J A M A I C A

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL No. 42/1985

BEFORE: The Hon. Mr. Justice Kerr, J.A.
The Hon. Mr. Justice Carberry, J.A.
The Hon. Mr. Justice Wright, J.A.

BETWEEN - MURRAY WARSHAW
ROY GILLINGS
RICHARD ADLER - DEFENDANTS/APPELLANTS

AND - WILLARD DREW - PLAINTIFF/RESPONDENT

Mr. Dennis Morrison instructed by Mr. Alan Deans of O.G. Harding & Co. for the Appellants.

Mr. Donald Scharschmidt instructed by Miss Sonia Jones of Gresford Jones & Co. for the Respondent.

June 23, 24 & July 24, 1986

CARBERRY, J.A.:

This is an appeal of a somewhat unusual character. It arises out of a summons brought by the Defendants to dismiss the Plaintiff's action for want of prosecution. It was heard before the Master, Mr. A.J. Lambert on the 7th and 15th May, 1985, and on the latter date he made what is sometimes called an "unless" order. It reads thus:-

"1. Order that this action be dismissed for want of prosecution, unless the Plaintiff within fourteen (14) days of the date hereof serve Statement of Claim filed herein on the 27th January, 1976, on the Defendants or their Attorneys-at-Law O.G. Harding & Co.

2. Costs of this application to be the Defendants in any event."

The Defendants, who were the applicants below, appeal against this order; they contend that the action should have been dismissed simpliciter, and that the Plaintiff should not in effect have been given an opportunity to get the action moving again. The Plaintiff filed a respondent's notice in which they support the Master's decision on the ground that the Defendants failed to show that they had been prejudiced by the delay, and that their application was misconceived.

The Writ, and the Statement of Claim were both filed in the Supreme Court Registry on the 28th January, 1976. They appear to have been settled on the 20th January, 1976, and to have been *"stamped" on the 27th January, 1976. (*Stamped means stamp duty paid, and is not the actual date on which they were filed in the Registry).

The story told by these two documents is to the effect that the Defendants are registered as the owners of certain premises known as Coral Gables situate at Coral Gardens near Montego Bay, in the parish of St. James, at Vol. 842 Fol. 7 of the Register Book of Titles. That they leased the premises to Arthur Lemieux and William Chenoeth for a period of five years as from 1st March, 1971. That the lease contained an option to purchase these premises at a price of (U.S.?) $24,000.00, and that the two lessees paid in advance for this option the sum of $1,000. and that apparently out of their monthly rental there is set aside in a special account the sum

of $139 per month, and that if the option is exercised the $1,000 and the total of these monthly sums will be credited towards the purchase price. All of these parties were normally resident outside of the jurisdiction. The Plaintiff alleged that the two original lessors assigned their lease and interest in these premises to him on the 14th September, 1971. The Plaintiff alleges that by letter dated the 13th January, 1975, from his then Attorney Mr. P.D. McConell of Messrs. Judah, Desnoes & Co. he exercised the option by letter addressed to the active member of the triumvirate of owners, Mr. Murray Warshaw, and that he is ready, willing and able to complete on the terms of the option, but that the Defendants having originally agreed to execute the necessary agreement for sale, have changed their minds and neglect or refuse to complete the sale. The Plaintiff claimed specific performance, and or alternatively damages.

It appears from what is said elsewhere that to date the Plaintiff still occupies the premises paying the stipulated rent and the amount due to go to the special account referred to earlier.

Pausing here, up to this stage no question of delay arises. The option was exercised in January, 1975, and after certain correspondence, in the course of which Plaintiff's original attorney Mr. McConnell died, Plaintiff filed this action through his new Attorney Mr. Gresford Jones, in January 1976.

Shortly after the Writ and Statement of Claim were filed, application was made for leave to serve Notice of the Writ on the Defendants out of the jurisdiction. (The Defendants appear to be American Citizens). Leave was granted on the 28th January, 1976. It does not appear to have been

acted on, for a second such application was made in October, 1976, and notes on the Supreme Court file show that on two successive dates when the application came on for hearing, there was no appearance by the Plaintiff or his attorney, and the application was adjourned sine die. No fresh Order was made. The Plaintiff's attorney offers an explanation for this, which is considered below. Be that as it may, the fact is that to date there has been no formal proof of service, nor any entry of appearance on behalf of the Defendants.

However, on the 28th January, 1976, the same date on which the Writ and Statement of Claim were filed, the Plaintiff, obtained an ex-parte injunction directed to the Registrar of Titles, restraining the Registrar from registering any dealings with the land, the subject of the action, "until the determination of this action, or further order of the Court". The injunction was issued in the main action: it is not in the usual form of an interim injunction, but rather in the form of an interlocutory injunction. It contained an undertaking by the Plaintiff "to indemnify the defendants against any damage that may be sustained by reason of the disposition of the property being delayed". The Defendants did not have the opportunity of being heard on the injunction so granted. On the other hand, though granted in January 1976 they have never to date sought to have it set aside on any ground whatsoever. We have not seen the supporting affidavit of Miss Sonia Jones in support of the application for the injunction, but it apparently alleged that the Defendants were negotiating to sell to someone else. If so, at that stage the defendants must clearly have been aware of this embargo, and, in all probability, of the Writ also.

The present application to dismiss the action for want of prosecution was taken out on 26th October, 1983, but not heard till May, 1984, due no doubt to the affidavits filed on both sides. The Summons did not on its face specify in what respect or for what cause it alleged default in the Plaintiff. The supporting affidavit filed in support of the Defendants' application was not made by any of them, but by their then attorney and it was content merely to point to the date of the writ, to note that leave had been given to serve it out of the jurisdiction, and that there had been subsequent applications for leave which had evidently not been acted on. The affidavit then baldly stated in paragraph 4:-

> "That since that time none of the Defendants has been served with notice of the writ of summons."

It added in paragraph 6:-

> "That to date no further steps have been taken in this matter by or on behalf of the Plaintiff"
> .....

It is fair to note that the signatory to the affidavit was one of a long succession of the Defendants' lawyers, (and not the last as she has unfortunately since died), and that one would have expected it to indicate that she had been informed and verily believed, or words to like effect, since she would have been in no position to make such an assertion without instructions from the Defendants, or at least the most active of them, Mr. Warshaw.

In response, the Plaintiff himself filed an affidavit. It set out much of the story indicated in the Statement of Claim, and exhibited letters to the Plaintiff's original attorney from a New York attorney-at-law acting for the Defendant Mr. Warshaw. That correspondence indicated (a) acceptance of Plaintiff as the new tenant, (b) willingness, if necessary, to grant a new lease, (c) a certain coyness on the question of exercising the option. These letters were in 1971 before the

Plaintiff had purported to exercise the option in the original lease. There are however exhibited letters from the New York attorney of 25th February, 1975, responding to the purported exercise of the original option, and which purport to accept the exercise of the option, and indicate that the Defendants were in process of signing a proposed contract of sale agreement, but sought one or two additional concessions. The correspondence also indicates that approval of exchange control was being sought by the Plaintiff. The Plaintiff's affidavit then sets out that having heard that Mr. Warshaw was proposing to sell to someone else, and his original attorney Mr. McConnell having died, he consulted Mr. Gresford Jones and Miss Sonia Jones, and they instituted the present action, and obtained the interlocutory injunction mentioned above. The Plaintiff then adds that the Defendant had a series of Jamaican Attorneys: Mr. Edsel Keith, who died, Mr. Frank Phipps, and more recently Mr. O.G. Harding. Mr. Keith indicated that the Defendants were willing to sign the necessary transfers, but later that they had gone back on that and instructed him to file a writ to recover possession: (suit F ? of 1977).

To interpolate, an affidavit from Miss Sonia Jones on behalf of the Plaintiff states that after several discussions with Mr. Edsel Keith with a view to settling Plaintiff's claim, Mr. Keith indicated that Defendants intended to file a summons for recovery of possession; that they agreed that he would accept service of Plaintiff's writ, and she would accept service of Defendants' writ. Plaintiff's affidavit indicates that he entered an appearance to the Defendants' writ, but that nothing more has ever transpired. Implied between the two affidavits is that Mr. Keith accepted service of the Plaintiff's writ, hence no further steps were taken to get leave to serve notice of the

writ out of the jurisdiction, as noted in Miss Hanchard's affidavit. Unfortunately Mr. Keith did not enter an appearance to the Plaintiff's writ, and the affidavit of Miss Jones stops short of alleging that she served it on him.

Returning to the Plaintiff's affidavit, he indicates that Defendant determined Mr. Keith's retainer, and engaged the services of Mr. Phipps. This retainer too was determined by the Defendant who engaged the services of Mr. Harding. Plaintiff indicates that Defendant led him to believe that the matter would now be settled and the sale consummated, this was in September 1979, but Defendant failed to keep his appointment. There then followed in the period 1980 to 1981 discussions between Miss Jones for the Plaintiff and Miss Hanchard (of O.G. Harding & Co.) for the Defendant. They failed to reach agreement. Miss Hanchard says that she then asked Miss Jones to accept service of a writ for recovery of possession, and getting no response filed the present summons to dismiss Plaintiff's action in October of 1983.

In short, by way of explanation of delay in proceeding with his action the Plaintiff sets up that the Defendant Warshaw kept inducing him to believe that he was about to settle and then reneging at the last moment and going to fresh attorneys, and going through the same process with them. Some comments will be made later on settlement negotiations as an excuse for delay, but even on this explanation there seems to have been a clear delay from some time in 1981 until these proceedings in October, 1983.

Turning to the law, there are interspersed in both the Rules of the Supreme Court (England) (see the White Book, 1982) and the Jamaica Civil Procedure Code, a number of provisions relating to the times within which various steps must be taken in the process of an action from filing and

service of the writ to eventual trial. The sanction for default in the taking of these steps is as against the Plaintiff that his action may be dismissed for want of prosecution, and as against a Defendant that the Plaintiff may become entitled to summary judgment. See for example U.K. Order 19 R 1, Jamaica section 244: Default of Pleading, non delivery of statement of claim; U.K. Order 24 R 16. Jamaica section 292 non compliance with order for discovery etc.; Order 34 R 2 compare section 342: time within which to set down action for trial etc. And see Order 25 R 1 and compare Jamaica section 272: Summons for directions. As a general comment it may be observed that the Jamaican rules are where the English rules were prior to 1967, and that since that date there have been introduced in England additional procedures for speeding up the conduct of an action, such as automatic discovery and the more stringent provisions of revised Order 25. Nevertheless the basic rules and principles are the same, and the principles set out in the White Book, 1982, in the commentary on Order 25 R 1 apply indifferently to both jurisdictions, save that in England, at the instance of the Judges, there has been a greater willingness by defendants and their attorneys to resort to the remedy of dismissal for want of prosecution than we have seen in this jurisdiction. A similar response by Jamaican Attorneys and Judges is perhaps long overdue.

The leading case on this topic is the Court of Appeal decision in Allen v Sir Alfred McAlpine & Sons Ltd. [1968] 2 Q.B. 229; [1968] 1 All E.R. 543: (C.A: Lord Denning M.R., Diplock and Salmon L.JJ.) Each of these eminent Judges delivered judgments, and later on I will return to consider some of the individual observations made. For the moment it is sufficient to adopt as correct the summary of the position set out in the 1982 White Book commentary on Order 25 R 1, see page 473 note 25/1/3B. It reads as follows:

"The above cases seem to lay down the following principles. The Court has power to dismiss an action for want of prosecution without giving the plaintiff an opportunity to remedy his default by making what is called an "unless order"; there is no rule which requires the defendant's solicitor to give the plaintiff's solicitor prior warning of his intention to apply to dismiss the action for want of prosecution. 'When the delay is prolonged and inexcusable, and is such as to do grave injustice to the one side or the other or to both, the Court may in its discretion dismiss the action straight away' (per Lord Denning M.R. in Allen v. Sir Alfred McAlpine & Sons Ltd., supra).

On the other hand, this power should not be exercised unless the Court is satisfied

(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 (see Wallersteiner v. Moir [1974] 1 W.L.R. 991; [1974] 3 All E.R. 217, C.A.); 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.

(The above paragraph was quoted with approval by Lord Diplock in Birkett v. James [1978] A.C. 297; [1977] 3 W.L.R. 33, 46-47; [1977] 2 All E.R. 801, 805 and cited with approval by Russell L.J. in William C. Parker Ltd. v. F.J. Ham & Son Ltd. [1972] 1 W.L.R. 1583 at p. 1585; [1972] 3 All E.R. 1051 at p. 1052.)

On an application to dismiss for want of prosecution, except in a very clear case, it is desirable that the plaintiff should file evidence explaining all the circumstances relied on as excusing the delay, and exhibiting all relevant documents, and equally that the defendant should file evidence to establish the nature and extent of the prejudice occasioned to him by such delay."

Allen v Sir Alfred McAlpine & Sons Ltd. (supra) was reviewed and approved by the House of Lords in Birkett v James [1978] A.C. 297; [1977] 2 All E.R. 801. The decision in Birkett v James added four matters to the considerations indicated above: (a) Lord Diplock discussed the role of an appellate court in reviewing the exercise of the discretion in the court below - to dismiss or not to dismiss; (b) it was pointed out that where the period prescribed by the Statute of Limitations applicable has not yet run out, an order for dismissal of the action should not normally be made, as it would serve no useful purpose if the defaulting plaintiff brought a fresh action, as he might, within the period; (c) it was pointed out that though delay in bringing the proceedings might be a factor for consideration as to the prejudice alleged to have been suffered by the defendant applying to strike out the action, what was essential was that he should show some additional prejudice due to the delay experienced after action brought: the complaint is after all based on delay in prosecuting the action; (d) that the fact that the Plaintiff might or might not have any remedy against his solicitors if the action was dismissed for want of prosecution was generally not relevant on the issue of whether the action should be dismissed or not. Lord Salmon however expressed rather different views on this point.

The present case is not one of intentional or contumelious default (e.g. disobedience to an order for discovery or the like). It is one in which it is necessary for the defendant to show (1) that there has been inordinate and inexcusable delay on the part of the plaintiff or his lawyers; and (2) that such delay has given 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 have caused serious prejudice to the defendants.

It is not clear from the Master's note what was his findings on (1) above. He found that there had been delay in serving the Statement of Claim, but that the delay was not intentional or contumelious as there were negotiations going on between the attorneys for the parties during the period of which complaint is made. He did not decide whether the delay was excusable or not, though he seems to have inclined in that direction.

There is a considerable range of situation in respect to delay due to negotiations proceeding between the parties. On occasion both parties may expressly agree to the delay in the proceedings as in Banca Popolare di Novara v John Livanos & Sons Ltd. [1973] 117 Sol.Jo.509 (C.A.) where it was held that the 7 year delay was thereby rendered excusable, and had not in fact greatly prejudiced the trial. Further, Order 3 r 5 and section 674 of the Civil Procedure Code allow the parties themselves by consent in writing to enlarge the time for delivering any pleadings or other document.

In National Insurance & Guarantee Corporation Ltd. v Radford [1970] 114 Sol. Jo. 436 (C.A.) a 15 year delay, largely spent in the parties trying to negotiate and settle among themselves a dispute of unusual complexity involving insurance and re-insurance, Lord Denning observed that both sides had acquiesced in not proceeding with the actions for a considerable part of this period. Though ultimately there had been a period of inexcusable delay for two years, the court refused to dismiss the action for want of prosecution observing that prejudice to the defendants was considerably mitigated by the fact that most of the issues turned on documentary evidence.

In Zimmer Orthopaedic Ltd. v Zimmer Manufacturing Co. [1968] 3 All E.R. 449, a case turning on the right to use a trade mark, the Court of Appeal struck out both the claim

and the counterclaim for want of prosecution: both parties were to blame for the delay and should be put in the same position. It should be observed that in the case now before us the Defendants' suit for recovery of possession, filed in 1977, is not before us, though it seems to be still at the stage where an appearance has been entered, and no pleadings delivered. Presumably it involves or will involve the present Plaintiff asserting a right to stay on in possession on the basis of the exercise of the option on which the instant case is based. It would seem prima facie unjust to dismiss the Plaintiff's claim in this case, leaving the Defendants free to prosecute their own, with the Plaintiff's hands so to speak tied behind his back.

In Austin Securities Ltd. v Northgate and English Stores Ltd. [1969] 2 All E.R. 753; [1969] 1 W.L.R. 529, (C.A.) Lord Denning held that the delay on both sides was inordinate and inexcusable, but the Court allowed the action to proceed.

Two remarks may be made on the cases referred to above: they were not actions for personal injuries but commercial cases, and that on the whole they turned not so much on oral evidence, but on the construction of documents, with the result that the possible prejudice to the defendant or the possible risk of not having a fair trial was thereby greatly reduced.

Incidentally Bostic v Bermondsey & Southwark Group Hospital Management Committee which was heard at the same time as Allen v McAlphine is an interesting example of delay due to the action of the Defendant, in never filing their defence - some nine years overdue. See Lord Denning at [1968] 2 Q.B. at 250. He observed of the hospital that they had their records, (this was the case of a nurse injured in her work at the hospital):

"I do not see they are prejudiced by the delay. Justice can be done by them if the case is permitted to go to trial. But if it is struck out, Miss Bostic loses all remedy without a trial."

Sayle v Cooksey [1969] 2 Lloyds R 618 (C.A.)

illustrates the possible range of judicial opinion on the topic of delay. It was a case of a claim for personal injury, and liability could not be contested. The insurers of the defendant however repudiated their liability to indemnify him, and for some five years plaintiff's attorneys delayed the filing of the statement of claim, as they waited for the determination of an arbitration proceedings brought by defendant against his insurers to determine liability under the policy. The defendant won this battle, and plaintiff then entered into negotiations with the insurers. There followed a further period of delay as plaintiff's attorneys sought to up date medical reports on his medical position as to possible permanent disability. When the statement of claim was eventually delivered, the defendant's insurers took out a summons to dismiss the action for want of prosecution, observing that no leave had been obtained for this late delivery. The Registrar dismissed the action; one appeal MacKenna J set the order aside and gave the plaintiff leave to serve the statement of claim within seven days. On appeal the Court of Appeal supported the Judge's decision by a majority. Russell LJ observed that the first five year delay was inordinate, but excusable: It is true that hanging back in the hope of settlement is not, on the authorities, regarded with favour .... but it would be unrealistic not to recognize that plaintiffs in these cases have to deal with insurers, and here it was the insurer who by wrongly repudiating liability to the defendant under the policy had caused this delay and now sought to use it to deprive the plaintiff of a judgment. As to the delay subsequently he held that the defendant did

not establish a sufficient case of prejudice to justify dismissal. Sachs LJ agreed with him. He observed at p. 625:

> "For while it is of course for the Court to take account of the need to avoid its machinery being abused by inordinate delays, it should also take account of the detriment to the interests of justice should a plaintiff innocent of blame suffer disaster by being driven from the judgment seat unless the justice of the case as a whole imperatively demands that course. The Court is entitled, as Lord Justice Diplock stated, (in Allen v McAlpine) to temper justice with humanity."

Widgery L.J. dissenting, observed (at p. 626):

> "The interest of the parties and of the public requires that litigation should be disposed of without delay and it is the plaintiff alone who can ensure that this be done .....
>
> Mere inactivity on the part of the defendant is no excuse and although it is proper for a reasonable time to be taken to dispose of the claim by negotiation it is the plaintiff's duty to get on with the action if a settlement is not forthcoming within a reasonable time." .....

There is considerable force in the observations of both judges in the quotations above. Those of Widgery L.J. relate to the question of whether the delay is excusable, while those of Sachs L.J. relate to the question of whether the defendants have been so seriously prejudiced or whether there is a substantial risk that it is not now possible to have a fair trial.

I am of opinion that in the instant case before us the delay was not only inordinate, but that it was also inexcusable. Though it was reasonable for some time for the plaintiff to hope for a settlement, his version of the settlement negotiations established that as soon as settlement was imminent between the lawyers, the principal defendant went back on it, and sought new lawyers and commenced the process de-novo.

The unexpressed background of course was the steady rise in land values in that area, and generally in Jamaica, over the period. I think this made the plaintiff the more anxious to secure the prize without a fight, and the defendant more anxious to avoid surrender, whatever his lawyers advised. It was the plaintiff's duty after the expiry of a reasonable time to get on with the action, as settlement was plainly not forthcoming.

There remains however the other consideration; have the defendants succeeded in showing that the delay has caused them serious prejudice, or been of such a sort that it is not now possible to have a fair trial of the issues involved?

It is clear that the onus is on the defendant to file evidence to establish the nature and extent of the prejudice occasioned to him by such delay. Nothing of this sort appeared in the affidavit filed by the defendant, and it appears that before the Master the defendant's attorney went so far as to argue that it was not necessary to prove that the delay will prejudice the fair trial of the action. This of course is not correct, and the Master has specifically found "that having regard to the nature of the case that delay would not cause (? defeat?) any claims to a fair trial of the issues nor any grave prejudice to the defendant".

There has not before us been any real challenge to that finding. The nature of the case is that the plaintiff has been a tenant of the defendant for some 13 to 14 years. He pays his rent regularly, and there is no suggestion that any of his obligations have gone unfulfilled. He even claims to have made substantial improvements to the premises. What is on issue is whether he has an option to buy the premises, and whether he has validly exercised it. These will turn on the

construction of the documents and correspondence in the case, and prima facie oral evidence will play no substantial role in the matter. There is no reason to reject the Master's view on this fundamental issue.

This brings me to the last and most troublesome issue in the case. The Defendants brought a summons to dismiss the Plaintiff's action for want of prosecution. Basic to such an application is that there is an action which has brought the Defendants before the court, and that delay is occurring in the taking of the steps necessary to bring it to trial.

As presented however, what the Defendants were saying is that we were never served, we are not properly before the Court at all. It should be abundantly clear that summons to dismiss for want of prosecution has no relation to the situation being put forward. There are other and better ways of raising such an issue, which if correct, would make the entire proceedings a nullity, not a mere irregularity: see for example, Craig v Kanseen [1943] 1 All E.R. 108; 168 L.T. 38. As Lord Greene M.R. observed in Craig v Kanseen at page 113:

> "In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper procedure in litigation."

However once the point was raised, though in a process which was both erroneous and incompatible, it could be said that the Court must deal with it, and if possible resolve it.

A number of points arise for consideration. It is to be noted that there is no affidavit from any of the Defendants, particularly their prime mover, Mr. Warshaw, asserting lack of

service. What has happened is that a young attorney, perusing the Court file has observed that summonses were taken out to obtain leave to serve notice of the writ out of the jurisdiction, and that there is nothing on the file to show what happened. It is clear that Mr. Warshaw must at least have known of the action; he and his successive attorneys have been engaged over the course of several years in an effort to negotiate a settlement of it. Further due to the caveat and the injunction granted in the action he must be clearly aware that his present situation is that he can not sell the property to any one else. Yet apart from having taken out an action in 1977 which has not so far been pursued he has done nothing. In that action the plaintiff's attorney entered an appearance, and her affidavit is endeavouring ~~to explain~~ why the Court records show outstanding summonses to serve out of the jurisdiction, sets out that these were dispensed with by mutual agreement; she accepted service of the 1977 writ in exchange for Mr. Keith doing the same for her action. She formally entered an appearance, unfortunately Mr. Keith did not, possibly because of his death or the termination of his retainer.

When the point surfaced so to speak before the Master, Counsel for the plaintiff, acting on the instructions of the Plaintiff's attorney, assured the Master that service of the writ had been accepted by the Defendants' previous attorney. The Master has accepted this. He states:

> "I accept that the writ was served on the Attorney-at-Law (Mr. Keith) then acting on behalf of the defendant."

It is true that the affidavit of the Plaintiff's attorney stops short, or falls short on this point, but it was drafted to meet a different situation. There was on the other side no affidavit by the Defendant alleging non-service, and they had taken over the years, by negotiations, and bringing

this summons a position which implicitly if not expressly recognised the service of the writ. Accepting that the period of limitation had run, and that it would not be possible to bring a fresh action, or for that matter to apply for leave to renew or to re-serve the writ, it is hardly surprising that the Master on the material before him accepted that the writ had been served, and made the "unless" order that he did.

Whether one accepts the role of the Court of Appeal in considering the exercise of discretion by a trial judge as one of "review only" per Lord Diplock in Birkett v. James [1978] A.C. at page 317, or the wider view advocated by Lord Wright in Evans v Bartlam [1937] A.C. 473 at 486, and adopted by their Lordships in Charles Osenton & Co. v Johnston [1942] A.C. 130 at 138, I am not satisfied that the Master came to a wrong conclusion in the decision that he made. It is now for the parties, particularly the Plaintiff, to take those steps that are necessary to bring this suit to trial and ultimate conclusion. Any further delays are unlikely to receive a sympathetic consideration by those who may have to deal with this action.

KERR, J.A.:

I have had the benefit of reading the draft judgment of Carberry, J.A. and I am in agreement with his reasoning subject to one small reservation.

I am unwilling to join him in categorising the Plaintiff's delay as "inexcusable". While the time spent in negotiating a settlement of a case may not per se excuse long delay yet in the instant case there are special circumstances, which in my view provide reasonable excuse. Carberry, J.A. in his judgment has carefully chronicled the history of the proceedings and the conduct of the parties, prior to the application by the Defendant to dismiss the Plaintiff's action for want of prosecution. With respect to such special circumstances it is enough to advert to the ~~nature of the~~ contract sought to be specifically performed, namely a contract for the sale of land, and attendant thereon, of the preparation of documents and their due execution by the Defendant, who resides abroad; the changes of defence attorneys during the period, the vacillating conduct of the Defendant and his keeping the contention alive by serving the Plaintiff in March, 1983 a Notice to Quit the demised premises and following on with his second action for Recovery of Possession and to say that these circumstances cumulatively provide acceptable excuses for the Plaintiff's delay.

I commend Carberry, J.A. for his scholarly and industrious review of the cases referred to in his judgment and in all other respects save that adumbrated above I concur with his reasoning and conclusion.

WRIGHT, J.A.:

I agree with the judgment of Carberry J.A.