JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 91/92

COR: THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A. (AG.)

BETWEEN	WEST INDIES SUGAR	DEFENDANT/APPELLANT
AND	STANLEY MINNELL	PLAINTIFF/RESPONDENT

Miss Jacqueline Cummings instructed by Gaynair & Fraser for Appellant

Dennis Daly, Q.C. for Respondent

29th, 30th September & 20th December, 1993

FORTE, J.A.

I have had the benefit of reading in draft the judgment of Downer, J.A. and am in agreement with the conclusion therein. I hereunder state a few words of my own.

The history of the matter has been sufficiently recorded in the judgments of Downer J A and Patterson J A (Ag.) and consequently I will not rehearse them here except to re-emphasize that the writ was filed some four years after the cause of action arose, and that at the time of the application to extend the time to file the statement of claim, another four years had expired. In my view, it is not debatable that the delay in filing the statement of claim so long after it was due in accordance with the rules of Court, was inordinate, and the concession in that regard by Mr. Daly, Q.C. who argued the case for the respondent, is indeed admirable.

The delay was inexcusable, the reason given in the affidavit in support of the respondent's application not being sufficient to explain the long delay and tardiness of the attorneys-at-law. See City Printery Ltd v. Gleaner Co Ltd 12 W.I.R. 126.

In **Allen v. Sir Alfred McAlpine & Sons** [1968] 1 All E R 543 Lord Denning M R went straight to the heart of the matter:

> "The principle on which we go is clear; when the delay is prolonged and inexcusable, and is such as to do grave injustice to one side or the other, or to both, the court may in its discretion dismiss the action straight away, leaving the plaintiff to his remedy against his own solicitor who has brought him to this plight."

In the same case, Diplock L J treated it this way:

> "Moreover, where the case is one in which at the trial disputed facts will have to be ascertained from oral testimony of witnesses recounting what they then recall of events which happened in the past, memories grow dim, witnesses may die or disappear. The chances of the court's being able to find out what really happened are progressively reduced as time goes on. This puts justice to the hazard. If the trial is allowed to proceed, this is more likely to operate to the prejudice of the plaintiff on whom the onus of satisfying the court as to what happened generally lies. There may come a time, however, when the interval between the events alleged to constitute the cause of action and the trial of the action is so prolonged that there is a substantial risk that a fair trial of the issues will be no longer possible. When this stage has been reached, the public interest in the administration of justice demands that the action should not be allowed to proceed."

Later in his judgment Diplock L J made it clear (p. 556) that in determining whether there may be a substantial risk that a fair trial would not be possible, regard should be given to the earliest date at which as a result of the delay, the action would come to trial if it were allowed to continue. It appears then that a delay before the filing of a Statement of Claim which is early yet in the proceedings would invite an assessment of a longer period than if for instance, the action was at the stage of setting it down for trial.

In the case of **Birkett v. James** [1977] 2 All E R 801 Lord Diplock reiterated the principles which should govern the exercise of the Court's power to dismiss an action for want of prosecution. He stated, after approving the correctness of the principles as stated in the "current white book":

> "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."

In keeping with these principles therefore the court should not exercise its power to make an order which would discontinue an action unless one of the alternatives expressed in 2(b) above is applicable. If there is a substantial risk that a fair trial would not be possible that would be sufficient ground for refusing the application for extension of time, and in the other alternative it would also be sufficient ground if the defendant would be seriously prejudiced as a result of the prolonged delay.

In **Department of Transport v. Chris Smaller Ltd** [1989] 1 All E R 897 at page 903 in response to a submission that once the limitation period has expired, inordinate and inexcusable delay should be a ground for striking out, even though there can be a fair trial of the issues and the defendant has suffered no prejudice for the delay, Lord Griffiths, in keeping with my own view set out above, stated:

> "The principle in **Allen v Sir Alfred McAlpine & Sons Ltd** and **Birkett v James** are now well understood and I have not been persuaded that a case has been made out to abandon the need to show that the post-writ delay will either make a fair trial impossible or prejudice the defendant." [Emphasis added]

In determining the degree of prejudice necessary Lord Griffiths continued:

> "Furthermore, it should not be forgotten that long delay before issue of the writ will have the effect of any post-writ delay being looked at critically by the court and more readily being regarded as inordinate and inexcusable than would be the case if the action had been commenced soon after the accrual of the cause of action. And that if the defendant has suffered prejudice as a result of such delay before issue of the writ he will only have to show something more than minimal additional prejudice as a result of a the post-writ delay to justify striking out the action."

In making this assessment, however, he cannot be understood to be stating that even where there is a substantial risk that a fair trial would be impossible, some prejudice other than that fact, would have to be established, before the court could exercise its power either to extend time or to dismiss the action. This view is supported by the following dicta taken from his judgment (p. 904):

> "Counsel for the plaintiffs submitted that the prejudice that entitled a defendant to strike out an action should be limited to proof of prejudice in the conduct of the litigation. This seems to me to be but another way of saying that delay has prevented a fair trial of the action; but in both **Allen v** Sir Alfred McAlpine & Sons Ltd and **Birkett v James** reference is made to the risk both that there could not be a fair trial of the action and of prejudice to the defendants, which, one would suppose, was intended to mean some prejudice other than the mere inability to have a fair trial."

The learned Law Lord, thereafter goes on to examine what kind of prejudice outside of matters directly affecting the trial would avail a defendant in an application to dismiss the action e g anxiety suffered by a nurse whose professional competence was in question (considered by Lord Denning M R in Geoffrey Lane L J in **Lambert Southwork and Lewisham Health Authority** [1978] 2 All E R 125), examples of the Court taking business prejudice into account as a ground for striking out - **Bridgeworth D.C. v Henry Willcock & Co Ltd** [1983] C.A. Transport 958. Such an examination was of course necessary in the circumstances of that case as the defendants were not contending that there was a risk of a fair trial not being possible but that they had in fact been prejudiced by the delay (of thirteen months) because their insurance cover was less than the amount claimed by the plaintiffs and the contingent liability for the balance had hindered them in raising finance for their business. In finding against the defendants the House of Lords concluded that on the facts, the thirteen months delay after the issue of the writ had only caused the defendants minimal prejudice because any difficulties arising from the contingent liability hanging over them as the result of the action, were attributable to the statutory limitation period of six years and not to the post-writ delay. The cases, in my view, therefore decide that the question of a possibility of a fair hearing, and prejudice to the defendants are alternative principles upon which the court acts in deciding how to exercise its discretion.

"Prejudice", however as stated in **Trill v. Sacher** [1983] 1 All E R 961 by Neil L J (page 980) may take different forms. In many cases the lapse of time will impair the memory of witnesses. In other cases witnesses may die or move away and become untraceable.

In coming to a conclusion on the issue in the instant case, I am persuaded by the dicta of Sir Thomas Bingham M R in **Costellow v. Somerset County Council** [1993] 1 All E R 952 at page 959:

"The first principle is that the rules of court and the associated rules of practice, devised in the public interest to promote the expeditious dispatch of litigation, must be observed. The prescribed time limits are not targets to be aimed at or expressions of pious hope but requirements to be met. This principle is reflected in a series of rules giving the court a discretion to dismiss on failure to comply with a time limit: Ord 19, r 1, Ord 24, r 16(1), Ord 25, r 1(4) and (5), Ord 28, r 10(1) and Order 34, r 2(2) are examples. This principle is also reflected in the court's inherent jurisdiction to dismiss for want of prosecution.
The second principle is that a plaintiff should not in the ordinary way be denied an adjudication of his claim on its merits because of procedural default, unless the default causes prejudice to his opponent for which an award of costs cannot compensate. This principle is reflected in the general discretion to extend time conferred by Ord 3, r 5, a discretion to be exercised in accordance with the requirements of justice in the particular case. It is a principle also reflected in the liberal approach generally adopted in relation to the amendment of pleadings.
Neither of these principles is absolute. If the first principle were rigidly enforced, procedural default would lead to dismissal of actions without any consideration of whether the plaintiff's default had caused prejudice to the defendant. But the court's practice has been to treat the existence of such prejudice as a crucial, and often a decisive, matter. If the second principle were followed without exception, a well-to-do plaintiff willing and able to meet orders for costs made against him could flout the rules with impunity, confident that he would suffer no penalty unless or until the defendant could demonstrate prejudice. This would circumscribe the very general discretion conferred by Ord 3, r 5, and would indeed involve a substantial rewriting of the rule." [Emphasis added]

In a reference to the case of **Communications Ltd v Worthington** [1991] Times 8 July, Sir Thomas Bingham M R in the **Costellow** case cited the words of Mustill L J who delivered the leading judgment. The following extract from that dicta in my view is of relevance to the instant case.

> "Thus I am ready to go this far with the appellants that the principles, so far as there are any, governing the application to extend and the application to dismiss may on occasion require the facts to be looked at in a rather different perspective. So that, for example, the inability of the defendant to prove that he has suffered detriment through the delay, or the fact that a fresh action may be started within the time limit, are now regarded as almost inevitably fatal to an attempt to dismiss, whereas in the context of a long overdue statement of claim, which is not only a breach of the rules but may leave the defendant without any clear idea of the case which he has to meet, may call for an assessment which treats the plaintiff more severely. Nevertheless, these are only shades of emphasis. For my part, I deprecate the attempts which are constantly made to cram the general discretions conferred by the rules of court into a set of rigid formulae, expressed in terms of the burden of proof, and so on. The rules are an indispensable frame-work for the orderly administration of justice. But they are no more. They should not be a prison restricting the free exercise by the court of its powers to conduct the litigation brought before it in whatever way, consistently with rules, seems [most] fair in the circumstances of the individual case. Thus, when one comes to regard the appellants' third proposition, its artificiality is easily seen. In some cases, for example where the real vice is not the plaintiff's breach of a rule, but his consistent delay in prosecuting the action, it will be sensible to look at the dismissal first. In others, the total delay may not be long, so that a fair hearing is still feasible; and yet the plaintiff's breach of the rules may be serious enough, and the immediate consequences sufficiently damaging, to justify a course which enables the defendant

> "to have the action disposed of with all the attendant costs, even if at some later date a properly prepared and conducted action can be started afresh." [Emphasis added]

How then do these principles apply to the circumstances of the instant case. On a view of the evidence, can it be concluded that there is a real risk that a fair trial is not possible or that defendant had been prejudiced by the long delay.

In my view the length of the delay since the filing of the writ is in itself evidence that there is **a substantial risk** that a fair trial is not possible. The indorsement to the writ which was the only notice to the defendant, as to what it would be called upon to answer merely states:

> "The Plaintif claims against the Defendant to recover damages for negligence for that on or about August 17, 1984 the Plaintiff in the course of his duties as servant or agent of the Defendant in the Defendant's sugar warehouse at Frome in the Parish of Westmoreland was injured by the negligent operation of a crane by GERALD BUCKNOR the servant or agent of the Defendant acting in the performance of his duties as servant or agent of the defendant.
> By reason of the premises the Plaintiff has suffered personal injuries and has been put to loss and expense."

It discloses, however that the claim was in negligence, and is to recover damages for personal injuries to the plaintiff.

In an effort to establish that no prejudice would befall the defendant if the extension was granted the plaintiff through his attorney swore to the following in an affidavit in support of the application at paragraph 18:

> "That the defendant has not been adversely affected by the delay occasioned herein as it would have records of the accident which caused the Plaintiff injuries and I am informed by the plaintiff and do verily believed (sic) that the witnesses and workers involved are either still working with the Defendant or can readily be found."

This is a case in which the evidence of the defendant will depend solely on the recall of witnesses, who in spite of the attorney's affidavit, may not be available, and whose memories as to the incident may have faded over the years. Two other factors are of relevance (i) if the extension is granted, it will still be sometime before the action comes on for trial and (ii) the details of the plaintiff's claim having only been revealed in the Statement of Claim filed as a result of the Masters grant of the extension, the defendant up until 4 years after the filing of the writ had no idea what the details of the plaintiff's case was, and what it would have to answer.

In those circumstances, I would conclude that the long delay in filing the Statement of Claim must give rise to a substantial risk that there cannot be a fair trial. In my view, this is so, in spite of the fact that the defendant has filed no affidavit alleging prejudice.

For those reasons, I am in agreement with Downer, J A and would allow the appeal with costs to the appellant to be taxed if not agreed.

DOWNER J A

This appeal was heard immediately after Patrick Valentine v. Nicole Lumsden (an infant) and Lascelles Lumsden (next friend) S.C.C.A. 106/92 and most of the authorities referred to previously, were cited again. In this case, the summons is to enlarge time permitted by section 192 of the Civil Procedure Code, but it is also closely connected with a dismissal for want of prosecution as in **Patrick Valentine's** pursuant to the court's general jurisdiction under section 224 of the Civil Procedure Code or in accordance with its inherent powers. In this case it is the plaintiff who takes the initiative, while on a **summons** to dismiss it is the defendant who institutes proceedings. The common strand is that in either case a party who is guilty of inordinate delay is liable to fail if he seeks enlargement of time to set his house in order. In both instances the other crucial feature is the prospect of there being a fair trial of the issues when either summons is filed. It is to be noted that where there is inordinate delay, this by itself, may make a fair trial impossible.

The allegations

Although the summons to enlarge time was filed on 26th July 1992, and heard 22nd September 1992, some eight years after the accident, the Master nevertheless granted an extension of time to file a statement of claim four years after an entry of appearance by the **appellant** had elapsed. The precise date of the entry was 26th August 1988. Be it noted that by section 192 of the Code, the statement of claim ought to have been filed "within 10 days after appearance, or within such extended time as may be fixed by the parties by consent in writing or by the court or judge."

To grant such an extension therefore, as was done in this case, would require the most compelling circumstances seeing that the delay was found in the court below to be inordinate.

What were the circumstances adduced by the respondent before the Master? Bearing in mind that the summons sought leave to file a statement of claim, which was granted, this Court now has the "advantage" of examining that statement. All that was before the Master was the generally endorsed writ which reads as follows:

> " The Plaintiff claims against the Defendant to recover damages for negligence for that on or about August 17, 1984 the Plaintiff in the course of his duties as servant or agent of the defendant in the Defendant's sugar warehouse at Frome in the Parish of Westmoreland was injured by the negligent operation of a crane by GERALD BUCKNOR the servant or agent of the Defendant acting in the performance of his duties as servant or agent of the Defendant.
>
> By reason of the premises the Plaintiff has suffered personal injuries and has been put to loss and expense."

The other information before the Master was the affidavit of Judy Grace Hylton, an associate of the firm on the record for the respondent Minnell. It is important to grasp the purpose of the affidavit. It explained the reasons for the delay. The delay must be such that it ought to be excused and the affidavit ought to show that at that stage it was possible to have a fair trial.

The approach the court ought to take was adverted in **Erskine Communications Ltd. v. Worthington** [1991] Times 8th July. This was cited in **Costellow v. Somerset County Council** [1993] 1 All E R 952 at p. 957:

"The Court of Appeal affirmed that decision, and in doing so made valuable observations on the correct approach to issues of this kind. In argument in that case, the defendants had relied on **Hytrac Conveyors Ltd v Conveyors International Ltd** [1982] 3 All E R 415, [1983] 1 W L R 44 and also **Price v Dannimac Ltd.** Mustill L J, in a leading judgment with which Balcombe and Woolf LJJ agreed, said (and I read from the transcript):

> 'On these authorities the appellants based a number of propositions. It is convenient to take the first three together. They are:— (1) there is a difference between the standards to be applied when the plaintiff requires an extension of the time for delivering his statement of claim and when the defendant seeks to have the action dismissed under the general jurisdiction; (2) the burden of proof is different in the two cases; (3) whereas in the present case there are cross-applications the question of extending the time for service should be considered first. As regards the first and second of these propositions, I am willing to accept that an application to extend time in the context of a failure to comply with rules of court may be approached in a rather different light from an application to dismiss for want of prosecution. In the one instance the plaintiff has by instituting his action submitted himself to an explicit and mandatory regime, set out in the rules. If he wishes his action to continue notwithstanding his transgression of these rules, he has some work to do, in the sense of persuading the court that in the interests of justice the action ought to go ahead, whereas in the case of an application to dismiss under the general jurisdiction, where often the plaintiff's lack of progress does not directly infringe any rule of court, the defendant must make the running so as to show that there is good reason why the

> proceedings, apparently well constituted, should be brought to a halt. Thus, I am ready to go this far with the appellants that the principles, so far as there are any, governing the application to extend and the application to dismiss may on occasion require the facts to be looked at in a rather different perspective. So that, for example, the inability of the defendant to prove that he has suffered detriment through the delay, or the fact that a fresh action may be started within the time limit, are now regarded as almost inevitably fatal to an attempt to dismiss, whereas in the context of a long overdue statement of claim which is not only a breach of the rules but may leave the defendant without any clear idea of the case which he has to meet, may call for an assessment which treats the plaintiff more severely. Nevertheless, these are only shades of emphasis."

Although this case was helpfully cited by Mr. Daly, perhaps Miss Cummings for the appellant company realised its force and did not put in an affidavit. The appellant company had no clear idea of the case it had to meet four years after it had entered an appearance. Certainly, this Court has to take that factor into consideration.

There were other features in the affidavit in support of the summons. Mrs. Judy Hylton relates that Mr. Roy Fairclough, the partner who had conduct of the case, left to set up practice in Montego Bay, shortly after the writ was filed. That would have been some time in June 1988. However, it should be borne in mind that the writ was filed some four years after the accident. The file was then mislaid she reports, and retrieved after the firm did an audit on its files in July 1991. This was an admission of negligence. Here it is pertinent to note that the firm which was styled Thwaites, Fairclough, Watson and Daly, subsequently became Daly, Thwaites, Watson and Campbell. What is significant

for this case is that the new firm retained the case file. So from June 1988 to July 1991 the file was misplaced. This Court has had occasion to deal with "upheavals" of this type and has decided that such delays are inordinate and not excusable: see **City Printery Ltd. v. Gleaner Co. Ltd.** 13 W I R 126. In that case the delay due to the solicitor's fault was two years. An earlier case which also demonstrates the Court's stance to application to enlarge time, was **Wright v. Salmon** [1964] 9 W I R 50. **Erskine v Communications Ltd.** (supra) stigmatised the excuse proffered in this respondent's affidavit as "a mere assertion that the person in charge forgot the statement of claim or was too busy to get on with it."

The learned Master found inordinate delay, but found that there was no prejudice to the appellant as the records of the company would have details of the accident and the witnesses are either still working with the company or can easily be found. In the first place nothing in the general endorsement on the writ indicates that records of the company will be of assistance in determining liability for the accident. Nor does the statement of claim assist in that regard. This was not an instance as in **Department of Transport v. Chris Smaller Transport Ltd.** [1989] 1 All E R 897 where the subject matter was expenditure for repairs to a bridge owned by the plaintiff. The defendant virtually admitted liability and paid a substantial sum into court almost immediately after commencement of the action. The drawings and calculations of the bridge would then be crucial in determining the issue before the court and the role of eyewitnesses' testimony were minimal. It was agreed by all that a fair trial could take place. Nor was it a case where the subject matter was the existence of an oral contract involving over one million pounds sterling as in **Birkett v. James** [1972] 2 All E R 801. There the

tribunal of fact would have to determine the issue of whether the plaintiff or the defendant was telling the truth.

It is true that the respondent in this case states that the witnesses were either in the employment of the company or could easily be found. But the real issue would be the witnesses' credibility after so long a period of time had elapsed. Would they recall the details of an accident which must have happened very quickly and would they have been concentrating on how the accident occurred merely because they were on the scene? The paramount interest is that of the administration of justice and the Master was obliged to determine whether a fair trial could have taken place in the circumstances of this case, where the accident occurred as far back as August 17, 1984 and the delay by the respondent after the entry of appearance was over four years. It is difficult to see how the answer could have been in favour of the respondent Minnell. It is true that a statement of claim is now in existence because the Master gave leave to serve it and it was served on 5th October 1992. But the appellant company ought to have been able to know the case it had to meet and have been able to prepare a defence from September 1988. Certainly, in such circumstances prejudice ought to have been inferred against the appellant.

So eight years after the accident, the appellant was knowing for the first time, the allegations of the respondent. Even if liability were admitted, the issue of damages had to be tried and the case of **Gloria v. Sokoloft** [1969] 1 All E R 204 shows how difficult this can be especially for a defendant who must be able to check out the claims of the plaintiff if the trial is to be conducted with the requisite degree of fairness acceptable under our adversary system.

It is true that the appellant did not file an affidavit to vindicate its defence, nor did it take the step to file a summons to dismiss for want of prosecution. It was not obliged to do either. This was especially so in a case where the circumstances and evidence in the case told a strong story in its favour. Moreover, since the court has an inherent jurisdiction to dismiss for want of prosecution, the case ought to be considered from that standpoint. Also the combined effect of section 192 and section 244 of the Civil Procedure Code gave the appellant a right to move for dismissal for want of prosecution if the statement of claim had not been served within ten days of entry of appearance. A case ought to be dismissed for want of prosecution, if there has been inordinate delay and if there is prejudice to the appellant or that it is impossible in the interest of justice to have a fair trial; see **Department of Transport v. Chris Smaller** at page 900 (D & C). Maybe a citation from **Clough v. Clough** [1968] 1 All E R 1179 at 1181 is a good background to consider the prejudice to the appellant in this case. It reads:

> "... No excuses have been proffered to show why there has been this great delay: first, three years before the issue of the writ, and then three years again and nothing done until the summons to dismiss for want of prosecution. It is plain to me that the delay here was both prolonged and inexcusable. Next, the question is whether the delay was such as to do grave injustice to one side or the other or both. I think that it was. There was a serious question between the defendants where the responsibility lay. The second and third defendants said that they were not to blame at all. That enquiry is seriously prejudiced by the delay of six years that has taken place. It is impossible to do justice between the defendants at this distance of time. I would add too that the three passenger

> plaintiffs suffer a grave injustice. They had an unanswerable claim for damages for their injuries. Yet all these years have elapsed without anything being done."

The essential feature to note is that inordinate delay by itself, can be relied on to show prejudice to the appellant and further to show that the enquiry itself would be prejudiced by the delay in this case. To reiterate, the writ was served in June 1988 four years after the accident. So nothing was done for the first four years. Then as demonstrated by the appellant, they entered an appearance on 24th August 1988. Nothing was done by the respondent until he filed a summons on 8th July 1992 to serve a statement of claim out of time. These bald facts tell their own story. To reiterate for emphasis, the story is that recollection of eyewitnesses on either side, would be now so vague that a fair trial is impossible, and additionally, the appellant up to the time of the filing of the summons, had no inkling of what the statement of claim would be, so as to prepare its defence.

Why did the Master err?

The ratio of her decision can be culled from the following passage at page 2 of her judgment:

> "... It has been established that, in any application in which relief for an enlargment of time to do an act, is sought, delay on the part of the applicant ought not to be a bar, unless in granting the application irreparable wrong would be done to the other party. This principle has been clearly enunciated by Bramwell L.J. in **Attwood v. Chichester** [1878] 3 QBD 722:
>
> > 'When sitting in Chambers I have often heard it argued that when irreparable mischief would be done by acceding to a tardy application, it being a departure from the ordinary practice, the person who failed to act

> within the proper time ought to be the sufferer but that in other cases the objection of lateness ought not to be listened to and any injury caused by the delay may be compensated for by the payment of costs.'
>
> Notwithstanding the foregoing, excessive delay can operate to preclude a dilatory applicant from succeeding. Excessive delay may influence the court to refuse to extend time, depending on the circumstances of the case."

Although the reference was used in the context of setting aside a judgment in default, they are quite appropriate to deal with the failure to file a statement of claim in the stipulated time. Where however, the circumstance of this case warrants the application of section 244 of the Code dealing with dismissal for want of prosecution, "then irreparable mischief might be done" and "the person who failed to act within the proper time ought to be the sufferer." So when she came to apply the principle she had expressed so admirably, she erred. She rightly found inordinate delay but then erred in finding that a plausible excuse was good enough. Further, she found that no irreparable wrong would be done to the appellant, when on the evidence, a fair trial was improbable. So she was wrong on all grounds. Further, she did not give any adequate attention to the prejudice the appellant would suffer if there were a trial.

Conclusion

In the light of the foregoing, the order below must be set aside, the taxed or agreed costs both here and below must be paid by the attorneys-at-law on the record for the respondent. The Registrar should take steps to inform the respondent Minnell of the reasons for the decision against him.

PATTERSON J A (AG)

The plaintiff, Stanley Minnell, filed a generally endorsed writ on the 2nd June 1988, claiming damages for personal injuries against his employers, West Indies Sugar Company Limited, the defendant, arising out of an accident in the defendant's warehouse on the 17th August 1984. The writ was served on the 10th August 1988, almost four years after the cause of action accrued. Appearance was entered on the 26th August 1988 and served on the plaintiff three days later. Thereafter, the action remained dormant for over three years and it was not until the 8th October 1991, that the plaintiff filed a notice of change of attorneys-at-law and a notice of intention to proceed. By then the time limited for filing the statement of claim had long past, and on the defendant's refusal to consent to extend the time, the plaintiff, on the 8th July 1992, filed a summons, supported by an affidavit, seeking an order that "the time for filing and serving the statement of claim in this action be extended or enlarged to a period of fourteen days from the date of the making of this order." The relevant documents were served on the defendant's attorneys-at-law on the 5th August, 1992 returnable before the Master on the 22nd September, 1992. The defendant did not file an affidavit in reply, but attended by counsel before the Master on the appointed day and contested the matter. At the end of the day, the Master granted the application and made consequential orders. The defendant now appeals against the orders with leave of the Master.

The evidence in support of the application was contained in the affidavit of Mrs. Judy Grace Hylton, the plaintiff's attorney-at-law having conduct of the action. The affidavit disclosed that she is an associate of the law firm of Daly, Thwaites, Watson & Campbell, Attorneys-at-Law. But she did not always have conduct of the action. When the action

was first filed the law firm was somewhat different in composition, and it was Mr. Roy Fairclough who had the conduct of the action, he being then a member of the firm in Kingston.

Shortly after the action commenced, Mr. Fairclough removed his practice to Montego Bay, leaving the file in the Kingston office of the law firm, but it was misplaced. It was only in July 1991, that the file was "discovered," and it was then that Mrs. Hylton assumed conduct of the action. Mrs. Hylton sought to put matters right. She took further instructions from the plaintiff and with some difficulty, she obtained a medical certificate of the injuries sustained by the plaintiff. Thereafter, she prepared the statement of claim. By letter dated the 6th January 1992, she sought the consent of the defendant's attorneys-at-law to file the statement of claim "out of time." The consent was not given, and consequently, the order of the court was sought. But even though it was said that the plaintiff displayed interest in pursuing the action, time slipped by, and the summons in question was not filed until the 9th July 1992, a few weeks short of eight years after the cause of action arose, a year after the limitation period had expired and most importantly, almost four years after the defendant had entered appearance.

Section 192 (b) of the Judicature (Civil Procedure Code) Law provides that the plaintiff shall file a statement of claim within ten days after appearance, or within such extended time as may be fixed by the parties by consent in writing or by the court or a judge. It was under this provision that the Master was asked to exercise her discretion and fix the time for filing the statement of claim.

The only evidence presented for the consideration of the court was contained in the affidavit of Mrs. Hylton, and apart from explaining the cause of the delay as I have already stated, she also deposed as follows:

> "18. That the Defendant has not been adversely affected by the delay occasioned herein as it would have records of the accident which caused the Plaintiff injuries and I am informed by the Plaintiff and do verily believe that the witnesses and workers involved are either still working with the Defendant or can readily be found.
>
> 18.(sic) That while the Defendant will not be adversely affected if this matter is pursued the Plaintiff will be severely prejudiced if this matter is not pursued."

The Master proceeded on the principle that "in any application in which relief for an enlargement of time to do an act, is sought, delay on the part of the applicant ought not to be a bar unless in granting the application irreparable wrong would be done to the other party." This is the principle she extracted from the judgment of Bramwell L J in Attwood v. Chichester [1878] 3 Q B D 722. She appreciated the fact that the question of delay is a primary consideration in any such application and she made a finding of fact that there was "an inordinate delay on the part of the plaintiff in filing the statement of claim." She then considered whether the plaintiff had proffered a "plausible explanation" for the delay and concluded that the evidence disclosed a "reasonable excuse," and accordingly, the plaintiff ought not to be penalised for the delay in applying.

Turning to the merits of the application, the Master considered whether "irreparable wrong" would be experienced by the defendant if the plaintiff's application was granted. In this regard she considered:

> (i) whether the defendant would have made and retained records relating to the accident;
>
> (ii) whether witnesses were still available and could recall the incident;

(iii) the effect of the endorsement to the writ in eliminating any element of surprise;

(iv) if there was any evidence that the defendant would be prejudiced in any way or suffer any damage or loss.

She concluded that "there is no likelihood of the defendant suffering any irreparable wrong and any injury it may have suffered can be compensated by the recovery of costs from the plaintiff." She expressed the view that "if the application were to be dismissed, the plaintiff's claim would be statute barred and he would be deprived of the opportunity of pursuing his action and the possibility of obtaining compensation for his injury." Such then were the reasons for the exercise of the Master's discretion in ordering that the plaintiff file and deliver the statement of claim within seven days of the 22nd September 1992.

The grounds of appeal on which the defendant relied are these:

"(a) The Learned Master erred in concluding that the Affidavit of Judy Grace Hylton sworn to on the 8th day of July, 1992 was evidence of sufficient cause to exercise her discretion in favour of the Plaintiff/Respondent.

...

(c) The Learned Master erred when she held that the Plaintiff/Respondent be granted leave to extend the time within which to file and serve the Statement of Claim herein."

Counsel for the defendant argued both grounds together. The main thrust of her argument seems to be that the Master applied the wrong test to the evidence presented. She contended that a "plausible explanation" without more is not the test, but whether the explanation for the delay is excusable in the circumstances. She submitted that the mere fact of the delay prejudiced the defendant's chances of a fair trial of the issues.

Counsel for the plaintiff, while conceding that there was inordinate and inexcusable delay, nevertheless argued that the Master rightly exercised her discretion. He contended that the onus was on the defendant to prove the risk of prejudice or the risk that a fair trial was impossible. This, he said, they had failed to do and in the absence of such evidence, the Master's discretion ought not to be disturbed.

I am mindful of the fact that this is an appeal on an interlocutory order of the Master in the exercise of her discretion and I am guided by the opinion expressed by Lord Diplock, when, in **Birkett v. James** [1977] 2 All E R 801 at 904 he said:

> "...Where leave is granted, an appellate court ought not to substitute its own 'discretion' for that of the judge merely because its members would themselves have regarded the balance as tipped against the way in which he had decided the matter. They should regard their function as primarily a reviewing function and should reverse his decision only in cases either (1) where they are satisfied that the judge has erred in principle by giving weight to something which he ought not to have taken into account or by failing to give weight to something which he ought to take into account; or (2) as in **Ward v. James** [1965] 1 All E R 563, [1966] 1 Q B 273 in order to promote consistency in the exercise of their discretion by the judges as a whole where there appear, in closely comparable circumstances, to be two conflicting schools of judicial opinion as to the relative weight to be given to particular considerations."

The inordinate and inexcusable delay on the part of the plaintiff in prosecuting this action cannot be denied. There has been delay in issuing the writ, and after the defendant entered appearance, there has been further delay of over three years in filing the statement of claim.

In the circumstances, the defendant had the option, under the provisions of section 244 of the Judicature (Civil

Procedure Code) Law, to "apply to the Court or a Judge to dismiss the action with costs, for want of prosecution." They did not exercise the option. But the delay has been so prolonged that even though the defendant has not applied to dismiss the action for want of prosecution, it would be within the court's inherent jurisdiction to do so if the summons to fix the time for filing the statement of claim is dismissed. The principles on which the inherent jurisdiction to dismiss is exercised when there is inordinate delay are well settled. Ever since the decision in **Allen v. McAlpine** [1968] 1 All E R 543 the House of Lords in **Birkett v. James** [1968] 1 All E R those principles which are these:

> "... 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." per Lord Diplock (at p. 805).

The mere fact that the defendant may have been prejudiced by the plaintiff's long delay in filing suit after the cause of action accrued, is in itself not enough for the exercise of the court's discretion to dismiss the action for want of prosecution before the limitation period has expired. But delay subsequent to the issue of the writ may have devastating consequences. This is what Lord Diplock said in **Birkett v. James** (supra) at p. 809:

> "... To justify dismissal of an action for want of prosecution some prejudice to the defendant additional to that inevitably flowing from the plaintiff's tardiness in issuing his writ must be shown to have resulted from his subsequent delay (beyond the period allowed by rules of court) in proceeding promptly with the successive steps in the action. The additional prejudice need not be great compared with that which may have been already caused by the time elapsed before the writ was issued; but it must be more than minimal; and the delay in taking a step in the action if it is to qualify as inordinate as well as prejudicial must exceed the period allowed by rules of court for taking that step."

The prejudice which may have been caused or is likely to be caused from the delay by the plaintiff in prosecuting the action, is not the only circumstance to be taken into account by the court in the exercise of its inherent jurisdiction to dismiss. The court must also consider whether the inordinate and inexcusable delay is likely to render it impossible for a fair trial of the issues. These are fundamental issues for the court's consideration, and if satisfied of either, then that will be sufficient to invoke the inherent jurisdiction to dismiss the action for want of prosecution.

But this is an application by a plaintiff who has failed to obey the rules. After a delay of some four years, he is now seeking the exercise of the court's discretion to fix the time for filing the statement of claim. He is in very serious breach of the rules and his delay is admittedly inexcusable and inordinate. Here too, the court must consider not only the question of prejudice, but also whether a fair trial will be possible. This is a case where the plaintiff suffered personal injuries in August 1984, while on the job. Even if witnesses will be available for a trial, given the passage of time, there is a grave risk that their memories will

have grown dim, especially since they have had no reason to believe that a case was being pursued in court. After eight years, the plaintiff's case had only reached the stage where the writ had been filed. Having regard to the vast number of cases on the cause and trial lists, I think it is fair to say that this case could not possibly come on for hearing within the next two years. In my view, it is impossible to have a fair trial after so long a delay.

The Master considered the question of prejudice to the defendant. She seemed to have been influenced in her judgment by what Mrs. Hylton said in the two paragraphs of her affidavit numbered "18" which I have quoted above. For the most part, what was said there seems to be purely speculative. Although the defendant was served with the writ, the delay after appearance of almost four years, (eight years after the cause of action arose) before seeking to file the statement of claim, must be considered to be more than minimal and will most likely cause prejudice to the defendants. Not only will they be prejudiced in the filing of their defence, but the question of damages may come into sharp focus. The plaintiff himself seems to have been prejudiced, for admittedly he had difficulties in obtaining a medical certificate to enable the preparation of the statement of claim.

The strong point of counsel for the plaintiff was that the burden of proving prejudice or the risk of an unfair trial rested squarely on the shoulders of the defendant.. He adverted to the fact that they had failed to file an affidavit in reply to that of the plaintiff, and argued that the assertions of the plaintiff were uncontroverted. He submitted that since the defendant had failed to discharge the burden cast on it, the plaintiff's application ought to succeed. In support of this point, he relied heavily on the opinion of Lord Griffiths expressed in **Department of Transport v**

Chris Smaller (Transport) Ltd [1989] 1 All E R 897. In that case, the matter for the consideration of their Lordships was whether the action ought to be dismissed for want of prosecution. After the pleadings were closed, the plaintiff failed to issue the summons for directions and eventually, the defendant did. The plaintiff failed to obey the order to set the action down for trial. The defendant then applied to dismiss the action for want of prosecution. The plaintiff was clearly guilty of inordinate and inexcusable delay and the question was whether post-writ delay was sufficient ground for striking out the action, the defendant not having suffered any prejudice.

Counsel for the defendant suggested that the burden of proving that the defendant will not suffer prejudice as a result of the delay should be on the plaintiff. Lord Griffiths in his opinion, at p. 904 rejected the suggestion. He said:

> "... I regard this as a wholly impractical suggestion. It would put an unrealistic burden on the plaintiff. The plaintiff will not know the defendant's difficulties in meeting the case, such as the availability of witnesses and documents nor will the plaintiff know of other collateral matters that may have prejudiced the defendant such as the effect of delay on the defendant's business activities. The defendant, on the other hand, has no difficulty in explaining his position to the court and establishing prejudice if he has in fact suffered it."

It seems to me that Griffiths was merely pointing out how impractical counsel's suggestion was in that particular case, and that he was not laying down any principle as that contended for by counsel for the plaintiff. On the facts of that case, it seems quite clear that in keeping with the general rule, the burden was on the defendant who was applying to dismiss, to show either that he had suffered prejudice by reason of the delay or that the delay had rendered a fair trial impossible, if the action was to be dismissed for want of prosecution. The

application arose as a result of the disobedience by the plaintiff of an order of the court.

As I have said before, the application before the Master in the instant case was one by the plaintiff to fix an extended time for filing the statement of claim. The delay in filing the statement of claim was inordinate and inexcusable. But that did not deprive the plaintiff of his right to make the application, a right given to him by law s. 192(b) of the Judicature (Civil Procedure Code) Law. What is of paramount importance is the principle by which the court will be guided when considering such an application. In my view, the principles laid down in those cases where the defendant applies for the dismissal of the action for want of prosecution, are in general, relevant where the application is to fix time. But because the plaintiff is in breach of the rules of court, his burden in convincing the court of the justice of his application is heavy and his past conduct in prosecuting the action will come under close scrutiny.

I say this because the refusal of the court to fix the time for filing the statement of claim will inexorably lead to the striking out of the action under the court's inherent jurisdiction to put an end to the proceedings, since the limitation period has expired. But there is a further principle that must be considered, and it is in accord with the discretion given to the court to extend the time for taking certain procedural steps. This principle forbids the court denying a plaintiff, in the ordinary way, from proceeding to a trial of his claim on its merits because of his lapse in procedural matters, unless by so doing, the defendant would be prejudiced in such a way that an award of costs would not be adequate compensaiton. The prejudice contemplated may take many forms and will be dependent on the nature of the issues that will arise in the case. The long delay may result

in the unavailability of witnesses or the destruction of vital evidence, or it may render a fair trial impossible. These are matters that the court must consider, whether the application be to extend time or to dismiss for want of prosecution or other procedural defect. In my experience, the court is usually faced with both applications at one and the same time, and they are heard together, and accordingly, the court is able to have a rounded view of the circumstances and decide the justice of the case. The party guilty of delay will usually adduce some evidence to explain the delay, and the party for dismissal will give evidence to show prejudice or the risk of an unfair trial.

In my view, where there is only an application to enlarge time before the court, as in the instant case, then it is for the plaintiff to satisfy the court that, in the interest of justice, his application should be granted and the action be allowed to proceed. This he may do by proffering an excuse for his delay, and if it is reasonable, save in exceptional circumstances, the court should not refuse the application unless the defendant has been or is likely to be prejudiced or a fair trial is impossible.

It does not appear to me that the Master, in the exercise of her discretion, gave due consideration to the principle that the delay over so many years "will give rise to a substantial risk that it is not possible to have a fair trial of the issues in the action." She did consider the question of prejudice, and she formed the view that the defendant would suffer no prejudice for which it could not be compensated by an award of costs. On the rounded view of the case, I am unable to agree with the Master in this regard. It seems to me that it is to the prejudice of the defendant if it is called upon now to file a defence after the action has been dormant for some four years. This is a claim for

personal injuries and I cannot see how an award of costs could possibly compensate for such prejudice that has been caused, or is likely to be caused by the inordinate and inexcusable delay.

I am of the view that the overall justice of this case required that the plaintiff's application should have been dismissed by the Master. I am satisfied that the Master wrongly exercised her discretion, and for that reason, I am bound to interfere. Accordingly, I would allow the appeal, set aside the order of the Master, and in the exercise of the inherent jurisdiction of the court, I would dismiss the action for want of prosecution.

FORTE, J.A.:

The appeal is allowed and the order below set aside. In the exercise of the inherent jurisdiction of the court, the action is dismissed for want of prosecution. The attorneys-at-law on the record for the plaintiff/respondent are ordered to pay the costs both here and below, to be taxed if not agreed. The Registrar should take steps to inform the plaintiff/respondent Minnell of the reasons for this decision.