IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

CLAIM NO. 2004 HCV 01625

BETWEEN	**HEATHER REID**	**CLAIMANT**
AND	**HENDRICK SMELLIE**	**1ST DEFENDANT**
AND	**GLASTONE THAYNE**	**2ND DEFENDANT**

Ms. Arlene Williams and Ms. K. Michelle Reid instructed by Nunes Scholefield, Deleon & Company for the 1st Defendant/Applicant

Ms. Shanique Scott instructed by Campbell and Campbell for the Claimant/Respondent

Heard: 5th and 26th March, 2010

Application to strike out for an abuse of process or inordinate and inexcusable delay; duty upon adjournment to set down claim for case management conference; Civil Procedure Rules 27.8, 27.10 and 27.11.

Although it may be said that the Registrar has a responsibility to fix a new date for CMC where there has been an adjournment for a date to be fixed by the Registrar, in keeping with the overriding objective, that is a responsibility shared by the parties, especially the party in default. This interpretation finds some support in the conduct of at least two of the attorneys-at-law in this matter, in so far as that evidences either an established or a growing practice. Therefore, the defaulting party will not escape culpability for any resultant inordinate and inexcusable delay.

IN CHAMBERS

CORAM : E.J. BROWN, J. (Ag)

1. On the 22nd September, 2009, the 1st Defendant filed a Notice of Application for Court Orders seeking, among other things, the

striking out of this claim. An amended version of that application was filed on the 3rd instant. In the amended application the 1st Defendant/Applicant has expanded on the order sought in September last. Specifically, the 1st Defendant/Applicant seeks the following orders:

i) That the Claim herein be struck out as an abuse of the process of the court.

In the Alternative:

ii) That the Claimant's statement of case be struck out for want of prosecution.

2. The grounds being relied on are as follows:

i) Pursuant to Rule 26.3 (b) of the Civil Procedure Rules 2002 (CPR)

ii) The Claimant's delay in proceeding with the matter herein is inordinate and inexplicable.

iii) That the delay on the part of the Claimant is not in keeping with the overriding objective in ensuring that cases are dealt with expeditiously and fairly.

iv) The Claimant did not attend the Case Management Conference in respect of this matter which had to be adjourned and has since not taken any steps to have a date fixed by the Registrar for Case Management Conference.

v) The Claimant has otherwise failed to take any steps in prosecuting this matter.

vi) The Defendants will suffer prejudice as a result of the delay.

vii) The Claim ought therefore to be struck out as an abuse of the process of the court and/or want of prosecution.

viii) The Defendants continue to incur costs in defending this matter.

THE BACKGROUND

3. Before considering the submissions, it is instructive to set out the background to this application. The cause of action arose on the 24th August, 1998. The claim form and particulars of claim were not filed until the 8th July, 2004. That is, just two (2) months shy of the expiry of the six (6) year limitation period. The Notice of Proceedings was also filed on the 8th July, 2004.

4. The Defendants were served eight (8) days thereafter, on the 16th July. The Defendants filed their Acknowledgement of Service on the 28th July, within the fourteen (14) days allowed, according to r.9.3 (1). The defence was filed on the 24th September, 2004, thirty-four (34) days beyond the forty-two(42) days permitted by r. 10.3 (1).

5. The pleadings having been closed, the Registrar, by notice dated the 16th August, 2005, notified all the parties of the case

management conference (CMC) scheduled for the 25th April, 2006, at 12 noon. At the scheduled CMC, while the 1st Defendant's attorney-at-law and his representative were present, neither the Claimant nor the Claimant's attorney-at-law deigned to grace the court with their esteemed presence. The learned Judge adjourned the matter for a date to be fixed by the Registrar.

6. Thereafter, the matter fell into hibernation in the anteroom of the registry's archives. That Rip Van Winkleish slumber was only faintly disturbed on the 25th August, 2006, when the Claimant filed a notice of change of attorney-at-law. The 1st Defendant, through his attorneys-at-law, wrote to the Claimant's insurers enquiring if they had received a date for CMC. First on the 13th November, 2008 and secondly on 28th January, 2009. But none of that roused the Claimant to action. It took the seismic rumble of this application for the Claimant to act. And then, that was on the day before the hearing of this application, when an affidavit in response was filed.

7. In the affidavit supporting the application, complaint is made that it has been eleven (11) years since the cause of action arose and

five (5) years since the claim was filed. At paragraph 12 the charge is made that given the Claimant's conduct, there is no abiding interest in pursuing the claim to its conclusion. Further, that the Defendant has been operating on the basis of that assumption.

8. Paragraph 14 of the affidavit is quoted in full:

> That further, the Defendant is likely to suffer serious prejudice as there may be a substantial risk that there will [not] be a fair trial of the action, in that:
>
> a. As a result of the delay the Defendant may be prejudiced in the conduct of his defence as he may be unable to locate his witnesses;
>
> b. And if he can locate them, the length of time that has elapsed since the accident may adversely affect their recollection of the incident;
>
> c. The Defendant also continues to incur increasing costs in actively trying to have the matter concluded.

9. The affiant Joan Marks, for the Claimant's insurers, swore that the insured lodged her report of the accident in the 28th August, 1998. That pursuant to their right of subrogation, counsel was retained and the action instituted. Subsequently, on the 14th November, 2008, it appears, the insurers were minded to accept

a proposal for a settlement "on a 50-50 contributory negligence basis." That acceptance had to await the Claimant's consent, according to the advice they received.

10. That settlement proposal has been left a begging as the Claimant's whereabouts are unknown. The several attempts to locate the Claimant have been like seeds upon barren ground. That notwithstanding, Ms Marks ends with the prayer that the court "will deem it fit to refuse the orders being sought."

SUBMISSIONS

11. Learned counsel for the 1st Defendant, Ms Williams, submitted that the claimant's failure to prosecute the claim constitutes inordinate delay, which remains unexplained. This delay, it was submitted, will prejudice the Defendant in advancing his defence at the trial. That prejudice will arise from an inability to locate witnesses, primarily the driver. Further, their memories might be affected by the passage of the years. Therefore, there is a substantial risk that the trial will be unfair. To bolster this point, Ms Williams argued that even if a trial date were to be fixed, it is

unlikely that one could be obtained before next year, which would make it thirteen (13) years since the cause of action arose.

12. Learned counsel further submitted that the defence has not contributed to the delay in any way. She said both the Defence and Acknowledgement of Service were filed within time. Additionally, the Defendant communicated with the Claimant's attorney-at-law to advance the matter but received no response. On the other hand, the Claimant has failed to comply with the Rules: absence at the CMC and making no effort to set another date for CMC. In short, the Claimant has not taken any steps to advance the matter to trial.

13. Reliance was placed on **Winston Wright v Nutrition Products Ltd. CLW 371/1997, dated October 8&10, 2003.** In that case there was a three and a half (3 ½) year delay between the close of the pleadings and the application to dismiss the action for want of prosecution. As in the instant case, there was an anticipated thirteen (13) year delay between the cause of action and the possible trial date. Additionally, evidence was tendered showing the unavailability of a number of the witnesses for the defence. Straw J. (Ag), as she then was, found that the 3 ½ years delay

was inordinate and inexcusable and that the nature of the delay exposed the defendant to the possibility of an unfair trial.

14. In response, Ms Scott for the Claimant took aim at the Registrar. It was her submission, that since the CMC was adjourned for a date to be fixed, the responsibility fell to the Registrar to set the claim down for CMC without awaiting a show of interest from the parties. For this proposition counsel cited **Jamaica Car Rentals Ltd v Wayne Taylor SCCA # 28/96, dated March 30, 1998**.

15. In that case, decided under the old rules, the Registrar failed to set the case down for trial as was required, after the plaintiff's attorney-at-law had filed the certificate of readiness. That resulted in a three year hiatus, broken only by the filing of the summons to dismiss the action. The inaction was laid squarely at the feet of the registry by the trial Judge and upheld on appeal. Learned counsel also relied on CPR r.27.3 (1). The latter provision makes it the general rule for the registry to fix a CMC. Counsel submitted that there is nothing in the CPR to suggest a duty on the Claimant to take any steps after the adjourned hearing.

16. Secondly, accepting there was a delay, will it result in a fair trial being impossible? counsel rhetoricized. To answer that question counsel cited **Taylor v Anderson [2002] EWCA Civ 1680.** In that case it was held that proceedings should not be struck out unless there was an unequivocal affirmative answer to the question of whether there was a risk that a fair trial would not be possible. The trial court must conclude that there is a substantial risk of a fair trial being impossible. Counsel contended that it had not been demonstrated that the witnesses will not be available. In addition to which, it was submitted, the Claimant gave a statement which complies with the requirements of the Evidence Act and the insurers will be seeking to rely on it.

17. In a brief response, Ms. Michell Reid submitted that the insurers' right of subrogation does not arise unless the insurer has indemnified the insured. **Vandyard Dacres v Tania Reid SCCA #103/2000 dated April 11, 2003** was cited as authority for that statement of the law. Counsel is absolutely correct but **Dacres v Reid** also held that the contract of indemnity may itself provide sufficient authority to the insurers to conduct proceedings to the ultimate end without resort to the principle of subrogation.

In respect of the Claimant's duty to act, counsel placed reliance on Part 1 of the CPR r.1.3 which says "it is the duty of the parties to help the court to further the overriding objective."

LAW

18. Rule 27.3 addresses the fixing of a CMC. The general rule is that the registry must fix a case management conference immediately upon the filing of a defence to the claim, such as the one filed in this case. A party may make a without notice application, giving reasons, to the court to fix a CMC before a defence is filed. Unless abridged by the court, by agreement of the parties or in urgent cases, the registry must give all the parties not less that fourteen (14) days notice of the date, time and place of the CMC. Once a CMC date has been fixed it may not be changed by the parties without the court's permission. Under r.27.11 (1)(a), a party wishing to vary a date fixed for CMC must apply to the court.

19. Attendance at the CMC is not optional for the parties but under r.27.8 (3), the court may dispense with the attendance of a party or representative. However, if a party is represented by an

attorney-at-law, she must attend herself or by another attorney-at-law fully instructed to deal with the case. Absence from the CMC is not treated lightly under the CPR.

20. Consonant with the tone of the CPR, the court is enjoined not to "adjourn a case management conference without fixing a new date, time and place for the adjourned case management conference." That is so in spite of the directory language of r.27.10 (1). Where the attorney-at-law and a party or his representative fail to attend the CMC, the court may adjourn the CMC to a fixed date and exercise any of its powers under Parts 26 or 64, according to r.27.8 (4).

21. The seriousness with which absence at CMC is regarded by the framers of the CPR is best exemplified by r.27.8 (5). That rule is quoted in full:

> Provided that the court is satisfied that notice of the hearing has been served on the absent party or parties in accordance with these Rules, then
>
> (a) If the claimant does not attend, the court may strike out the claim; and
>
> (b) If any defendant does not attend, the court may enter judgment against that defendant in default of such attendance.

RATIOCINATION

22. It is convenient at this point to examine the first submission made by learned counsel Ms Scott. It has oft been pronounced from the bench, but bears repeating, that the CPR 2002 inaugurated a new regime. Old things have passed away, all things have been made new. The new regime is meant to be judge-driven, taking the pace of litigation out of the hands of the parties. It is small wonder then that the Registrar's role in setting a case down for CMC is limited to the close of the pleadings as is clear from r.27.3 (1). It is to be noted however, that that is the general rule. That notwithstanding, it was the Claimant's then attorney-at-law who wrote to the Registrar advising the close of the pleadings and requesting the setting down of the claim for CMC.

23. With all due deference to learned counsel, the analysis has commenced at the wrong point of the history of this claim. The Claimant and her attorney-at-law having been absent from the scheduled CMC, without anyone holding or representing either,

had the benefit of the court's discretion exercised in the Claimant's favour. An unless order could have been made under Part 26 or even an award for costs under Part 64.

24. The Claimant now seeks to convert that discretion into a shield when it is submitted that the Claimant having failed to comply with the Rules, need not do anything since the adjournment was for a date to be fixed by the Registrar. Counsel is correct that there is nothing in the CPR obliging the Claimant to take any steps in pursuance of the order of the 25th April, 2006, if the CPR are to be read without reference to Part 1. First, as counsel for the Defendant submitted, "it is the duty of the parties to help the court to further the overriding objective," r.1.3. That duty encompasses saving expenses and ensuring that the case is dealt with expeditiously and fairly, r.1.1 (2) (b) and r 1.1 (2) (d). So, although the CPR are judge-driven, the parties are not thereby devoid of all responsibility.

25. Secondly, as Lord Woolf commented, the new rules were "deliberately not designed expressly to answer every question which could arise." **(The Civil Procedure Rules In Action Grainger and Fealy p.8).** This contrasts with the old rules which

had a "tendency to provide for every eventuality, with resultant technicality and complexity." **(Grainger and Fealy supra)**. The so-called conundrum as to who is to act when the judge exercises his discretion to adjourn the case in the manner done in this case, has to be answered in the spirit in which the CPR are to be carried out.

26. According to the learned authors of **Blackstone's Civil Practice 2010,** para. 1.13, "where there are no express words in the CPR dealing with a situation, the court is bound to consider which interpretation best reflects the overriding objective when construing the rules." **Under the Judicature (Civil Procedure Code) Law**, when the pleadings were deemed to be closed, the plaintiff was required to take out a summons for directions to commence a hearing analogous to the CMC. If the plaintiff failed to do so within the specified time, the defendant could either make good on that omission or apply for the dismissal of the action. The summons for directions having been taken out, if it was adjourned without a date being fixed for the resumed hearing, either party could restore it to the list on two days notice to the other.

27. The CPR do not provide for the CMC being adjourned without a date, which was the effect of the order of the 25th April, 2006. However, it does appear that the intention is to remove the progress of the claim from the hands of the parties once the pleadings are closed. What then was the position once that order was made? The answer would seem to be that the claim had not progressed from the close of the pleadings. If that was so, then it may not be farfetched to say that the Registrar's role to fix a date, time and place for CMC had not been perfected and should be repeated.

28. That having been said, if r.1.3 is to be given any substance, then this cannot preclude action by the parties, especially one in default. So, either the Registrar or any of the parties, especially the defaulting party, could have seen to the rescheduling of the aborted CMC. However, it would not be surprising if the innocent party did nothing and in the fullness of time makes an application such as the one under consideration.

29. Finally, **Jamaica Car Rentals Limited v Taylor [supra]** may be distinguished from the instant case. In that case the plaintiff took the last step required to set the registry in motion. In this

case the Claimant has done nothing. And in the spirit of the CPR, the Claimant was required to act.

30. It is therefore a fact well established, that the Claimant was responsible for the delay ensuing as a consequence of the adjourned CMC and the failure to apply for a rescheduling. That delay has to be seen in the context of the attitude towards the prosecution of this action. The claim was filed almost six (6) years after the cause of action accrued. A CMC was scheduled and the Claimant did not attend. Letters were written to the Claimant's attorney-at-law proposing a settlement and enquiring of a date for CMC and not even a courtesy response was forthcoming.

31. The inactivity characteristic of this Claimant constrains the court to the view that the proceedings were issued without any intention of taking the case any further. That in itself is an abuse of process: **Barton Henderson Rasen v Merrett [1993] 1 Lloyds Rep 540.** That view finds support in the frank admission by Ms Marks that the claimant cannot be found.

32. It may well be an exercise in rhetorication to ask if there has been inordinate and inexcusable delay in pursuing this claim. August 24, 2010, will mark twelve (12) years since the cause of action arose. Similarly, the 25th April, 2010, will be the fourth anniversary since the adjourned CMC. An identical period was so characterized in **Wright v Nutrition Products Ltd,** *supra*.

33. While counsel for the Claimant accepts the fact of the delay, counsel argued that it will not derail the possibility of a fair trial. Counsel's contention that it has not been demonstrated that the witnesses will not be available has some sympathy. It is to be noted that although there is no affidavit evidence, one way or the other, the whereabouts of the 2nd Defendant may not be known as he was not served and he would be the material witness, having been the driver. However, this is a case that will turn on the credibility of the witnesses. Although the giving of evidence is not a memory test, it is a *chose jugee* that the passage of time dims memory. That certainly will weaken the witnesses' ability to reliably recall the events in question.

34. This leads to the question of the admission of the Claimant's statement into evidence under the provisions of the Evidence

Act. In the unlikely event that such a statement is admitted, how much weight would it bear? It would stand as bald, unchallenged assertions. But the Claimant may yet have a higher hurdle to cross.

35. Ms Marks, at paragraph 5 of her affidavit, speaks to the insurers acting in "pursuant to its rights of subrogation". It is in furtherance of that right that counsel, Ms Scott, submitted a preparedness to utilize the Claimant's statement in the manner adverted to above. However, Ms Marks has not deponed to having indemnified the insured. Without that indemnification, as the 1st Defendant's counsel submitted, subrogation does not arise: **Dacres v Reid**, *supra.* It is recalled that the right to act may be written into the contract of insurance but Ms Marks does not rely on it.

36. So, the insurers may not have any *locus standi.* Without that they wont even be able to approach the bar to make the requisite application for admission of the statement. Therein may lie the explanation for the insurers' own dilatory conduct. Although the report was made to them four (4) days after the accident, the action was not filed until the eleventh-hour. That was only compounded by the utter discourtesy which they showed to the 1st

Defendant's insurers. The Claimant's insurers have not the faintest idea of the whereabouts of the Claimant but the claim is to stay on the list until their triumvirate of sages can follow the star in the east until it hovers the longitude and latitude of the Claimant's secret dwelling.

37. Even if the Claimant's insurers were to overcome their possible legal disability, it is highly improbable that the claim could come on for trial before 2011. That would be a full thirteen years since the cause of action arose. I find that the palpable inordinate and inexcusable delay has precipitated a substantial risk of a fair trial being impossible. Further, the prolonged inactivity of the Claimant, from the institution of these proceedings to responding to this application, amounts to no less than an abuse of the court's process.

38. Although it may be said that the Registrar has a responsibility to fix a new date for CMC where there has been an adjournment for a date to be fixed by the Registrar, in keeping with the overriding objective, that is a responsibility shared by the parties, especially the party in default. This interpretation finds some support in the conduct of at least two of the attorneys-at-law in this matter, in so

far as that evidences either an established or a growing practice. Therefore, the defaulting party will not escape culpability for any resultant inordinate and inexcusable delay. Perhaps the way to ensure no recurrence of this problem is to either amend the rules and couch them in mandatory, rather than discretionary language. Failing that, the matter could be the subject of a practice direction directing judges to adjourn all CMC to a fixed date, in keeping with the manifest intent of the CPR.

39. The claim is therefore struck out for inordinate and inexcusable delay. Costs to the 1st Defendant/Applicant, to be taxed if not agreed.