courts looked at in the pre-CPR era are no longer of any value, the use of the word "generally" notwithstanding. Lord Woolf did not indicate in what way and why they are no longer "generally" relevant. As Sir Christopher Slade in ***Nasser v The United Bank of Kuwait*** [2001] All ER (D) 368; [2001] EWCA Civ 1454, pointed out at paragraph 27:

> *I am, however, sure, that in saying this [the irrelevance of pre-CPR authorities], Lord Woolf MR was not intending to suggest that the factors regarded by the court in Birkett v James as crucial, namely the length of the relevant delay, the culpability for it, the resulting prejudice to the defendant and the prospects of a fair trial are no longer relevant considerations when the court has to deal with an application for dismissal for want of prosecution.*

May LJ in my respectful in ***Purdy v Cambran*** www.butterworths.co.uk/aller/index.htm stated the correct approach to the CPR when he said:

> *The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad judgment after considering available possibilities.* ***There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case.*** (my emphasis)

This passage was cited with approval in ***Walsh's*** case, the third case relied on by Miss Wolfe.

Before leaving this part of the judgment I must refer to ***Arrows Nominees Inc v Blackledge***, *The Times* July 7, 2000. This case was cited by Mr. Gammon and in particular he relied on page 529. In that case Chadwick LJ stated that a court ought not to proceed to trial if there is a substantial risk of injustice and any litigant that pursues a course of conduct with the object of preventing a fair trial would be ejected from the proceedings. I have no quarrel with this statement of principle and in the circumstances of ***Blackledge*** it was quite an appropriate remark. The circumstances there were outrageous. There was evidence of breaches of disclosure obligations and fraudulent alteration of documents. The judge found that there was a risk of forgery and that other documents prejudicial to the petitioner's case were destroyed. Even under the old rules that case would have been thrown out as an abuse of process. There is nothing remotely approaching this sorry state in the case before me. When viewed in its context the dictum of Chadwick LJ if it is to be faulted the fault would be

on the basis that he understated the matter. This case does not assist Mr. Gammon's main argument.

In summary, the correct approach to cases in which an application is made to strike out a claim for want of prosecution is as follows:

(1)there is no pre conceived notion of which power of the court is prima facie more applicable than another;

(2) the court takes into account all the circumstances of the particular case in light of rule 1.1;

(3) the factors identified in preCPR cases are still valid and ought to be taken into account but they are directed to the exercise of the discretion under rule 26.3 or under the inherent power of the court. The exercise of the discretion must always seek to give effect to the overriding objective of dealing with cases justly;

(4) after examining all the circumstances of the case the court then decides how best to deal with the case at that point in time when the decision is being made. In so doing the court looks at potential harm to all the parties and see how they can be addressed using the powers available to it under the CPR which of course includes the power of striking out.

The affidavits for the defendants

The two affidavits of Mr. Peter Wilson filed in this matter on behalf of the second defendant do not indicate how he has been affected by the delay. They simply state the conclusion that there is a real likelihood that a fair trial cannot now be had. The affidavits seemed to have been crafted with the

Grovit v Doctor principle in mind (i.e. the delay may be such of a magnitude that it amounts to an abuse of process). However as I have endeavoured to show the fact of delay no longer has the power in and of itself to precipitate an automatic striking out. It is one of the factors that the court takes into account. The question now to be asked is, "What is the best way to deal with this case justly?" What I have said about Mr. Wilson's affidavits applies to the affidavit of Mr. Gammon.

Let me make it clear that I am not saying that the absence of proof of prejudice was decisive to the outcome of this case but the lack of information about how the defendants were prejudiced deprived me of additional information to weigh when considering the exercise of my discretion in the light of rule 1.1.

Application of principles

In applying the law to this case I will examine each ground of the applications separately.

(a) Inordinate and inexcusable delay

It is nearly ten years since the cause of action arose and more than nine since the action was commenced. All activity from the claimant ceased for over four years until December 12, 2003. The explanation is that the internal processes of the claimant's attorneys led to the file being misplaced. This is not a satisfactory explanation. If they were inactive for over four years and only discovered it when an internal audit of the file was undertaken then one wonders about the level of interest of Mr. Mead. Surely if Mr. Mead had great interest in his case he would have contacted his attorneys who would have

been alerted to the "missing" file. The delay is inordinate and the excuse is poor. However this is not conclusive of the matter. I must go on to look at the other grounds raised by the defendants and still ask whether the case can be dealt with justly at this point.

(b) Prejudice to the defendants because of the delay

Miss Wolfe says that since this is a claim for false imprisonment there can be no prejudice to the defendants since the only issue is whether there was lawful justification for the detention. This submission is correct to a limited extent. Based upon the pleadings there is no question that Mr. Mead was detained by the police on October 23, 1994 and released without charge on October 24, 1994.

It is obvious that the first defendant made a report to the police about Mr. Mead. The police acted upon this report and took Mr. Mead into custody.

There is no indication from the defendants that they would not be able to mount a defence even after this long delay. This would be the main prejudice to the defendants. They have not said for example, that their chief witnesses to speak to the lawfulness of the detention are unavailable. They have not suggested that the information they have would not be admissible under the Evidence Act because they would at this late stage not be able to meet the standards stated there.

What is clear is that the defendants have been subjected to an imposition of costs for over nine years. The first defendant has had to retain attorneys for this period at some cost to itself. The second defendant has had to expend time and resources on this matter. The first defendant has had to make provision for this potential liability in their accounts. Both defendants are now

at risk of higher damages being awarded against them. All these are very important considerations. However I am convinced that the court has adequate powers to deal with issues of damages and costs.

If damages are awarded the court can decline to award the claimant interest or award interest only for a particular period. Under rule 64.6 (4) in dealing with costs the court is obliged to take account of many factors including

a. the conduct of the parties before and during the proceedings;

b. the manner in which a party has pursued its case.

Rule 64.6(5) sets out many costs orders that a court may now make. These orders properly used can be used to isolate the costs associated with different parts of the proceedings and the offending party obliged to pay accordingly. The claimant may even be ordered to pay all the costs of the defendants.

(c) There is substantial risk that there cannot be a fair trial

The defendants have not indicated in what way a trial at this stage would be unfair to them. Neither did they attempt to show that the powers of the court under the CPR are inadequate to meet the justice of their case. Under the CPR there is no alchemy that turns, automatically, the base metal of delay into the gold of a successful application to strike out a case. In my view there has to be some attempt to show that the powers of the court are unable to provide the means to deal with a case justly.

I will now deal with Mr. Gammon's submission that any trial ordered would take place three years into the future. The courts now have power to order

the manner in which evidence is put before the court, the length of cross examination, opening and closing speeches and such like. These powers are directed to the management of the actual trial itself. In this way the court can allocate such time and resources as it considers appropriate for this case. This means that there is no inevitability of the three year trial date suggested by Mr. Gammon. As presently advised this is quite a simple case. Mr. Mead will "prove" what has is already an agreed fact. That is, that he was arrested by the police at the behest of CIBC. There after it is simply a question of the lawfulness of the detention. There is no evidence that the defendants do not have the witnesses that can speak to the issue of the lawfulness of the arrest of Mr. Mead that being the only real issue in this matter.

From my experience in these matters a trial can be had within months if the case is properly managed. It must not be forgotten that the parties are now under an express duty to assist the court in furthering the overriding objective. One of the implications of this is that where appropriate, admissions ought to be made so that the issues are narrowed and the court is only concerned with adjudicating on the matters that are really in dispute.

Conclusion

There are sufficient powers in the CPR to enable the just disposition of this case. The court can effectively monitor the conduct of all parties from this time forward. The rules permit the court to set time tables to which the parties must adhere. Any breach by the claimant or the defendant of the timetable set by the court may be visited with severe sanctions. There is greater flexibility in dealing with costs and existing flexibility on the question of interest.

The applications are dismissed. Having regard to all the circumstances of this case this is not an appropriate one to award costs to the claimant on this application. Costs reserved until the disposal of the matter. Leave to appeal granted to the defendants.