IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

BETWEEN			KEVIN SMART (by next friend ROBERT SMART)	1ST PLAINTIFF
A	N	D	ROBERT SMART	2ND PLAINTIFF
A	N	D	EUGENE FORREST	3RD PLAINTIFF
A	N	D	PERCIVAL CUNNINGHAM	1ST DEFENDANT
A	N	D	VINCENT WALKER	2ND DEFENDANT

Mr. Rudolph Smellie for Plaintiffs.

Mr. Christopher Samuda for Defendants.

HEARD: 7th May, 1997, 13th, 18thand 19th December, 2000

F.A. SMITH, J.

Before me are two summonses. The first in time is the defendants' Summons to Dismiss the plaintiffs' Action for Want of Prosecution. The other is the Plaintiffs' Summons to Extend Time.

The Facts

This action arose out of an accident which occurred on the 15th March, 1989. At the material time the first plaintiff was a school boy aged 7 years. The second plaintiff is the father and next friend of the first plaintiff. No mention is made in the pleadings as to the status of the third plaintiff, but presumably she is the mother of the first plaintiff.

On the date aforesaid a car bearing registration number PP3199 owned by the first defendant and driven by the second defendant collided with the first plaintiff thereby causing him personal injuries. The plaintiffs alleged that the accident was caused by the negligence of the second defendant.

The Writ of Summons with the Statement of Claim was filed by the plaintiffs on the 9th February, 1990. These were served on the first defendant on the 12th February, 1990.

On the 1st March, 1990, Interlocutory Judgment in Default of Appearance was entered against the first defendant. On the 17th July, 1990 a Summons to Proceed to assessment of damages was filed.

On the 29th August, 1990 Appearance was entered on behalf of both defendants. Also on the 29th August, 1990, a Defence was filed on behalf of both defendants. This was irregular.

On the 8th November, 1990, a Summons to Set Aside Default Judgment and for leave to file Defence was filed.

On the 18th February, 1991 the Interlocutory Judgment entered against the defendants was set aside and the defendants were granted leave to defend the action and to file their Defence within fourteen (14) days of the date of the Order.

On the 21st February, 1991 the defendant filed their Defence. A Reply thereto was filed by the plaintiffs on the 28th February, 1991. On the 16th May, 1991 the Summons for Direction was heard and it was ordered that the matter be set down for trial within 30 days. On the 12th June, 1991, the plaintiffs requested

that the Registrar set down the matter on the cause list. A formal Order was filed on the 26th November, 1991.

On the 26th November, 1991 and on the 6th March, 1993 the plaintiffs filed Certificates of Readiness.

On the 19th May, 1995 the defendants filed a Summons to Dismiss Action for Want of Prosecution. This Summons was set for hearing on the 9th October, 1995.

On the 9th October, 1995 the summons was adjourned sine die with costs to the defendants. The summons was re-issued for the 10th January, 1996 when the plaintiffs complained that the summons was short served. It was again adjourned sine die and it was further re-issued for the 29th May, 1996.

On the 17th January, 1996 the plaintiffs filed a Summons to Extend Time for Setting Down Cause for Trial. This latter summons was set for hearing on the 5th February, 1996. The minute of Order indicates that the plaintiffs and their attorneys were absent on the 5th February, 1996 when the summons was adjourned sine die with costs to the defendants.

Subsequently, it was ordered that both Summonses be set down for hearing on the same day.

The hearing of these Summonses began before me on the 7th May, 1997. The hearing was adjourned for completion on the 8th May, 1997. On that date it was not reached and was adjourned to the 15th May, 1997. The minute of Order indicates that on the 15th May the file was not located and the hearing was adjourned to 17th June, 1998.

On the 17th June, 1998 the file was still not located and the matter was adjourned to the 15thJuly, 1998. There is no record in the file as to what transpired on the 15th July, 1998. However the Registrar wrote the plaintiffs on the 31st July, 1998 with a view to obtaining a convenient date for continuation. The 23rd September, 1998 was agreed upon. However, the matter was not listed for that date. Further attempts were made by the Registrar to arrive at a convenient date for continuation. The 22nd of February, 1999 was set for the matter to be completed. On the 16th February, 1999 the Registrar wrote the parties' attorneys, advising them that the matter "will not be heard on February 22, as the Judge has been reassigned to hear Assessment of Damages." They were asked to contact the Registrar with a view to fixing a new date. No other date was set until the 11th December, 2000.

Setting down Matter for Trial

After an Order on the Summons for Directions is made, it is the duty of the plaintiff to set the matter down for trial within the time prescribed by the Order – section 342(I) Judicature (C.P.C.) Act. In order to set the matter down for trial the plaintiff must deliver to the Registrar a request that the action be set down for trial at the place specified in the Order – Section 343 C.P.C.

On the 12th June, 1991 the plaintiffs' attorney wrote the Registrar requesting that the action be set down on the cause list. At the time of this request no Formal Order was filed. The matter was not set down on the cause list presumably because of the failure of the plaintiffs' attorney to file a Formal Order on the Summons for Direction.

Section 579 (2), (3) and (4) reads:

> (2) Subject to the provisions of section 495 every Judgment or order shall unless otherwise ordered be drawn up and entered by the party having the carriage of such judgment or order or his solicitor within 14 days from the date thereof, and if any judgment or order shall not have been drawn up and entered within the time aforesaid the Registrar shall report to the Judge in writing as to the reason why the provisions of this subsection have not been complied with and whether in his opinion any and which of the parties or their solicitors are r espon-sible for the delay, and thereupon the Judge may direct such parties or solicitors to attend before him and may unless a satisfactory explanation be forthcoming make such order as to the payment of all or any part of the costs of drawing up and entering the judgment or order as he shall think fit. He may also direct that as against any party responsible for such delay the time for appealing from such judgment or order shall run as from the date when the same ought to have been drawn up and entered in accordance with this subsection.
>
> (3) Every judgment or order shall after entry be forth-with filed with the proceedings.
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> (4) A judgment or order hereby required to be drawn up and entered shall not be acted on or enforced unless and until such judgment or order has been so drawn up and entered.

Section 495(I) of the C.P.C. provides:

> (1) Where an order has been made not embodying any special terms nor including any special directions but simply enlarging time for taking any proceeding or doing any act or giving leave –
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> (a) for the issue of any writ other than a writ of attachment ;
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> (b) for amendment of any writ or pleadings;
>
> © for the filing of any document; or

> (d) for any act to be done by any officer of the court other than a solicitor, it shall not be necessary to draw up such unless the Court or Judge otherwise directs, but the production of a minute of such order, approved by the Judge shall be sufficient authority for such enlargement of time, issue, amendment, filing or other act.

Although a duty is placed on the Registrar to report non compliance with S.579(2) to the Judge it seems to me that the Registrar was none the less correct in insisting that the Formal Order be drawn up and filed before the matter is set down for trial. The orders made on the Summons for Directions must be lodged with the Registrar with the request to set down the matter. If this is so, then the request of the plaintiffs made on the 12th June, 1991, was not effective at the time it was made. It could only become effective on the 26th of November, 1991 when the Formal Order on the Summons for Directions was filed. This would mean that the plaintiffs did not comply with the Order of the master to set the matter down for trial within 30.

Dismissal for Want of Prosecution

S.342(2) of the C.P.C. 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."

In **Birkett v. James** (1977) 2 All E.R. 801, Lord Diplock restated the principles which should govern the exercise of the Court's power to dismiss an action for want of prosecution:

> "The power should be exercised only where the court is satisfied either:
>
> (i) that the default has been intentional and contumelious eg. disobedience of a peremptory order of this 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."

These principles were applied by the Jamaican Court of Appeal in **Valentine v. Lumsden** (an infant) and **Lascelles Lumsden** (next friend) SCCA 106/92, **West Indies Sugar v. Minnell** SCCA 91/92 and **Vashti Wood v. H.G. Liquors Ltd. et al** SCCA 23/93.

Inordinate and Excusable Delay and Prejudice to Defendant

Mr. Samuda for the defendants submits that the evidence clearly shows that there is a default on the part of the plaintiffs or their attorneys in prosecuting the action.

There have been periods of delay in excess of two (2) years which, he contends, are inordinate. The affidavits contain unequivocal admissions that the delay in prosecuting the action was in consequence of counsel for the plaintiffs' inadvertence or ignorance of procedural law. The main periods of delay of which he complains are:

1. The period of delay of 6 months between the hearing of the Summons for Direction and the filing of the Formal Order.

2. The delay of 16 months from the filing of the Formal Order to the filing of the last Certificate of Readiness which was irregular.

3. The delay of 4 months from the filing of that Certificate of Readiness to July, 1993 when it is said that the plaintiffs' Counsel sought further instructions from the plaintiffs.

4. The delay of 19 months between July, 1993 and May, 1995 when the Summons to Dismiss was filed.

The primary consideration for the court, he contends, is its duty to control the pace of litigation irrespective of the wishes of the parties. For this contention he relies on **Valentine v. Lumsden** (supra).

The cause of the inordinate delay, he argues, is the failure of the plaintiff s' attorneys to file the Formal Order within the prescribed time of 30 days, and their failure to make the requisite enquiries. These failures were as a result of the inadvertence or ignorance of the plaintiffs' attorneys.

Mr. Samuda further submits that there is a duty on plaintiffs' counsel to ensure that the matter is placed on the Cause List and brought to trial. Public policy demands that the plaintiffs prosecute the matter with diligence and

dispatch. He relies on **City Printery Ltd. v. Gleaner Co. Ltd**. (1968) 13 W.I.R. 126 and **Gwendolyn Salmon v. Ronford Wright** (1964) 8 JLR 510.

On the evidence before the court, he contends, that it is clear that there has been inordinate delay and that the plaintiffs have failed to show that such delay was excusable. The defendants, he submits, have been severely prejudiced by the delay. They have been prejudiced in that since the accident there has been a significant devaluation of the dollar with the consequential inflation. Further, any decision against the defendants may result in an award which exceeds the limit of the insurance policy. He refers to **Gloria v. Sokoloft** (1969) 1 All E.R. 204 and submits that after such inordinate delay of over 6 years from the date of the accident there could not be a fair trial on the issue of damages.

Mr. Smellie for the plaintiffs submits that before the court may dismiss an action for want of prosecution, the court must be satisfied that the three conditions referred to in the decided cases have been satisfied.

The court must be satisfied that:

(1) there has been inordinate delay on the part of the plaintiff;

(2) such delay was inexcusable, and;

(3) it has caused prejudice or there is the risk that there might not be a fair trial.

He concedes that there has been inordinate delay. However, he contends that the plaintiffs did not cause the delay. The initial post – writ delay was

caused by the defendant, which led to the defendants' application to set aside default judgment on 18th February, 1991.

He admits that in terms of the "following up" there was inadvertence on the part of the plaintiffs' attorneys. However, he contends that there is no duty on the plaintiffs' attorneys to "follow up".

The bases of his submissions are:

(i) The plaintiffs' attorneys had done all that they had to do to have the matter set down for trial.

(ii) Even if the failure of the plaintiffs to file the Formal Order timeously and to follow up was the cause of the inordinate delay, such delay was excusable.

(iii) Such delay will not give rise to any substantial risk that a fair trial will not be possible, or to any other prejudice to the defendants.

Analysis and Conclusion

As stated earlier, Mr. Smellie has conceded that the delay is inordinate. I have endeavoured to show that the plaintiffs' attorney had a duty to file the Formal Order along with the letter requesting the Registrar to set the matter down for trial. This was not done through inadvertence or ignorance. Indeed, Mr. Smellie in his affidavits sworn to on the 17th January, 1996 and 20th of May, 1997 stated:

> "that through inadvertence or ignorance the Order on Summons for Directions was not filed until the 26th day of November, 1991, such Order being signed and certified by the Registrar".

After the 26th November, 1991, neither the plaintiffs nor their attorney did anything until March 1993, when a Certificate of Readiness was filed. Then the plaintiffs and their attorney went to sleep again. Some three years later, they were bestirred by the defendants' Summons to Dismiss and on the 17th January, 1996 they filed a Summons seeking an extension of time to set the matter down for trial.

What is the plaintiffs' attorneys excuse or reason for the inordinate delay? Mr. Smellie, in his affidavit sworn to on the 20th May, 1997, had this to say at paragraphs 9 and 10.

> "(9) That up until recently we had at no time received any notification from the Registrar that there was any problem concerning the matter being placed on the Cause List, and believed that any failure on the Registrar's part to have done so was due to no more than the administrative problems which the Civil Registry of the Supreme Court faces.
>
> (10) That through some inadvertence we had failed to make the requisite enquiries concerning this matter but as a result of action being taken herein to dismiss the matter for want of prosecution, we recently made enquiries at the Registry as to the reason for the delay in the matter, and were advised by Miss Grizzle of the said Registry, and verily believe, that the matter has not been set down because the Formal Order on the Summons for Directions was not filed within 30 days of the Order on the said Summons being made."

It is fair to say that the affidavits filed by counsel on behalf of the plaintiffs are replete with failures and omissions on the part of their counsel to discharge

the duty of ensuring that the matter is not only placed on the Cause List but also is assigned a trial date.

Furthermore, the affidavits of counsel for the plaintiffs disclose admissions of failure to make the necessary enquiries with respect to the placement of the matter on the Cause List.

It seems to me that it cannot be seriously argued that such inadvertence and/or such ignorance can constitute a valid excuse for the delay. Public policy insists on promptness in hearing of cases – ***Valentine v. Lumsden*** C.A. (supra) per Downer J.A.

In **Gwendolyn Salmon v. Ronford Wright** (1964) 8 JLR 510, the then President of the Court of Appeal said at p.512 (F-G):

> "In the instant case it is my view that the applicant has not shown any good cause or reason why this court should exercise its discretion in his favour. The delay in this cause has been extensive and we have been complaining from this bench for some time past of the obvious carelessness with which appellants and some practitioners, counsel as well as solicitors, appear to conduct their business, and unless really good cause is shown and the court is satisfied that every effort has been made to cure any defect that might have existed in the appeal proceedings, that we should be slow to exercise that discretion."

Although the Court of Appeal was then dealing with an application to extend time for appealing and not an application to dismiss for want of prosecution, it is my respectful view that the above passage is applicable to the instant case.

It is also my view that the plaintiffs have failed to show that the inordinate delay was excusable.

I pass now to deal with the issue of prejudice. The second defendant, Mr. Vincent Walker, in his affidavit sworn to on the 19th July, 1995 swore that:

> "with the passage of time I am certainly unable to recall the actual details of the accident which happened in split seconds when the plaintiff suddenly and unexpectedly dashed from behind a motor vehicle into the side of the bus I was driving."

He further stated that he was advised by his attorneys and "do verily believe that the current value of the injuries which the first plaintiff allegedly suffered is, in respect of the award for pain and suffering alone, is in the region of Four Hundred Thousand Dollars ($400,000.00), to Five Hundred Thousand Dollars ($500,000.00) which will increase with the passage of time as a consequence of the rate of inflation."

The first defendant, the owner of the vehicle which was involved in the collision, in his affidavit sworn to on the 19th May, 1995 testified that the limit of the vehicle's insurance policy was $250,000.00 in respect of any one claim.

He also stated:

> "I am further advised by my attorneys-at-law and do verily believe that the value of such injuries in 1991 or even 1992 was below Two Hundred and Fifty Thousand Dollars ($250,000.00) but that the same has increased dramatically with the violent devaluation of the local currency and resultant adverse inflationary effects on awards for personal injuries made in the Supreme Court."

It is the fear of the first defendant that, in the event the action is permitted to proceed and judgment given to the plaintiffs, he will be unable to pay damages in excess of the policy limit.

The court must consider the prejudicial effect of the inordinate and inexcusable delay on both the issue of liability and the issue of damages.

In **Valentine v. Lumsden** (supra) Downer, J.A. emphasised the fact that the courts have taken a stern attitude towards inexcusable delay, especially in running down actions which depend largely on the personal recollection of witnesses. Although witnesses could refresh their memories from their written statements, their actual recollection of the details of the accident which happened suddenly and in a brief moment, might vanish with the passing of time.

The accident which gave rise to this action took place some eleven (11) years ago. When the plaintiffs filed their Summons to extend time in January, 1996, nearly seven (7) years had elapsed since the accident. In **Gloria v. Sokoloft** (1969) 1 All E.R. 204, where liability was admitted, the Court of Appeal was of the opinion that a 6 year post accident period was so long that there could not be a fair trial on the issue of damages. Since the limitation period in this jurisdiction is six years, (in England it is three years for personal injuries), the law contemplates trials after six years in instances where the Writ was filed, just in time. However, if this case should proceed to trial, it is not likely that it would be tried before the year 2002, that is, thirteen (13) years after the accident. I am firmly of the view that after such a long period there could not be a fair trial on the issue of damages or on the issue of liability.

In **FitzPatrick v. Batger and Co. Ltd**. (1967) 2 All E.R. 657 at 658 E-F, Lord Denning M.R., quoting himself in a previous decision, said:

> ".....it is the duty of the plaintiff's adviser to get on with the case. Public policy demands that the

> business of the courts should be conducted with expedition. Just consider the times here. The accident was on December 13, 1961. If we allowed the case to be set down now it would not come on for trial until the end of the year. That would be some six years after the accident. It is impossible to have a fair trial after so long a time. The delay is far beyond anything which we can excuse. This action has gone to sleep for nearly two years. It should now be dismissed for want of prosecution."

It is said by counsel for the plaintiffs that, in light of the medical evidence the damages awardable would not exceed the insurable limit of $250,000.00 if the matter is allowed to go to trial. I would venture to think that there can be no guarantee that this will be so.

Conclusion

I hold that there has been inordinate and inexcusable delay on the part of the plaintiffs' attorneys-at-law 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.

Accordingly, it is hereby ordered that:

1. The Summons to Extend Time for Setting Down Cause for Trial dated 17th January, 1996 be dismissed with costs to the defendants , to be taxed if not agreed.

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