IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 225 OF 1992
IN CHAMBERS

BETWEEN	LORENZO RICHARDS	PLAINTIFF
AND	UNITED CAR RENTALS LTD.	1ST DEFENDANT
AND	OSMOND BERNARD	2ND DEFENDANT

No appearance for plaintiff

Miss Alicia Richards instructed by Messrs. Dunn, Cox for the first defendant

Heard July 3, 2002 and July 12, 2002

APPLICATION TO DISMISS FOR WANT OF PROSECUTION

Sykes J (Ag)

This is yet another of the now many cases coming before these courts where a defendant is seeking to remove the threat of liability from his neck because of the inordinate delay of the plaintiff in pursuing his action. The second defendant is not a party to this hearing.

The cause of action arose out of an accident that occurred on November 6, 1991. The plaintiff in his writ of summons and statement of claim filed December 14, 1992

alleged that he was injured by a motor car driven by the second defendant which was owned by the first defendant.

The first defendant entered an appearance on March 3, 1993. A defence was filed by March 10, 1993. By May 4, 1993 orders were made by the Master on a summons for directions. So far the matter was proceeding with appropriate speed.

Within three years of the writ being filed the matter first came up for hearing on May 29, 1995. It was adjourned to June 1, 1995. On that day the case was adjourned sine die because the plaintiff's attorney was absent.

Between June 1, 1995 and December 8, 1997 nothing happened. The case finally reappeared on the trial list on December 8, 1997. It was adjourned to December 10, 1997. On December 10, 1997 the matter was adjourned because the second defendant, apparently was "not served", whatever that means. This caused the matter to be adjourned sine die. By this time the plaintiff was now represented by Arthur Williams & Co and not Messrs. Kelly, Williams and Mclean. The change was effected on December 3, 1997 when a notice of change of attorney was filed.

It must be noted that the first defendant was represented on every date the matter was set down for trial. There is no evidence to suggest that the first defendant contributed to any of the adjournments.

Absolutely nothing has been done by the plaintiff since December 10, 1997. We are now five months away from the fifth anniversary of total inactivity on the part of the plaintiff.

At this hearing the plaintiff was not present and neither was he represented by counsel.

The first defendant has applied, by summons dated February 28, 2002 and filed March 4, 2002, to have the

action dismissed for want of prosecution either under the Civil Procedure Code or under the inherent power of the court.

I have taken careful note of the following:

1. the summons to dismiss for want of prosecution and supporting affidavit were filed on March 4, 2002;
2. they were served on the attorney on record for the plaintiff, Arthur Williams & Co. on June 19, 2002 at 12:07 pm;
3. the acknowledgement of service is evidenced by a stamp in the name of Arthur Williams & Co. and signed by one "S. Robinson" who received the documents;
4. no affidavit in response to the summons has been filed by or on behalf of the plaintiff.

I am satisfied that the plaintiff was properly served and had sufficient notice of the hearing of this summons.

The affidavit filed in support asserts that the plaintiff has failed to prosecute his claim with "due diligence and care" without giving any reason for the long delay. This appears to me to be raising the issue of whether what has occurred to date can be regarded as an abuse of process.

The affidavit in support of the summons also deals with prejudice caused to the first defendant. The affidavit states that the first defendant has been prejudiced in three ways:

(a) witnesses are no longer available and even if they were their memories may have faded during the period between the accident and now, a period of over ten years;

(b) the first defendant has had to keep this suit on their books as a contingent liability. This has had an adverse effect on the business because each year it has had to set aside increasing sums of money to allow for the effects of inflation and interest, assuming that the plaintiff was successful in the suit;

(c) there is the risk of being exposed to significantly higher damages awarded now than in 1997 when the matter last came up for trial.

THE LAW

The legal principles applicable to this area are well known. They have been restated by the Court of Appeal of Jamaica as recently as March 11, 2002 in the case of ***Port Services Ltd v Mobay Undersea Tours Ltd. & Fireman's Fund Insurance Company*** SCCA No. 18/2001.

An examination of the cases shows that suits, such as motor vehicle cases, that depend upon the recollection of witnesses are particularly vulnerable to attack by summonses to dismiss for want of prosecution whenever the basis of the dismissal is one of inordinate delay. The reason for this kind of vulnerability is not hard to see.

Downer J.A. in ***Valentine v Lumsden (An Infant) & Lumsden (Next Friend)*** (1993) 30 J.L.R. 525 has so eloquently said at page 527:

> *As for inordinate delay,* ***the courts have taken a stern attitude towards inexcusable delay especially in running down actions which depend largely on the personal recollection of witnesses.*** *Even the best of memories falter after a lapse of six years and so it may be impossible to obtain a fair trial. Since the limitation period is six years and the law contemplates hearings after six years where the writ was filed just in time.* (my emphasis)

Gordon J.A. said much the same thing in ***Wood v H.G. Liquors Ltd*** (1995) 48 W.I.R. 240, 252b:

> ***The courts have been particularly anxious to ensure that cases are dealt with expeditiously, especially accident cases.*** *In these cases, witnesses have to depend largely on their memories to recollect details of events which occurred in the past and with the passage of time, recollection fails.* (my emphasis)

In the light of these passages it should not be surprising if defendants in motor vehicle accident cases may find it easier to make a case of great prejudice on the sole basis of lapse of time. These passages however do not and really cannot assist the first defendant for reasons that are set out further in this judgment.

That a court can take into account the impact of delay on the operations on a business cannot now be questioned. There is not much authority on this point in Jamaica but the issue has been canvassed in the United Kingdom. There is support for this to be derived from passages in ***Biss v Lambeth Health Authority*** [1978] 2 All ER 125.

Lord Denning M.R. said at page 131e:

> ***There is much prejudice to a defendant in having an action hanging over his head indefinitely, not knowing when it is going to brought to trial****…So in the* ***President of India case,*** *which we heard the other day. (sic) The business was prejudiced because it could not carry on its business affairs with any confidence, or enter into forward commitments, whilst the action for damages was still in being against it.*(my emphasis)

Geoffrey Lane L.J. at page 134d stated:

> *A small business concern faced with a huge claim in damages may well suffer continuing financial stringency and loss each week that goes by through having to set aside funds against their contingent liabilities.*

With regard to the submission that the first defendant's liability may be greater Downer J.A. in ***Valentine's case*** (supra) accepted the proposition that devaluation of the dollar with the consequential inflation thereto is a factor that may become relevant (see page 527C).

Delay in pursuing an action can in some instances be regarded as an abuse of process. In ***Grovit v Doctor*** [1997] 2 All ER 417 Lord Woolf made this very important point at page 424f-g

> *To commence and continue proceedings which you have no intention to bring to a conclusion can amount to an abuse of process. Where this is the situation the party against whom the proceedings is brought is entitled to apply to have the action struck out and if the justice so requires (which will frequently be the case) the courts will dismiss the action.* ***The evidence***

> ***relied upon to establish the abuse of process may be the plaintiff's inactivity.*** *The same evidence will then no doubt be capable of supporting an application to dismiss for want of prosecution.* (my emphasis)

ANALYSIS AND CONCLUSION

(a) abuse of process

This cause action arose in 1991. The writ was filed in 1992. There have been four trial dates upto December 1997 and since 1997 the plaintiff has done nothing to proceed with the matter. What inference ought the court to draw from this inactivity? The most reasonable one to me is that he no longer intends to pursue the action. Not even the summons to dismiss the action for want of prosecution has elicited any kind of response from the plaintiff or his attorneys on the record.

Grovit v Doctor (supra) has established that "to continue litigation with no intention to bring it to a conclusion can amount to an abuse of process." The plaintiff's inactivity can be sufficient. The delay in ***Grovit's*** case (supra) was two years in a libel action. The allegedly libelous words were known so there was no question that there could have been a trial on the merits but the plaintiff was undone by delay.

The case of ***Arbuthnot Latham Bank Ltd. v Trafalgar Holdings*** [1998] 1 W.L.R. 1426 did not seek to question either the result or the basis of the decision in ***Grovit's*** case (supra). What the ***Arbuthnot*** case (supra) did was to add yet another weapon to the amoury of defendants who seek to have matters dismissed. The case decided that the manner in which litigation is conducted may itself amount to an abuse of process. This ground is quite clear and distinct

from the ground of prejudice that must be supported by evidence.

These two cases have put the law beyond any doubt: the ground of abuse of process is an independent ground and may be relied on either together with the ground of prejudice or in cases where prejudice cannot be established.

It may well be that the Court of Appeal in England while accepting the authority of ***Birkett v James*** [1978] A.C. 297 were seeking to circumvent its straight jacket of Lord Diplock's second limb by developing the abuse of process ground.

In the instant case there is a four and one half year delay after the last adjournment. This is not the conduct of a plaintiff who is anxious to have the matter concluded. As I have already noted on every single occasion that the matter has come up on the trial list the first defendant has been represented and there is nothing to indicate that any of the adjournments was caused by the first defendant. There is no good reason why this action should be allowed to remain in the court system.

On the authority of ***Grovit's case*** (supra) I would dismiss this case on the grounds of abuse of process.

(b) prejudice to the defendant

(i) Unavailable witnesses

The first defendant asserts that its witnesses are no longer available. This factor in any kind of case must amount to some prejudice to the litigant. An examination of the defence filed by the first defendant does not seem to me to rest at all on the ability of witnesses to recall the

details of the accident. The first defendant is denying that the second defendant was its servant or agent. It says that the second defendant was a hirer of the motor car and was on his own business. This would mean that the minute details about how the accident happened is not of immediate importance to the defence as pleaded. Thus despite the passages cited the cases of ***Valentine*** (supra) and ***Wood*** (supra) cannot assist the first defendant.

The witnesses that are no longer available would seem to be those that would be used to establish the contractual relationship with the second defendant. Further the submission that the memories would have faded even if they were available is of doubtful assistance to the first defendant unless it is being said that the contract of hire was not in writing or there is important evidence that these witnesses can provide.

I would also add that the omission to state who the witnesses were and what evidence they were likely to give means that I am is unable to properly assess the impact that this may or is likely to have on the first defendant's case. Consequently I do not accept the mere assertion that the witnesses are no longer available. This ground of prejudice has not been made out. This is not a plain and obvious case there the court could presume prejudice because of the clear inordinate delay by the plaintiff.

(ii) effect on business

The first defendant says that each year it has to be setting aside greater and greater sums in anticipation of an event that may never come. The sums increase because of

inflation and the possibility of interest being awarded to the plaintiff.

Inferentially the first defendant is saying that money that could be usefully spent in the conduct of his business now has to be set aside and therefore such sums are not available to him. Inferentially as well he has been doing this ever since he was made a party to the suit - a period of nine years.

The affidavit in support of the summons has not demonstrated how the suit has affected the operation of the business. All that is said is that money has to be set aside. What effect this has had on the actual operation of the business has not been stated. If the applicant wishes to succeed on this ground it must be demonstrated, as distinct from merely asserted, that the action has had a corrosive effect on its business operations. The damage done by the action must be attributable to the delay in prosecuting the matter and not attributable to the mere existence of the action.

The fact that an action is brought against a business will always mean that they have to regard it as a contingent liability and in that regard a business is in no worse position than any other defendant. There is no evidence in the supporting affidavit setting out how the business has been affected. Accordingly this ground of prejudice has not been made out.

(iii) possibility of increased damages

The final ground, under this head, relied on by the first defendant is that the damages awarded now would be higher than in 1997 is an unsupported assertion. The court

would be greatly assisted if it were demonstrated how this would be prejudicial to the first defendant.

I do not believe that this assertion without more is sufficient. Inflation is a fact of life and to that extent unless the defendant settles the suit soon after service of the writ of summons and statement of claim it is almost inevitable that any damages awarded at a later date will be adjusted to take account of inflation.

Again the evidence is not there to permit me to accept this submission.

Defendants who are applying to have the matter struck on the basis that they have been prejudiced should bear in mind the timely reminder of Lord Brandon of Oakbrook in ***Warshaw v Drew*** (1990) 38 W.I.R. 221. His Lordship approved the view of Carberry J.A. (Carberry J.A.'s judgment in the Court of Appeal in the same case) that there is an onus on [defendants] to establish by evidence the nature and extent of any prejudice caused to them by the delay on which they rely. Lord Brandon went on to say that in that particular case the court was not prepared to infer prejudice in the absence of any such evidence.

There has been a failure in this particular case to demonstrate by evidence the prejudice caused to the first defendant. The inevitable consequence of this is that I have not been able to accept any of the reasons advanced by the first defendant to support the ground of prejudice.

CONCLUSION

The action against the first defendant is dismissed on the ground that the plaintiff has not demonstrated that he intends to conclude the matter. His inactivity for over

four years is inordinate and inexcusable. He was able to have the matter in court four times for trial in two years. There is no evidence before me explaining why the plaintiff has not been able to have the matter set down even once in the next four and one half years.

Costs to the first defendant to be agreed or taxed.