NMS

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 66/2003

BEFORE: THE HON. MR. JUSTICE PANTON, J.A.
THE HON. MR. JUSTICE HARRISON, JA.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN:	RUPERT WHILBY	APPELLANT
AND	VERNAL ALLEN	1st RESPONDENT
AND	CARMEN ALLEN	2nd RESPONDENT

Ms. Carol Vassall instructed by Norman Samuels for Appellant.

Manley Nicholson instructed by Nicholson & Phillips, for Respondents.

July 11, 2005 and December 18, 2006

PANTON, J.A:

I have read in draft judgment of Harris, J.A. I agree with her reasoning and conclusion and have nothing to add.

HARRISON, J. A:

I also agree.

HARRIS, J.A:

On July 11, 2005 we allowed this appeal. At that time we promised

to put our reasons in writing. This we now do. This is an appeal against an order of the Honourable Mrs. Justice Marva McIntosh dismissing an action, brought by the appellant, for want of prosecution.

The action is one of negligence arising out of an accident on August 13, 1989 involving a motor cycle operated by the appellant and a motor vehicle owned by the 1st respondent and driven by the 2nd respondent.

It is essential to recount a history of the facts which gave rise to this appeal. On June 22 , 1992 the appellant, by way of a writ of summons and statement of claim commenced the action. Amended Writ of Summons and Statement of Claim were filed on December 16, 1993. The respondents entered appearance through their attorneys-at-law Messrs Brown Llewellyn and Walters on July 13, 1993. Some time after, they sought and obtained the consent of the appellant to file defence out of time. Consent was given on January 11, 1994. Defence was filed January 20, 1994. Reply was filed on January, 24, 1994. An Order on Summons for Directions was obtained May 18, 1994. By letter dated 26th May 1994, the appellant advised the Registrar of the Supreme Court of the closure of the pleadings.

The action was placed on the Cause List and the appellant was so informed by letter of the Registrar dated September 14, 1994. Certificate of Readiness was filed on June 27, and served on the respondents on June 28, 1995. The action came on for trial in July 1996 but was

adjourned by mutual consent of the parties.

A renewed Certificate of Readiness was filed by the appellant on July 9, 1997. This Certificate was served on the respondent s on July 22, 1997.

On December 31, 1999 the firm of Brown Llewelyn and Walters was dissolved and legal representation of the respondents was assigned by them to the firm of McGlashan Robinson and Company in October 2001. Following this, Notice of Change of attorneys at law was filed and served on the appellant's attorney-at-law on October 4, 2001. On the same date the respondents' new attorneys-at-law filed the summons to have the action dismissed for want of prosecution. This summons came on for hearing on March 19, 2002 but was adjourned. A further Certificate of Readiness was filed on April 10, 2002 and served on the respondents on April 24, 2002.

An application for Case Management Conference was made by the appellant on June 30, 2003. However, on July 10, 2003 the Summons again came on for hearing and the learned trial judge made the order dismissing the action.

The court's powers to strike out an action are governed by Rule 26.3(1) of the Civil Procedure Rules 2002 (hereinafter referred to as the CPR). Rule 26.3 (1) (a)and (b) provides as follows:-

> "26.3 (1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a

statement of case if it appears to the court -

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of the process of the court or is likely to obstruct the just disposal of the proceedings;

(c) ...

(d) ..."

Rule 1.1 of the CPR by its overriding objective empowers the court to deal justly with cases in accordance with considerations promulgated in the rules. The rule reads:

"1.1 (1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases justly.

(2) Dealing justly with a case includes –

(a) ensuring, so far as is practicable, that the parties are on an equal footing and are not prejudiced by their financial position;

(b) saving expense;

(c) dealing with it in ways which take into consideration –

(i) the amount of money involved;

(ii) the importance of the case;

(iii) the complexity of the issues;

and

(iv) the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

The introduction of the CPR has brought revolutionary changes in civil procedure. These new rules permit the courts to adopt a more flexible approach in relation to matters falling within the parameter of the rules, than that which the old rules allowed. It empowers the courts to apply this flexible approach in dealing with matters such as those arising under rule 26.3.

The new approach as commanded by the rules, dictates that the court, in its quest for justice, must make orders which are fair in the particular circumstances of each case. It is of importance to recognize that since the application of the Rules is still in its introductory stage, recourse must be had to authoritative guidance as to the methodology which ought to be embraced in the determination of the type of order a court should make, using the powers conferred on it by the rules. Invaluable assistance in this regard, has been given in cases such as **Biguzzi v Rank Leisure PLC** (1999) 1 WLR 1926, and **Purdy v Cambran** [1999] CPL R 843, C.A.

In **Biguzzi v Rank Leisure PLC** (supra) Lord Woolf at page 1933 said:

> " Under rule 3.4 (2)(c) a judge has an unqualified discretion to strike out a case such as this where there has been a failure to comply with a rule. The fact that a judge has that power does not mean that in applying the overriding objectives the initial approach will be to strike out the statement of case. The advantage of the C.P.R. over the previous rules is that the court's powers are much broader than they were. In many cases there will be alternatives which enable a case to be dealt with justly without taking the draconian step of striking the case out.
>
> Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.
>
> There are alternative powers which the courts have which they can exercise to make it clear that the powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the

> effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated."

The manner in which the court, in its application of the rules, ought to operate was further clarified by May L. J. in **Purdy v Cambran** (supra) when at paragraph 45 he stated:

> "Under the Civil Procedure Rules, the court has ample power in an appropriate case to strike out a claim for delay. The power is to be found, if nowhere else, in rule 3.4(2) (c), which provides that the court may strike out a statement of case if it appears to the court that there has been a failure to comply with a rule, practice direction or court order; or in rule 3.1(2)(m), which provides that the court may take any step or make any other order for the purpose of managing the case and furthering the overriding objective; or under the court's inherent jurisdiction, expressly preserved by rule 3.1(1); each of these to be exercised and interpreted in accordance with rule 1.2(a) and (b) to give effect to the overriding objective.
>
> The Civil Procedure Rules are a new procedural code with an overriding objective enabling the court to deal with cases justly in accordance with considerations which include those to be found on rule 1. (2). One element expressly included in rule

> 1.1(2) as guiding the court towards dealing with cases justly is that the court should ensure, so far as is practical, that cases are dealt with expeditiously and fairly. Delay is, and always has been, the enemy of justice. The court has to seek to give effect to the overriding objective when it exercises any powers given to it by the rules. This applies to application to strike out a claim. When the court is considering, in a case to be decided under the Civil Procedure Rules, whether or not it is just in accordance with the overriding objective to strike out a claim, it is not necessary or appropriate to analyse that question by reference to the rigid and overloaded structure which a large body of decisions under the former rules had constructed."

At paragraphs 50 and 51 he went on to say:

> "Lord Woolf MR in **Biguzzi** drew attention to the armoury of powers which the court has under the Civil Procedure Rules in addition to that of striking out: see in particular his judgment at 1932G to 1934C. ... In doing so, he was doing no more than emphasising the range of powers available to the court in its search for justice, indicating that the court should consider such powers as may be relevant to a particular case before deciding which to use. He was not indicating that any one of those powers was inherently more appropriate than any other ...
>
> The effect of this is that, under the new procedural code of the Civil Procedure Rules, the court takes into account all relevant circumstances and, in deciding what order to make, makes a broad

> judgment after considering available possibilities. There are no hard and fast theoretical circumstances in which the court will strike out a claim or decline to do so. The decision depends on the justice in all the circumstances of the individual case."

Four (4) grounds of appeal were filed. I will first give consideration to grounds (a) to (c). These grounds are stated as follows:

> "(a) The Learned Trial judge erred in finding that there was inordinate and inexcusable delay in the Plaintiff's conduct of the case when the Plaintiff had filed all documents by the time of the Trial in 1996.
>
> (b) The Learned Trial Judge was wrong in attributing blame to the Plaintiff in the conduct of the case when the Plaintiff had filed Certificate of Readiness on the 22nd day of July, 1997 and again on the 10th day of April, 2002.
>
> (c) The Learned Trial Judge failed to consider that the period of time that the action failed to come on for hearing was not in itself ground for inordinate or inexcusable delay in having the action heard."

Miss Vassall submitted that the respondents failed to prove that, if there was delay on the appellant's part, it was intentional or contumacious. It was also her submission that an application for case management had been made by the appellant.

In dealing with the issue of delay the learned trial judge held as follows:

"1. The delay of six years by the plaintiff in taking steps to ascertain that case still on the cause list was inordinate.

2. The plaintiff did not display any interest in ensuring that any action taken to have the case listed for trial again is inexcusable.

3. The delay will result in prejudice to a fair trial thirteen years had lapsed since the accident and the defendant's eyewitness had died. The defendant's recollection of the accident was vague."

A number of authorities were cited for the learned trial judge's consideration. Among these were: **Birkett v James** [1977] 2 All E R 801 **Allen v Mc Alpine** [1968] 1 All E R 543 and **Port Services Ltd v MoBay Underseas Tour Ltd. & Anor** SCCA 18/2001 (unreported) delivered on March 11, 2002. All cases on which reliance was placed, preceded the introduction of the CPR. Although the learned trial judge did not give detailed reasons for her findings, it is clear that she had proceeded on reliance on these cases.

The CPR came into operation on January 1, 2003. The hearing of the summons for dismissal of the action commenced on July 10, 2003. Since the hearing had taken place subsequent to the commencement date of the new Rules, it would have been incumbent on the learned trial judge to have considered the summons in conformity with the rules.

The foregoing notwithstanding, the question is whether the present case is one which ought to proceed to trial. The action commenced on

June 22, 1992. Up to July 1996 the appellant took all necessary steps to bring and had brought the action to trial. The matter was fixed for trial in July, 1996 but was adjourned by the consent of the parties. Following this adjournment, the appellant did not faithfully adhere to the timetable laid down for bringing the matter to its conclusion. A major part of the delay occurred between 1997 and 2001.

On July 9, 1997 the appellant's attorney-at-law renewed the application for a trial date by filing yet another Certificate of Readiness. The Certificate having been filed, it would have been the duty of the Registrar of the Supreme Court to have appointed a date of trial at a date fixing session. A date having not been fixed, the appellant could have goaded the Registrar into fixing one.

During the period of inactivity, the firm of Brown Llewelyn and Walters, was dissolved in 1999. The matter of representation of the respondents remained in abeyance. On October 4, 2001 a Notice of change of attorneys at law was filed and the summons for dismissal of the action was issued by McGlashan Robinson and Company to whom Brown, Llewelyn and Walters assigned the respondents' representation.

Although the appellant could have been more proactive in setting down the matter for hearing during the period 1997 to 2001, between December 1999 and October, 2001 the respondents would have been unrepresented. In all the circumstances, it would not have been just and

fair if the action proceeded without the respondents being accorded legal representation.

A further Certificate of Readiness was filed by the appellant on April 24, 2002. This clearly demonstrates that he intended to pursue the matter. The Certificate of Readiness would have again placed an onus on the Registrar to fix a trial date. No trial date was fixed.

The proceedings commenced prior to January 1, 2003. Rule 73.3(4) of the CPR requires a claimant, whose action began before January 1, 2003, to make an application for case management conference.

The rule provides:

> "Where in any old proceeding a trial date has not been fixed to take place within the first term after the commencement date, it is the duty of the claimant to apply for a case management conference to be fixed."

With the action still pending on January 1, 2003, the appellant would have been obliged to make an application for Case Management Conference as prescribed by rule 73.3(4). In compliance with the rule, on June 30, 2003 the requisite application was made by the appellant's attorney at law. The request for case management conference having been made, it would have been the responsibility of the Registrar to fix a date for case management. The hearing of the action would thereafter abide the case management conference.

It is of significance that the respondents complain of the appellant's

tardiness, yet between 1992 and 1996 they were dilatory in respect of their defence of the action. The initial delay in this matter was due to their late entry of appearance, rendering it necessary for them to file a Notice of Appearance. They did not only enter appearance out of time but also failed to file defence within the time prescribed for so doing, and had only done so after securing the appellant's consent. They further contributed to the delay between 1999 and 2001.

In the circumstances of the present case, although there was delay on the part of the appellant, such delay cannot be said to be deliberate nor could it be rendered inexcusable, as, it has not been shown that the appellant was guilty of the kind of conduct which could be characterized as an abuse of process which would warrant dismissal of his action.

I will now address ground (d) which states:

> "The Learned Trial Judge erred in relying on the matter of prejudice when the Defendants failed to challenge the Plaintiff on and to establish that the Plaintiff was guilty of inordinate and inexcusable delay."

The learned trial judge held that the delay would cause prejudice to the respondents, should the trial proceed.

In keeping with the overriding objective of the rule, the court must consider prejudice in the context of what is fair and just, notwithstanding delay. In **AXA Insurance Company Ltd. v Swire Fraser Ltd** (2000) CPLR 142 C.A. Tuckey, L.J said:

> "Specifically it is no longer necessary to consider prejudice in the **Birkett v James** sense as elaborated in many cases which followed this decision. Obviously the court will consider prejudice as part of its general inquiry as to what is just, but it will not have to seek out prejudice or ascribe it to a particular period or particular periods of delay. This exercise gave rise to endless arguments and citation of authority in the pre-CPR days. We no longer have to perform it, thanks to the CPR."

The respondents contend that the prejudice to which they would be exposed is occasioned by the lapse of time, thus rendering a fair trial impossible, as, their memories as to the details of the accident have diminished, their witnesses could not be located and they would be liable to meet increased damages at any future trial. Although they have raised these contentious issues, in keeping with the objective of the rules, it is necessary to concentrate on the intrinsic justice of this particular case. See **Purdy v Cambran** (supra).

The question therefore is whether a fair trial can be achieved. Assessing what amounts to a fair trial is not devoid of challenges. It may be concluded that a fair trial is one in which all material evidence is placed before the court for determination of the issues arising. However, there may be situations in which some evidence germane to a party's case, although available at the commencement of the proceeding, becomes unavailable at the time of trial by reason of delay. This notwithstanding, if the interest of justice so requires, a fair trial may yet be

possible provided safeguards are implemented so as not to cause any undue prejudice to that party.

The accident ought to have been reported to the police, as required by the Road Traffic Act. Statements would have been taken by the police. These statements could be used by the respondents to refresh their memories as, they could be obtained from the police. Statements, if any, given by witnesses who cannot now be located, could be tendered in evidence under section 31 of the Evidence Act.

In the instant case, the claimant has sustained injuries and clearly wishes to be compensated. It cannot be said that the respondents are without blame, as, a substantial part of the delay must be ascribed to the their neglect in complying with the rules. Further, at the date on which the summons was heard, a request for case management conference for which an application had been made by the appellant was pending. In our view the application of the overriding objective of the rules would be pertinent to this case, with the caveat that we must ensure fairness to both parties, bearing in mind the particular circumstances of this case. The action should proceed to case management conference with a view to trial. We are of the opinion that a fair trial can still be achieved notwithstanding the complaints of the respondents.

It is necessary for us to emphasise that we have adopted this approach in light of the special conditions of this case. We must stress

that in each case, a court, in determining the type of order which is appropriate in any given situation, must exercise great care in evaluating the evidence before it. In **Walsh v Misseldine** [2000] EWCA Civ. p. 61, Brooke L.J. said:

> "Courts will be faced with an infinite variety of factual situations, and even in cases where liability is not in issue, it would be quite wrong for anyone to infer from this judgment that the order we are making today can simply be replicated in other cases without the court first taking a careful look at all the relevant circumstances and weighing up carefully the order that it considers it just to make on the facts before it. The real significance of this judgment is that it shows that the court's ability to do justice is much less constrained under the new rules than it was under the old."

This court is loathe to interfere with a trial judge's exercise of his or her discretion, except it is of the view that he or she had erred in law or misdirected himself or herself on the facts that would lead the court to conclude that it would be manifestly unjust to allow the order to stand. The determination of the summons by the learned trial judge was dependent on the circumstances of this case. In considering the matter, she was obliged to have taken into account the overriding objective of the rules and having not executed the mandate imposed by the rules, her order cannot stand.

The order of the court below is set aside with costs of this appeal to the appellant, to be agreed or taxed.

PANTON, J.A.

ORDER:

(1) The appeal is allowed.

(2) The order of the court below is set aside.

(3) The action should proceed to case management conference with a view to trial.

(4) Costs of this appeal to the appellant to be agreed or taxed.