IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 1991/M 239A
IN CHAMBERS

BETWEEN	GLEN MORGAN	PLAINTIFF
AND	THE ATTORNEY GENERAL OFJAMAICA	DEFENDANT

No appearance by or for plaintiff

Miss Annaliesa Lindsay for the defendant instructed by the Director of State Proceedings

Heard July 4, 2002 and July 10, 2002

APPLICATION TO DISMISS FOR WANT OF PROSECUTION

Sykes J (Ag)

THE FACTS

The defendant was served with a writ of summons and statement of claim on the 18th day of October 1991 in which the plaintiff alleged that he was falsely imprisoned by the police on September 18, 1991 and released October 7, 1991.

The defendant entered an appearance on November 13, 1991. He did not file a defence. On March 18, 1992 judgment in default of defence was entered against the defendant. This finally prompted the defendant to act. He successfully applied on July 2, 1992 to set aside the interlocutory judgment.

On July 15, 1992 a defence was filed and served on the plaintiff on July 16, 1992. On August 26, 1992 the plaintiff filed and served his reply on the defendant. Pleadings were closed.

The mandatory summons for directions was heard on the October 29, 1992. One of the orders made by the Master on the summons was that the action should be set down for trial within thirty days.

The plaintiff failed to comply with that part of the order. In fact he did nothing until September 8, 1994 when he filed a notice of intention to proceed. Thus the first period of post writ delay was one year and eleven months months - the period from the Master's order to the filing of the first notice of intention to proceed.

Despite this notice the plaintiff in fact did nothing. He did nothing for the next four and one half years. This is the second period of delay. On May 13, 1999 the plaintiff filed a second notice of intention to proceed. The second notice did not hasten the plaintiff's steps. He has flouted the Master's order made in October 1992 to set down the matter within thirty days and acted contrary to his intention stated in two notices of intention to proceed.

Ten months after the second notice, on March 30, 2000, he writes to the defendant seeking his consent for orders on a second summons for directions. No reason has been given for this course of action. The defendant naturally declined to assist the plaintiff. The plaintiff resumed his life of indolence.

Between October 29, 1992 and March 30, 2000 other than filing the two notices of intention to proceed and asking

the defendant to consent to a second summons for directions the plaintiff did absolutely nothing.

This summons that has come before me is dated July 17, 2000. This summons was served on the plaintiff's attorneys on April 6, 2001; the same attorneys who have represented the plaintiff from the inception of the action.

On April 19, 2001 when the summons came on for hearing the matter was adjourned and costs awarded to the defendant. No reason is stated for the adjournment. The order for costs suggests that the adjournment was at the request of the plaintiff. It came up for hearing again on May 15, 2001. On that date the plaintiff applied for an adjournment so that he could file an affidavit in response to the summons to dismiss his action for want of prosecution. On July 17, 2001 the summons was set down for hearing but because of civil unrest in Kingston it was not heard. No affidavit was filed by that date by the plaintiff. Almost one year later the summons is relisted for July 4, 2002. The plaintiff has not filed any affidavit one year after he was granted an adjournment to do so.

The plaintiff's attorneys were served on May 21, 2002 at 3:15 pm(over five weeks ago) with the summons for hearing on the July 4, 2002. Neither the plaintiff nor his legal advisers has appeared.

LAW AND ANALYSIS

There can be no doubt about the applicable principles. They have been stated in ***Warshaw v Drew*** (1990) 38 W.I.R. 221; ***Port Services Ltd v Mobay Undersea Tours Ltd. & Fireman's Fund Insurance Company*** SCCA No. 18/2001 (unreported) (delivered March 11, 2002); ***Grovit v Doctor***

[1997] 2 All ER 417 and ***Arbuthnot Latham Bank Ltd. v Trafalgar Holdings*** [1998] 1 W.L.R. 1426.

My understanding of the law is that there are two types of cases. There are those in which the defendant seeks to establish that he is prejudiced in some way and therefore the matter should be struck out on the ground of prejudice (see ***Warshaw v Drew*** (supra) and ***Port Services Ltd.*** (supra). For convenience I will call this the prejudice ground. On the other hand there those in which the defendant may not have suffered any prejudice but insists that the what has occurred is an abuse of process with the consequence that the action should be struck out (see ***Grovit v Doctor*** (supra) and ***Arbuthnot Latham Bank v Trafalgar Holdings*** (supra)). I will call this the abuse of process ground. There does not seem to be any case decided in this jurisdiction that deals with the ground of abuse of process. All the cases from the Court of Appeal of Jamaica involve the striking out on the basis of prejudice.

The cases of ***Grovit*** (supra) and ***Arbuthnot Latham*** (supra) have clearly established that the abuse of process ground has an independent existence. It does not have a symbiotic relationship with the prejudice ground. However this does not mean that they are mutually exclusive. In some instances what is sufficient to establish an abuse of process may also be sufficient to establish prejudice.

It necessarily follows from this that what amounts to prejudice may not necessarily amount to an abuse of process. This would suggest that a prudent defendant who wants to have the matter struck out should, if he can, seek to establish both heads. The critical difference between the two is really the evidence. Under the abuse of process ground the defendant can point to the conduct of the

plaintiff and ask the court to conclude that his conduct in the particular case amounts to an abuse of process. He does not have to demonstrate how he has been prejudiced though he may do (see Lord Woolf in ***Grovit v Doctor*** (supra) at 424g). Under the prejudice ground he has to produce some evidence of prejudice (see Lord Brandon of Oakbrook in ***Warshaw v Drew*** (supra) at page 230j-231b).

Mere assertions of prejudice are quite likely going to be insufficient unless the case is really too clear to admit of debate. The basis for this last proposition is to be found in the case of ***Wood v H.G. Liquors Ltd.*** (1995) 48 W.I.R. 240 as explained by Downer J.A. in ***Administrator General of Jamaica v Vivian Plowright and another*** SCCA No. 55/99 (unreported) (delivered July 19, 2001) at page 25.

It is important to recognise that the ground for dismissal is quite distinct from the basis of the courts power to strike out a case. The latter of necessity must be established before the former.

The basis of the power in Jamaica is both statutory and under the inherent power of the court. Section 342 of the Civil Procedure Code permits the court to dismiss an action for want of prosecution in the circumstances set out there.

Under section 342(2) a defendant may apply for the action to be dismissed for want of prosecution. The precondition for this power is found in section 342 (1) of the Code. That section states that every order for trial shall fix a period within which the plaintiff is to set down the action for trial. This was what the Master did in the instant case on October 29, 1992. The plaintiff has not complied with the order.

Downer J.A. has clearly stated the basis of the courts inherent power in the ***Plowright case*** (supra) at pages 19 (citing Lord Diplock in ***Bremer Vulkan v South India Shipping*** [1981] 2 W.L.R. 141, 147).

The plaintiff in this case is to my mind in an even worse position than the plaintiff in ***Grovit v Doctor*** (supra). There the plaintiff failed to act for two years after the court had ordered a trial of the preliminary issue of whether the words used were capable of bearing a defamatory meaning. Here, eight years after the order was made to set the matter down for trial within thirty days of the order the plaintiff is yet to do that. How can any court ignore such a blatant flouting of the Master's order?

In ***Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd.*** (supra) an action was struck out after eleven years on the basis that the overall conduct of the case amounted to an abuse of process. That case involved two appeals that raised identical issues and although they were argued separately a single judgment was delivered (see page 1429). One case involved a bank and the other a firm of accountants. It is the latter case that is of immediate relevance. Proceedings were started in 1986 for the recovery of professional fees from the defendant who disputed the figure and filed a counterclaim. A second action was commenced by the plaintiffs in 1986 claiming even higher fees. Yet a third action was launched by the plaintiffs seeking to recover interest on the sums claimed. In 1992 all three actions were struck but were reinstated on October 22, 1993. The actions were consolidated and a number of directions were given which were ignored by the plaintiff.

The defendant sought to have the matters struck out a second time. He contended that he suffered great prejudice including deteriorating health and poor memory. The defendant succeeded a second time in having the matters struck out. It was this second striking out that went on appeal. It was conceded by the plaintiff that there was inexcusable delay but that the delay was neither intentional nor contumelious.

Lord Woolf noted in the case of the accountants at page 1435 that:

> *Although there had not been a peremptory or an unless order made in this case which had not been complied with there had been a total disregard for the rules by both parties and the overall conduct of this case amounted to an abuse of the court.*

In addition the matters had been struck out previously. To my mind it is significant that the court did not rely on the prejudice alleged by the defendant (i.e. his poor health and impaired memory). The prejudice narrated by the defendant seemed to have been a part of the history of the case but did not influence the court in coming to its decision. It must be noted as well that even though the conduct of the defendant "may also have been remiss", that was no bar to the matter being struck out (see page 1435). His Lordship also noted that if an action had already been struck out and was restored there is a greater onus on the [offending] party to comply with the rules than before. That was the situation there.

My understanding of the case is that the post restoration conduct was only a factor that was taken into account in determining whether the conduct of the case by

the plaintiff was an abuse of process. I do not think Lord Woolf was saying the principle can only be applied in instances where the action had been in existence for eleven years or some other inordinate length of time, struck out and then restored. Such a principle would not be of much utility since the number of cases which would have such a history would not be very great. Obviously there will be difficult cases that arise and reasonable men may differ on whether the conduct of the litigation amounted to an abuse of the court.

The principle to be derived from the case is that the court must examine the history of the litigation to see how it has been conducted and then ask itself whether the conduct was such that the most appropriate sanction is to strike it out on the basis that the manner in which the matter has been conducted upto the date of the filing of the summons for striking out amounts to an abuse of process. I use the date of filing because the defendant would be relying on the facts and circumstances upto at least that date. This does not mean that if the summons is heard some time later the court should ignore that period since the conduct of the plaintiff after being served with the summons for striking out may be relevant. In the normal course of events if the summons is heard relatively early after it has been filed it would be quite exceptional for post service conduct to have any impact on the decision to strike out the matter.

In the case before me the summons is being heard one year after it was filed and served on the plaintiff who was granted an adjournment to file an affidavit in response. He has not done so. I do not think that the court can ignore that fact.

It is to be noted as well that the conclusion that the conduct of the litigation is an abuse of process is an inference drawn from objective facts. The report of the case does not indicate whether the accountants proferred any explanation for the delay.

It has been said that there is no utility in trying to define conduct that amounts to an abuse of the court. In ***Grovit's case*** (supra) the conduct found to be an abuse of process was identified as commencing litigation with no intention of bringing it to a conclusion. That was a conclusion drawn from the proven facts. It ***Arbuthnot's case*** (supra) the abuse was found in the manner in which the litigation was conducted. That was an inference the court drew from the facts. In neither case was there any discussion of whether a fair trial on the merits was possible. In neither ***Grovit' case*** (supra) nor ***Arbuthnot's case*** (supra) did the court rely on failing memories although it was mentioned in the grounds for dismissal relied on by the defendant in the case of the accountants. It is my view that both cases have identified conduct that can amount to abuse of process. Where there is an abuse of process the court should not countenance it.

The learned Law Lord in ***Arbuthnot*** (supra) added at page 1436:

> *While an **abuse of process** can be within the first category identified in Birkett v James [1978] A.C. 297 it **is also a separate ground for striking out or staying an action** (see Grovit v Doctor at pp. 642-643) which **does not depend on the need to show prejudice to the defendant or that a fair is no longer possible.*** (my emphasis)

What are the objective facts in this case?

1. The plaintiff failed to comply with the order on a summons for direction that he should set the matter down for hearing within thirty days. That order having been made on October 29, 1992.
2. Between October 29, 1992 and September 8, 1994 the plaintiff did absolutely nothing.
3. On September 8, 1994 the plaintiff filed a notice of intention to proceed. He did not proceed. His conduct was at variance with his stated intention.
4. He filed another notice of intention to proceed on May 13, 1999. Again his conduct spoke more loudly than his words. He did not proceed.
5. On March 30, 2000 he tries to lead the defendant to drink deeply from the cup of delay by inviting him by letter to agree to a second summons for directions.
6. From April 6, 2001 he knew that the defendant had applied for the action to be dismissed for want of prosecution.
7. He was even granted an adjournment to file an affidavit in response to the summons. One year later he has not done so.

Can it be said that the conduct of the litigation by this plaintiff is that of some one who intends to conclude the matter (the ***Grovit v Doctor*** question)? I think so

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Can it be said that the manner in which the litigation has been conducted by the plaintiff amounts to an abuse of process (the ***Arbuthnot v Latham*** question)? I think it does.