IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1989/R-014

BETWEEN	SPURGEON REID	PLAINTIFF
A N D	CORPORAL LOBBAN	1ST DEFENDANT
A N D	THE ATTORNEY GENERAL FOR JAMAICA	2ND DEFENDANT

Miss Keri-Gaye Brown for Plaintiff instructed by Gifford, Thompson & Bright.

Miss Monique Harrison for 2nd Defendant instructed by the Director of State Proceedings.

Heard: May 30 & June 12, 2001

McDONALD J. (Ag.)

This application seeks to dismiss the action for want of prosecution pursuant to section 342 (2) of the Judicature (Civil Procedure Code) Law and the inherent jurisdiction of the Court.

A Chronology of the events are as follows:-

(1) On 27th January 1989 a Writ of Summons and Statement of Claim claiming damages for assault inflicted on the Plaintiff by the 2nd Defendant were filed.

(2) An Appearance was entered on the 16th February 1989 by the Director of State Proceedings for the 2nd Defendant.

(3) A defence was filed on 6th June 1991.

(4) On 17th March 1993, Notice of Change of Attorney was filed by Robin Smith Attorney-at-Law on behalf of the Plaintiff .

(5) On 28th March 1994 Summons for Directions was filed. The

matter came up for hearing on 9th May 1994, 20th June 1994, 9th November 1994 and 2nd March 1995 and were adjourned sine die on all dates. On 20th July 1995 the Summons for Directions was heard and it was ordered inter alia that the matter be set down for trial within 30 days.

(6) On 1st December 1995 Robin Smith, Plaintiffs Attorney filed summons to remove his name from the record . The summons was set for hearing on 13th February 1996 on which date it was adjourned sine die - Plaintiffs Attorneys absent.

(7) Formal order on Summons for Directions was filed on 24th July 1995 and served on the Director of State Proceedings on 15th March 1996.

(8) By letter dated 29th June 2000 the Registrar advised Plaintiffs Attorney Robin Smith and the Director of State Proceedings that the matter had been placed on the Cause List.

(9) Notice of Change of Attorneys was filed by Gifford, Thompson and Bright on behalf of the Plaintiff on 12th October 2000 and served on the Director of State Proceedings on the said date.

(10) Messrs. Gifford, Thompson & Bright filed Certificate of Readiness dated 18th October 2000 and sent letter dated 11th October 2000 to the Registrar requesting that matter be placed on the Cause List.

On 19th October 2000 the Director of State Proceedings was served with a copy of a Certificate of Readiness dated 18th October 2000.

(11) On 7th November 2000 the 2nd Defendant filed summons to dismiss the action for want of prosecution. This summons was heard on 30th May 2001.

Setting down matter for Trial

Section 342 (2) of the Judicature (CPC) Law provides that where the Plaintiff:-

> ".....does not within the period fixed .....set the action down for trial, the defendant may himself set the action down for trial or may apply to the Court or a Judge to dismiss the action for want of prosecution and on the hearing of such application the Court or Judge may order the action to be dismissed accordingly or may make such other order as to the Court or Judge may seem just".

On the 20th July 1995 an order on Summons for Directions was made. Thereafter the Plaintiff has a duty to comply with sections 342 (1) and section 343 of the Judicature (CPC) Law. The Plaintiffs Attorney ought to file the formal order along with a letter requesting the Registrar to set the matter down for trial.

The Plaintiff's case is that by letter dated 21st July 1995 the Plaintiffs Attorney Robin Smith requested the Registrar to set down the matter on the Cause List. In compliance with section 579 (4) of the Judicature (CPC) Law the Registrar can only act on this request if the formal order on the Summons for Directions has been filed.

Additionally there has to be compliance with section 343 (2) of the Judicature (CPC) Law which reads as follows:-

> "A party to an action who sets it down for trial shall, within twenty-four hours after doing so, notify the other

parties to the action that he has done so, but save as aforesaid, no notice of trial shall be necessary in any action".

Reference to paragraph 14 of Miss Harrison's affidavit leads to the inescapable inference that the 2nd Defendant was not notified that the matter was set down for trial.

No evidence has been presented to the Court by the Plaintiff that this letter dated 21st July 1995 Exhibit "KGB1" was received by the Registrar as evidenced by Registrar's date stamp or by any other form of admission of service.

Miss Harrison submitted that letter dated 29th June 2000 written on behalf of the Registrar informing Mr. Robin Smith and the Director of State Proceedings that the matter had been placed on the Cause List refers to "your letter received 6th June 2000" Exhibit "MH3." She pointed out that the date of letter is not referred to and that the operative time is when the Court received it.

No letter dated 21st July 1995 from Robin Smith to the Registrar and stamped as having been received in the Registry or Registrar's Chambers on 6th June 2000 has been placed before the Court.

Based on the evidence before the Court I find as a fact that no letter dated 21st July 1995 was received by the Registrar requesting that the matter be placed on the Cause List. I find that the plaintiff failed to comply with the order on the Summons for Directions to set down the matter within 30 days of the date of the order.

Further that there is no evidence to satisfy the Court that there was compliance with sections 342 and 343 of the Judicature (CPC) Law.

Miss Harrison at page 6 paragraph 4 of her written submissions opines that the plaintiff's failure to comply with the order and to

have the matter set down for trial within the stipulated time in the order amounts to inordinate and inexcusable delay as well as an abuse of the process of the Court. She referred the Court to section 342 of the Judicature (CPC) Law where the Court has power to dismiss an action for want of prosecution in circumstances such as these where the Plaintiff does not within the period specified set down the action for trial.

Dismissal for Want of Prosecution

The Court is empowered under its inherent jurisdiction to dismiss the action for want of prosecution if certain conditions are satisfied.

Lord Diplock in Birkett v. James (1977) 2 ALL ER 801 referred to the principles on which the Court should rely in determining whether or not to exercise its discretion to dismiss a matter for want of prosecution and restated the principles in Allen v. McAlpine (1968) 1ALL ER 543. thus:

> "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(a) 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".

This application was based on principle (2) only.

The period of delay of which Miss Harrison complains are:-

(1) the period of delay of 1 year and 9 months between date of filing of defence (6.6.91) and date when Director of State Proceedings was served with copy notice of change of Attorney (19.3.93).

(2) The delay of 5 years from date formal order on Summons for Directions was served on Director of State Proceedings (15.3.96) to date Director of State Proceedings received letter from the Registrar of the Supreme Court advising that the matter had been placed on the Cause List (29.6.00)

Miss Harrison further contends that 7 years have elapsed since the date of issue of the Writ of Summons and Statement of Claim to date order on Summons for Directions was made. Out of those 7 years, 5 years and 9 months have been occasioned by inactivity on the Plaintiffs part.

I accept Miss Harrison's submission on the question of delay re (1) above and in respect of (2) I find the delay to be 4 years and 3 months and not 5 years. I find that 6 years and 5 months have elapsed since the date of the issue of the Writ of Summons and Statement of Claim to date on which Summons for Directions was made.

Section 272 of the Judicature (CPC) Law makes provision for the filing of a Summons for Directions within 7 days of the pleadings being deemed to be closed. Defence was filed on 6th June 1991. It follows that there is delay in the filing of the Summons for Directions.

The order on Summons for Directions was made on 20th July 1995 and the Director of State Proceedings served with a copy on 15th March 1996.

The Director of State Proceedings received a letter from Mrs. Williams on behalf of the Registrar of the Supreme Court dated 29th June 2000 advising that the matter has been placed on the Cause List.

By letter dated 11th October 2000 Plaintiffs Attorneys Gifford, Haughton and Bright requested the Registrar to set down the matter on the Cause List. This procedure is incorrect as leave would first have to be sought to extend the time for setting down and an order granted.

I find that the delay in the instant case is inordinate.

I reject Miss Brown's argument at paragraph 6 of her affidavit that the plaintiff has not delayed in the prosecution of the action and has taken all the required steps and should the orders sought be granted the Plaintiff would be penalized for the administrative delays in the registry.

Even on the Plaintiffs case that Mr. Smith by letter dated 21st July 1995 wrote to the Registrar requesting that the matter be set down, there is no evidence before the Court of any enquiry on his part to ensure that the matter was placed on the Cause List and assigned a trial date at the date fixing session. If it was a case that the file was lost, a new file could have been reconstructed with permission and the matter proceed. Unless the Plaintiff was able to establish that letter of request dated 21st July 1995 came in on time, then Mr. Smith would be obliged to apply for extension of time within which

to set down the matter. However the fact is that the Plaintiff has failed to prove that the Registrar received the said letter. The Registrar's letter of 29th June 2000 is of no effect. It was not until October 2000 that a Certificate of Readiness was filed and served on the Director of State Proceedings and the Registrar by letter dated 11th October 2000 was requested to set down the matter on the Cause List. As stated earlier in order for the Registrar to properly set down the matter, the Plaintiff's Attorney would have had to apply by way of summons for an extension of time within which to set down the matter for trial and to have obtained an order to that effect. This was not done.

Public policy demands that the Plaintiff prosecute the matter with diligence and dispatch. City Printery Ltd. v. Gleaner Co. Ltd. (1968) 13 WIR 126 and Gwendolyn Salmon v. Ronford Wright (1964) 8JLR 510

Even if delay was on the part of the Plaintiff's Attorney, this would not avail the Plaintiff. Wolfe J.A. (as he then was) said in Vashti Wood v. H.G. Liquors Ltd. (1995) 48 WIR page 255

> "a plaintiff cannot hide behind the ineptitude of the Attorneys-at-Law. The Attorneys-at-Law failure to act promptly cannot be a basis on which to deprive a party of his right to have the action dismissed for inordinate delay. The Plaintiff's remedy in such a case is against the defaulting Attorney-at-Law".

I find that the delay is not only inordinate but inexcusable, and that the delay will give rise to a substantial risk that it is not possible to have a fair trial of issues in the action.

In Vashti Wood v. H.G. Liquors Ltd. (supra) Wolfe J.A. (as he then was) in reference to the judgment of Forte J.A. in the West Indies Sugar Ltd. v. Minnell (1993) 30 JLR 542 stated:-

> ".....the substantial risk that there cannot be a fair trial because of the inordinate delay and prejudice are two separate entities and that the proof of one or the other entitles a party to have the matter dismissed for want of prosecution. Once there is evidence that the nature of delay exposes a party to the possibility of an unfair trial he is entitled to the favourable exercise of the Court's discretion, prejudice apart. Inordinate delay, by itself, may make a fair trial impossible. Prejudice, in my view, includes not only actual prejudice but potential prejudice which in the instant case would be the possibility of not being able to obtain a fair trial because of the passage of time".

Thirteen years have elapsed since the cause of action arose. I take into consideration that it would take eighteen (18) months to 2 years (on an optimistic estimate) for the matter to come up for trial. Witnesses would therefore be required to testify to events which occurred in 1987 some 15 years afterwards. To do so will operate unfairly against the 1st Defendant.

The Defendant's case is based primarily on the personal recollection of the 1st Defendant and any witnesses he may have and not substantially on documentary evidence.

Miss Harrison referred to the dicta of Downer J A in the case of Patrick Valentine v. Nicole Lumsden (supra) where it was stated that in actions which depend solely on the personal recollection of witnesses such as in running down cases, even the best of memories falter after the lapse of 6 years. I agree with her submission that although Justice Downer's statement was made in the context of a motor vehicle claim, the principles expounded by him are equally applicable in the present case.

It is difficult to envisage a situation where after 15 years witnesses would be easily available and would recellect with clarity and accuracy at trial what transpired and their memories remain unaffected by the delay.

The Court have a duty to see that cases are conducted with dispatch and in West Indies Sugar v. Minnell and Valentine v. Lumsden it was held that delays of 4 and 6 years respectively were in the particular circumstances unacceptable.

In respect to paragraph 18 of Miss Harrison's affidavit Miss Brown asserted that there was no evidence of the prejudice being suffered by the defendant.

On the issue of prejudice Miss Harrison opined that prejudice includes not only actual prejudice but also potential prejudice and that the requirement that prejudice i.e. actual prejudice be shown has been strongly criticized in many quarters. Further she referred the Court to Vashti Wood v. H.G. Liquors Ltd. (supra) and Valentine v. Lumsden (supra).

In Valentine v. Lumsden the Court of Appeal allowed the appeal on the grounds that the Respondent was guilty of inordinate and inexcusable delay in prosecuting the action.

Patterson J A stated at page 529

> ".....the appellant did not only prove that there was inordinate and inexcusable delay on the part of the respondent's Attorney-at-Law, but also that the delay has resulted in severe prejudice to him, and had given rise to the possibility that a fair trial was no longer possible".

I accept Miss Harrison's submission that the views expressed in Patrick Valentine v. Nicole Lumsden are further supported by the case of Barratt Manchester Ltd. v. Metropolitan Borough Council and another (1989) 1 ALL ER. In that case the English Court of Appeal in dismissing an action where the Plaintiff failed to comply with an Order of the Court requiring him to serve a number of documents on the Defendant setting out his claim held that:-

> ".....the greater the delay, the less the need to establish prejudice: and where there has been excessive and prolonged delay, the Court should not hesitate to... dismiss the inquiry even though it could not be shown to have occasioned any prejudice on the other party ".

Miss Harrison supported her position that a plaintiff's failure to set down an action within the time specified by the Court amounted to an abuse of the process of the Court and was sufficient

ground for the action to be struck out by referring the Court to the case of Gidharimal Choraria v. Nirmal Kumar Sethia (1988) EWCA 179. This case emanates from the Court of Appeal of England and Wales where Lord Justice Nourse stated:-

> "An action may also be struck out for contumelious conduct, or an abuse of the process of the Court or because a fair trial of the action is no longer possible. Conduct is in the ordinary way regarded as contumelious where there is a deliberate failure to comply with a specific order of the Court. In my view however, a series of separate inordinate and inexcusable delays in complete disregard of the rules of Court and with full awareness of the consequences can also be properly regarded as contumelious conduct or, if not that, an abuse of the process of the Court. Both this and the question of a fair trial are matters in which the Court itself is concerned and do not depend on a Defendant raising the question of prejudice".

This case is of persuasive authority.

I am of the opinion that the principles relating to the issue of prejudice outlined in the case of Biss v. Lambeth, Southwark and Lewisham Health Authority (1978) 2 All ER and Grovit and others

v. Doctor and Others (1997) 2 ALL ER 417 are applicable to the instant case.

In the former case Lord Denning at page 130 stated:-

> ".....the prejudice to a defendant by the delay is not to be found solely in the death or disappearance of witnesses or their fading memories or in the loss or destruction of records. There is much prejudice to a defendant, in having the action hanging over his head indefinitely, not knowing when it is going to be brought to trial".

He went on further to state inter alia

"There comes a time when it (the Defendant) is entitled to have some peace of mind and to regard the incident as closed".

In the latter case Lord Woolfe at page 417 stated:-

> "The evidence which was relied upon to establish the abuse of process may be the plaintiff's inactivity. The same evidence will no doubt be capable of supporting an application to dismiss for want of prosecution".

In conclusion I find:-

(i) that there has been non compliance by the Plaintiff with section 342 of the Judicature (CPC) Law.

(ii) that there has been inordinate and inexcusable delay on the part of the plaintiff in the prosecution of the matter and 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.

(iii) that the delay has caused prejudice to the defendant.

(iv) that the delays amounts to an abuse of the process of the Court.

Action dismissed for want of prosecution and the costs incidental to and occasioned by this application be awarded to the 2nd Defendant to be taxed if not agreed.